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REFER TO FILE NUMBER
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Submitted Via Email; Original Sent by Courier
Mr. Jeremy Haas
California Regional Water Quality Control Board
San Diego Region
9174 Sky Park Court, Suite 100
San Diego, CA 92123

Re: **Public Comments Regarding Tentative Order No. R9-2007-0002 NPDES No. CAS0108740, dated February 9, 2007 ("Tentative Order")**

Dear Mr. Haas:

The Building Industry Association of Orange County ("BIAOC"), and the Building Industry Legal Defense Foundation ("BILD")[1], by and through the undersigned counsel, submit these comments to the California Regional Water Quality Control Board, San Diego Region ("Regional Board") concerning Tentative Order No. R9-2007-0002, NPDES No. CAS0108740, Waste Discharge Requirements for Discharges of Urban Runoff from the Municipal Separate Storm Sewer Systems ("MS4s") Draining the Watersheds of the County of Orange within the San Diego Region, dated February 9, 2007 (herein after "Tentative Order") and related Fact Sheet/Technical Report For Tentative Order No. R9-2007-0002 ("Technical Report"). In addition, BIAOC and BILD hereby adopt the written comments, and all documents and information referenced therein, as submitted by the County of Orange, as lead Copermittee, dated April 4, 2007, the Construction Industry Coalition for Water Quality ("CICWQ"), dated April 4, 2007, and the Rancho Mission Viejo Company.

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[1] BIAOC is the local chapter of the Building Industry Association of Southern California ("BIASC"), which is a nonprofit trade association representing more than 2,050 member companies that collectively employ more than 200,000 employees. BIASC's mission is to promote and protect the building industry to ensure its members' success in providing homes for all Southern Californians. BILD is a non-profit mutual benefit corporation and a wholly-controlled affiliate of the Building Industry of Southern California, whose purpose is to defend the legal rights of current and prospective home and property owners and to maintain a favorable business climate for the construction industry in Southern California.

We appreciate the recent workshop that Regional Board held regarding the Tentative Order, and this opportunity to review and comment on the Tentative Order and Technical Report. BIAOC and BILD agree with and fully support the Regional Board's goal for this Tentative Order – clean water to protect the beneficial uses identified in the Water Quality Control Plan for the San Diego Basin (9) ("Basin Plan"). As stakeholders, we are committed to working with the Board and Copermittees to achieve this purpose. Notwithstanding our respect for the underlying goal, BIAOC and BILD request that the Regional Board *not* adopt the Tentative Order in the present form, because among other reasons,: 1) procedurally adequate notice to comment on the Tentative Order has not been provided to the regulated stakeholders; 2) certain Tentative Order findings and related requirements exceed the Regional Board's legal authority, adversely affecting water quality policy; 3) the Regional Board's determination of requirements that constitute Maximum Extent Practicable (MEP) water quality control is not consistent with legal mandates; 4) certain provisions and findings of the Tentative Order do not provide adequate due process or are not supported by sufficient and/or credible technical and scientific evidence, denying the regulated stakeholders an adequate opportunity to comment and adversely affecting water quality policy; 5) the Tentative Order watershed planning provisions undermine watershed planning efforts, adversely affecting water quality policy—See Comment Chart Item 36.

Plainly, the Tentative Order reflects the Board's staffs' earnest attempt to make progress in the area of runoff water quality from existing and future development. Viewed in light of the Board's staffs' motives, BILD and BIAOC do not contest many of the water quality "ends" that the Tentative Order seeks to achieve. That said, the Tentative Order seeks to achieve certain water quality "ends" by employing various "means" (permit requirements, conditions and terms) that are plainly indefensible. We therefore object to the Tentative Order on a number of legal and related policy grounds. We look forward to resolving the various problematic provisions of the Tentative Order and Technical Report with the Regional Board.

The Comment Chart attached to this letter, and the materials and documents referenced therein, set forth for the Board and its staff our many, detailed comments regarding specific provisions of the Tentative Order. Through the Comment Chart, we have tried to set forth our concerns succinctly and in a form that will allow the Board and its staff to consider our specific concerns individually. Where possible, we have also tried to identify and recommend more appropriate "means" for achieving the laudable water quality "ends." We further adopt the recommendations for achieving water quality protection proposed by the CICWQ letter, and the GeoSyntec Technical Memorandum submitted therewith ("GeoSyntec Memorandum").

There are many constants in our concerns regarding the Tentative Order. Those overarching issues, including not only legal issues, but also the policy implications of those issues, are discussed in this letter below. We request that the Regional Board rework the Tentative Order to properly address the legal and policy issues raised in this letter, the Comment Chart, and the other enclosures and documents cited in these documents. We submit that if the Regional Board considers—as indeed it must under applicable law and guidance-- the relevant water quality science, technical information and cost information available and/or submitted in these comments and the others adopted hereby, the Tentative Order issues identified can be corrected.

I. INADEQUATE NOTICE TO COMMENT ON THE TENTATIVE ORDER

As a threshold matter, we are obligated by case law to point out that the Regional Board did not provide full and complete notice of Agency action.[2] The Regional Board has not identified the procedural nature of the present proceedings. [3] Neither the Tentative Order nor any other document[4] on the Regional Board's website related to the Order, advises whether the Regional Board regards the instant proceedings as quasi-legislative, or, instead, as quasi-adjudicative, subject to Gov. Code §11400 *et.seq*. If the Regional Board considers the action quasi-legislative, we would have expected the required "Notice of Proposed Rulemaking."

If—as we strongly suspect based on recent case law and state and regional regulatory pronouncements—the Regional Board considers this action to be an administrative adjudication, we would expect and request full compliance with Gov. Code §11425.10 *et.seq*. (Administrative Adjudication Bill of Rights), which requires, among other things, that a copy of the procedures to be followed be given to the individuals at whom the adjudication is directed. Gov. Code §11425.10(a)(2). Further, we would expect and request compliance with Government Code §11425.10(a)(1), which mandates that the Regional Board shall provide not only an opportunity to be heard, but also the opportunity to present and rebut evidence. As discussed more fully in this letter below, here the Regional Board has not yet established sufficient procedures to allow MS4 operators and other regulated stakeholders to reasonably access, in an orderly way, the direct evidence that the Board has gathered and relied upon in proposing the measures set forth in the Tentative Order. The Board must clearly identify, and make such direct evidence accessible to the regulated community, and then must provide a reasonable timeline and process that will allow interested persons to meaningfully rebut the direct evidence upon which it relies. Given the highly technical, scientific and voluminous nature of the evidence at issue, it is paramount that the process established must be orderly, deliberate and unrushed.

Identification of the nature of the proceeding has immense bearing on all aspects of the action, from the form of notice, to the form of the proceedings, to the rights of interested parties, to the specificity of the Findings, to the substance of the evidence that supports the Regional Boards' decision, to the applicable rules for Board member action on the Tentative Order. In addition to satisfying the Government Code, the Regional Board must also clarify the nature of the

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2 See Comment Chart, Threshold Issue.

3 The submitting parties intend to participate fully in an appropriate public process for adoption of a renewed Tentative Order, and therefore must reserve the right to submit additional comments and information for inclusion in the administrative record, and for consideration by San Diego Regional Board staff and board members as the process for preparation and adoption of the subject MS4 Permit proceeds. All documents, attachments, comments memoranda and other materials referenced or cited in this document are hereby incorporated by reference into these comments. Capitalized terms and acronyms used herein and not otherwise defined have the meaning ascribed to them in the Tentative Order.

4 The Notice of Hearing simply states that the Regional Board intends "to hold a public hearing"... and "Upon adoption, at a later date, Order R9-2007-0002 will replace R9-2002-0001." The Fact Sheet/Technical Report for Order R9-2007-0002, dated February 9, 2007 ("Technical Report"), discussion in support of Tentative Order § F.2. provides only that hearings are required under Cal. Water Code § 13378 and 40 CFR 124.12(a)(1). Both of these references simply provide for a hearing when NPDES permits are issued; neither specifies whether the proceeding is quasi-legislative or quasi-adjudicative.

proceedings at the onset to ensure that the regulated community and other affected individuals' fundamental rights to due process under both the California and federal constitution are protected. Where the nature of the proceeding has not been disclosed adequate "notice" has not been given, and an adequate opportunity to review the evidence, to be heard, and to rebut the evidence and supplement the record, has not been provided.

II. CERTAIN REQUIREMENTS OF THE TENTATIVE ORDER EXCEED THE REGIONAL BOARD'S JURISDICTION.

There are a number of provisions in the Tentative Order and Technical Report that the Regional Board does not have the power or authority to impose. We identify five of these types of requirements and provisions below, and discuss these provisions and others that exceed authority in more detail in the Comment Chart. We also identify the adverse affects of these five types of provisions on water quality policy.

A. Improper Regulation of Discharges "Into" Storm Drain Systems and Shifting of Liability to Copermittees.[5]

1. Legal Issues. The Tentative Order seeks to impose on Copermittees an enforceable permit obligation to prevent discharges *into* their MS4 systems: "[d]ischarges into and from municipal separate storm sewer systems ("MS4s") in a manner causing, or threatening to cause, a condition of pollution, contamination or nuisance ...are prohibited." *Tentative Order,* § A.1, p. 15 (emphasis added). This provision, and other manifestations of it in the Tentative Order and Technical Report, improperly shift liability to Copermittees for pollution in both stormwater and non-stormwater discharges that may enter their MS4s as a result of unknowing, accidental, and even *intentionally illicit* activity that is entirely beyond the control of MS4 operators. These discharges may include, but are not limited to, industrial discharges, sewage discharges, residential hazardous materials spills, nursery and farming discharges, and non-compliant discharges from upstream MS4 systems.

The federal Clean Water Act ("CWA") requires that MS4 operators adopt and enforce "means, measures and methods to control discharges" (specifically, illicit discharges, non-stormwater discharges and other discharges that may be significant contributors of pollutants) into storm drains that may cause pollution. *See* 33 U.S.C. § 1342(p)(3); 40 C.F.R. 122.26(d)(2); 40 C.F.R. 122.34(3). But, the CWA does not contemplate that Copermittees would be liable and subjected to civil and criminal penalties for discharges by third parties into storm drains that could cause pollution if the "methods, means and measures" adopted and enforced by MS4 operators are ineffective or circumvented in any particular instance.

Further, state law does not authorize the Regional Board to impose this permit condition on Copermittees. The Basin Plan provision cited in the Technical Report as supporting prohibition of discharges "into" MS4s simply prevents discharges of waste to waters of the state – not into MS4s. Likewise, the State Water Resources Control Board ("SWRCB") considered this issue and refused to uphold prohibitions against discharges "into" MS4s, and rejected permit conditions purporting to impose liability on MS4 operators for such discharges. SWRCB Order WQ 2001-15, pp 9-10. The Regional Board may *encourage* control of discharges into the MS4, but the Regional Board does not have authority to create civil/criminal penalties for Copermittees as a consequence of a third party's improper discharge into the MS4. 33 U.S.C. § 1342(p)(3); [add Cal. Water code citation re: issuance of WDRs] SWRCB Order WQ 2001-15, pp 9-10.

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[5] See, *inter alia,* Comment Chart Items 1, 2, 10, 14, 35.

2. Adverse Affect of Legal Issues on Water Quality Policy. The inclusion in the Tentative Order of improper prohibitions of discharges *into* MS4s substantially undermine the ability of regulated parties to implement watershed and subwatershed based water quality control approaches, and unnecessarily restrict implementation measures that are valuable water quality control tools in those planning efforts. The provisions further combine to substantially undermine the ability of regulated parties to implement shared BMPs in more local, project-level Water Quality Management Plans (called SUSMPs in the Tentative Order) that incorporate a combination of source control and regional or end-of-pipe treatment/volume control Best Management Practices (BMPs). Preclusion of these BMPs is contrary to technical and scientific information indicating that regional and end-of-pipe BMPs *do* constitute a very effective component in regional and subregional urban runoff water quality treatment control strategies.

Further, both Copermittees and regulated land owners in Orange County have successfully implemented a number of watershed and subwatershed planning efforts incorporating as significant component regional or shared BMPs. These efforts have been implemented in accordance with a number of state and federal regulatory and environmental policy programs, including, without limitation, one or more of the following regulatory authorities: the current MS4 Permit and accompanying guidance documents[6]; the federal Nonpoint Source Management Program (Federal NPS Program);[7] the State of California Nonpoint Source Program Strategy and Implementation Plan, 1998-2013, dated January 2000 (PROSIP); federal Clean Water Act § 404 and the regulations adopted thereunder (CWA § 404); [8] the streambed alteration provisions of the California Fish and Game Code (Section 1600 provisions);[9] Army Corp of Engineers Special Area Management Plan Guidance ("SAMP Guidance");[10] the Integrated Regional Water Management Plan provisions of the California Water Code (IRWMP);[11] and the state and federal Endangered Species Acts[12] (collectively, these state and federal regulatory and guidance provisions are referred to in this letter as "Watershed Planning Regulatory Authority"). The prohibition of discharges "into" MS4 systems, which are, in Priority Development and Redevelopment Projects, the systems that convey urban runoff to regional or shared BMPs, is inconsistent with, and undermines the substantial water quality control planning implemented at both a watershed and specific plan level in South Orange County under state and federal law, including that conducted under the Watershed Planning Regulatory Authority.

Because the foregoing provisions exceed legal authority, deprive dischargers of valuable tools (regional BMPs) in controlling water quality, and result in adverse affects on water quality planning, the Tentative Order and Technical Report should be revised as required by SWRCB Order WQ 2001-15.

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[6] The guidance documents include the Orange County Drainage Area Management Plan, dated September 24, 2003, including, without limitation, Sections 7.3.3, 7.3.4, 7.4, 7.5, and 7.6 (the DAMP); and Exhibit 7.II of the DAMP, the Model Water Quality Management Plan adopted by all Copermittees as their JURMP, including, without limitation, Section 7.II-3.3.3 (the "Model WQMP").

[7] Federal Clean Water Act § 319 (33 U.S.C. § 1329).

[8] 33 U.S.C. § 1344; 40 C.F.R. §§230 *et. seq.*

[9] Cal. Fish and Game Code §§ 1600 *et. seq.*

[10] A copy of federal SAMP Guidance can be found at: http://www.spl.usace.army.mil/cms/index.php?option=com_content&task=view&id=43&Itemid=63

[11] Cal. Water Code §§ 10540 *et. seq.*

[12] Cal. Fish and Game Code 2050 et seq.; 16 U.S.C. 1531 et seq.

B. Imposition of Liability on Copermittees akin to "Strict" Water Quality Liability.13

1. Legal Issues. Pursuant to Tentative Order § A.3.c, as interpreted by the Technical Report, p. 65, Copermittees are subjected to liability even when they are properly implementing measures to control MS4 discharges to the Maximum Extent Practical (MEP), and regardless of whether it is technically feasible, or even possible to take further action. Good faith pursuit of the iterative process for improving BMPs upon recognizing continuing receiving water quality excursions does "not shield the discharger from enforcement actions if discharges cause or contribute to a violation of water quality standards" for receiving waters. Technical Report, p. 65. These provisions are clearly intended to impose liability on Copermittees when receiving waters fail to achieve water quality standards, contrary to SWRCB Order WQ 99-05 and WQO 2001-11, p. 3 (and citations therein), which hold that the iterative process (adaptive management of BMPs) is the appropriate recourse for failure to comply with all discharge prohibitions of MS4 Permits.

In addition, federal regulations and EPA guidance endorse implementation of BMPs, and iterative improvements to BMPs, when receiving water quality exceedences persist. See, Clean Water Act, 33 U.S.C. 1342(p)(B)(iii);40 C.F.R. § 122.34(a); National Pollutant Discharge Elimination System--Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 64 FR 68722, at 68753 (Environmental Protection Agency December 8, 1999). See also, *Defenders of Wildlife v. Browner,* 197 F.3d 1035 (9th Cir. 1999).

There is no State or federal statute, regulation, order or guidance recommending or requiring that Copermittees be or remain 'strictly' liable for civil/criminal enforcement of MS4 Permits due to receiving water limit violations when the Copermittee is proceeding with the requirements of the iterative process. As a result, Tentative Order § A.3.c and the Technical Report language at p. 65 and p. 74 should be deleted or revised to constitute a clear determination that the iterative process constitutes compliance with the MS4 Permit. Without these revisions, the Tentative Order requirements exceed legal authority.

2. Adverse Affect of Legal Issues on Water Quality Policy. These legally improper findings of strict liability form the basis for Tentative Order requirements that move away from the iterative process endorsed by the State Water Resources Control Board, and that are overly prescriptive, contrary to the proper approach to determining requirements necessary to achieve MEP. In addition, creation of the equivalent of strict liability for Copermittees fosters an unproductive, adversarial relationship between the Regional Board and the Copermittees, and the Copermittees and regulated stakeholders. These provisions will force Copermittees to adopt measures, including strict and prescriptive ordinances and broad indemnity provisions, in an attempt to protect the municipality from water quality liability under this expansive interpretation of municipal responsibility for discharges. Such an approach is counterproductive to the South Orange County approach to protection of beneficial uses via watershed based planning, and collaboration on regional, subregional and project specific WQMPs. The Tentative Order should instead be devised to support collaborative efforts and voluntary and cooperative water quality planning, which is a framework endorsed by state and federal law, including the Watershed Planning Regulatory Authority.

The Tentative Order and Technical Report should be revised consistent with applicable law to eliminate "strict liability" concepts because they exceed legal authority, and create

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[13] See, inter alia Comment Chart Items 1, 2 and 10.

a permit structure that undermines watershed planning and a collaborative approach to water quality control and improvement.

C. The Tentative Order Includes An Improper Demand That Copermittees "Terminate" Access To MS4s.[14]

1. Legal Issues. The Technical Report discussion of Finding § D.3.b. provides: "the municipality must demonstrate that it has adequate legal authority to control the contribution of pollutants in stormwater...[C]ontrol in this context means. . . to limit, discourage or ***terminate*** a stormwater discharge to the MS4." Technical Report p.54, emphasis added. At the March 12th Public Workshop, Regional Board officers stated that the Tentative Order requires municipalities to physically cut off access to the MS4, or otherwise block discharges from upstream dischargers, including small MS4s.

The Regional Board overreaches its authority under 33 U.S.C. § 1342(p)(3)(B)(ii) to prohibit illicit and non-stormwater discharges into MS4s, for reasons set forth more fully in Section I.A.1 above. If Copermittees have adopted, implement, and enforce appropriate legal authority to control improper discharges, they have fully complied with the Clean Water Act. See discussion in § I.A1 above. It is not technically feasible to physically preclude non-compliant stormwater discharges to the MS4. See, GeoSyntec Memorandum, dated April 4, 2007. Even if it were technically possible for municipalities to terminate certain upstream discharges, such physical "closure" of the MS4 could cause significant flood damage to personal and public property, with attendant adverse legal consequences for the municipalities attempting to comply with public health and safety mandates, private property protection mandates, and the terms and conditions of public and private agreements setting forth drainage rights. See, Cal. Water Code §§ 8100 *et. seq.*; 8700 *et. seq. Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 280 (1977). See generally, *Hopkins v. Clemson Agricultural College,* 221 U.S. 636 (1911)(counties, municipalities and other public corporations are not exempt from suite where it is alleged that their actions have injured private parties or their property). This provision not only exceeds the limits of the Regional Board's jurisdiction, but could cause adverse legal consequences for the Copermittees if they comply with such a state mandate.

2. Adverse Affect of Legal Issues on Water Quality Policy. Tentative Order mandates for physical preclusion of runoff discharges to the MS4 from existing development, new development, and redevelopment (which are contrary to the public health, safety and property interest of regulated stakeholders) redirect stormwater quality control strategies away from collection and treatment of storm water in BMPs and watershed water quality planning and management initiatives that have been working well in South Orange County. Instead, with provisions mandating physical preclusion of runoff, Copermittees will be required to focus on insulating their MS4s from discharges, and shifting responsibility for stormwater treatment via any means possible to others. This redirection will undermine the collaborative water quality planning process and will negatively affect the water quality control planning measures that have been, and are scheduled to be implemented in South Orange Counties.

Because the foregoing provisions exceed the legal authority of the Regional Board, will improperly redirect Copermittee water quality control efforts, and will undermine watershed planning the Tentative Order and Technical Report should eliminate these provisions consistent with applicable law.

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[14] See, *inter alia,* Comment Chart Items 1, 2, and 10.

D. Improper Definition Of Runoff As "Waste"15

1. Legal Issues. The Tentative Order incorrectly and imprecisely characterizes runoff as "waste," stating: "The discharge of urban runoff from an MS4 **is** a 'discharge of pollutants from a point source' into the waters of the United States." Tentative Order, Findings §§ C.1. and C.3, p 3 (emphasis added). The CWA regulates the discharge of pollutants, **which may be contained in** stormwater. 33 U.S.C. §1342 (a)(emphasis added). Similarly, the State Board has recognized this point: "...it is the waste or pollutants in the runoff that meet these definitions of "waste" and "pollutant" [under Cal Water Code § 13050(d) and 40 C.F.R. § 122.2], and not the runoff itself." SWRCB Order WQ 2001-15, p. 12. While stormwater may contain waste, it is improper to characterize stormwater as waste *per se.*

Moreover, in many instances, storm water will naturally contain certain non-anthropogenic loads of pollutants, such as sediment. Such natural loads are not "pollution" as defined by the federal Clean Water Act, 33 U.S.C. § 1362(19). Instead, the objective of the Clean Water Act is to "restore and maintain" the natural characteristics of waters. 33 U.S.C. § 1251.

2. Adverse Affect of Legal Issues on Water Quality Policy. By inappropriately equating runoff flows and waste, rather than correctly regulating the constituent pollutants with reference to background receiving water quality and runoff constituents, the Regional Board sets up an expansive jurisdictional framework in the Tentative Order and Technical Report for regulating stormwater more broadly than necessary to address potential adverse affects on receiving waters that may be proximately caused by pollutants in runoff. This expansive approach to regulation of runoff water quality is further exacerbated by the adoption of extremely general findings, and promulgation of very broad and conclusory Technical Report statements, that fail to make a transparent analytical connection between, on one hand, Tentative Order water quality control requirements, including prescriptive Best Management Practices (BMPs), hydromodification control mandates, and Advanced Sediment Treatment requirements, and, on the other hand, the "non-natural" pollutants these measures are designed to control. In addition, these measures have been proposed without a clear analysis or summary of monitoring data and information that characterized the waste *currently* found in urban runoff in South Orange County, taking into account the now-established history of MS4 program implementation by the Copermittees and the watershed and water quality planning initiatives currently underway. Because the Tentative Order is based on the concept that all runoff is waste and constituent pollutants are not specifically considered in relationship to natural, background loads, the measures of the Tentative Order are not reasonably tailored to address the pollutants currently adversely affecting beneficial uses of receiving waters, to the detriment of water quality control.

These provisions of the Tentative Order and Technical Report should be revised because the Regional Board's authority is limited to regulating the discharge of waste or pollutants. In addition, these provisions should be revised because the Tentative Order requirements and measures should be better tailored and directed in order to reasonably control specific pollutants causing excursions of receiving water quality standards in South Orange County, based on current and local data and information. Cal. Water Code § 13263(a). In this way, Copermittees and the regulated community can better target their water quality efforts as needed to protect beneficial uses.

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[15] See, *inter alia,* Comment Chart Items 3, 5-8, 13

E. Improper Statement of the Basis for Copermittee Water Quality Liability and Unnecessary Exercise of Local Land Use Authority by the Regional Board[16]

1. Legal Issues. The Technical Report discussion of Tentative Order § Finding D.1.f., (pp. 43-44) misstates the basis on which MS4 permits are issued to municipalities, claiming that the permits are issued to municipalities "because of their land use authority." Technical Report, p 43. The Regional Board further claims "the ultimate responsibility for the pollution discharges, increased runoff, and inevitable long-term water quality degradation that results from urbanization lies with local government." Technical Report p.43. In addition, the Technical Report states: "The Order holds the local government accountable for this direct link between its land use decisions and water quality degradation." Technical Report discussion of finding D.1.f., p. 44. These provisions improperly define the legal basis for issuance of MS4 permits, and the basis for liability for improper discharges from the MS4.

Under the federal Clean Water Act, MS4 permits are issued to municipalities because they are owners/operators of MS4s, and as such are required to apply to NPDES permits; not because they have land use authority. 40 C.F.R. §122.26(a)(3); §122.26(d). Similarly, under Porter-Cologne, waste discharge requirements are issued to dischargers of waste, not to local agencies due to their land use authority. Cal. Water Code § 13250. Further, contrary to the Tentative Order conclusions, there is no liability under the federal Clean Water Act or Porter-Cologne for land use decisions made by municipalities. The Regional Board statements of the basis for issuance of municipal liability[17] are not correct under state or federal law, both of which hold dischargers liable for their discharges.

2. Adverse Affect of Legal Issues on Water Quality Policy. It is important for at least two reasons to revise and correct the misstatements of the Tentative Order to properly reflect the legal basis for issuance of MS4 Permits to municipalities and the scope of municipal liability for violation of MS4 Permits.

First, these statements improperly, and without basis in law, expand the water quality liability of Copermittees for land use decisions, and, as a direct result, expand the secondary or "contingent" liability of other stakeholders that apply for land use approvals. As written, these provisions create exposure of local agencies and developers to enforcement action under the MS4 Permit long after land use approvals and project construction has occurred.[18] In addition, these provisions may be expansively interpreted to create a new potential cause of action against agencies issuing and applicants seeking land use approvals, outside of the scope of applicable land use and environmental laws, such as CEQA, the subdivision map act, and local land use and planning ordinances.

Second, these arbitrary conclusions provide support, though without basis in law, for the Regional Board to improperly extend its authority to prescriptively mandate land use and project design requirements. The Tentative Order mandates certain "one-size-fits-all" planning and design decisions for Priority Development and Redevelopment Projects as small as 1 acre, such as

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[16] See, *inter alia,* Comment Chart Items 9, 13, 16, 17, 19, 23.

[17] See, *e.g.,* Technical Report, Discussion of Finding, D.1.f., at pp 43-. 44.

[18] The Los Angeles Regional Board (LARWQCB) recently issued approximately 35 such notices of violation to redevelopment and development projects, many of which had been completed, to the County of Los Angeles and various incorporated cities. See, *e.g.,* LARWQCB Claim N. 7000-0600-0029-1197-1854, dated June 15, 2006.

requiring application of site design BMPs preserving even low resource value drainages for all Priority Development Projects, including infill and redevelopment, at the lot-by-lot scale, rather than at the subwatershed or watershed planning scale (Tentative Order, §§ D.1.d(4)(a) and (B)). Similarly, these provisions provide the basis for "one-size-fits all," project-by-project implementation for all projects 20 acres and greater of interim hydromodification control requirements mandating hydrograph matching, infiltration, protection of low value drainages, and buffer zones regardless of resource value, existing site, soils, and channel conditions (Tentative Order § D.1.h.(5)).

These types of Tentative Order requirements go beyond the programmatic specification of a menu of available storm water quality controls and technologies as required by the Clean Water Act. 33 U.S.C. §1342(p)(3). CFR 122.34(d)(3). The State Water Resources Control Board (SWRCB) has recognized the importance of respecting the very different roles of local agencies and regional boards in the issuance of MS4 Permits. The SWRCB found that the BMPs specified as controls to reduce the discharge of pollutant to the MEP should properly consist of "programmatic and planning requirements for the permittees...similar to those in other MS4 Permits" and designed to control pollutants in stormwater. SWRCB Order WQ 2001-15, p.2. However, based on broad but inaccurate pronouncements of water quality liability for land use authority, the Tentative Order mandates very specific land use and project design criteria, such as those discussed above and in the attached Comment Chart. These mandates unnecessarily and improperly impinge upon the land use authority of local governments under Cal. Const. art. XI, section 7.

To be consistent with applicable law, and to properly address water quality at a programmatic level that does not impinge upon, or create new liability for a local agency's exercise of local land use authority, the Tentative Order and Technical Report should be revised to eliminate improper statements regarding land use power as the basis for water quality liability. In addition, Tentative Order and Technical Report should be revised to eliminate prescriptive BMPs for water quality and hydromodification control, and to specify instead, at a programmatic level, a menu of measures, controls and technologies required to control stormwater quality to the MEP. In this regard, we adopt the recommendation set forth in the GeoSyntec Memorandum.

III. THE REGIONAL BOARD'S DETERMINATION OF REQUIREMENTS THAT CONSTITUTE MEP IS NOT CONSISTENT WITH LEGAL MANDATES.[19]

The Regional Board has failed to follow the appropriate methodology and assumptions to establish Tentative Order requirements reasonably tailored to control water quality to the MEP. Rather than following well-prescribed state and federal law to determine MEP, the Regional Board is using an arbitrary standard of its own devising to do so – attempting to justify this position by the unsubstantiated statement that "requirements in this Order that are more explicit than the federal storm water regulations . . . are prescribed in accordance with the [federal Clean Water Act]" and are the measures "necessary to meet the Maximum Extent Practicable ("MEP") standard." *Tentative Order*, Findings § E.6, p. 13.

1. Legal Issues. Although federal law does not preclude Regional Boards from adopting "more stringent standards," in exercising their discretion to determine the degree to which stormwater discharges are regulated, in establishing requirements for the control of water quality to the MEP as mandated by federal law, the Regional Boards are not free to disregard either 1)

[19] See, *inter alia,* Comment Chart Items 12, 13, 14, 15, 17, 19, 20, 23, 26.

applicable California law, or 2) the terms and conditions under which EPA delegated to the State the authority to administer the federal program.

State and federal law and guidance, including Cal. Water Code§ 13241, set forth factors to be considered and evaluated by Regional Boards in determining requirements of a permit necessary to control runoff water quality to the MEP. As a result, Regional Boards do not have unfettered discretion in establishing MEP, but must as a matter of law and good policy and practice, exercise discretion in a disciplined manner that is transparent to the regulated community by explicitly evaluating Tentative Order requirements in light of Cal. Water Code § 13241, and other applicable factors. Such an explicit and express evaluation is absent from the Tentative Order, Technical Report and administrative record.

As we are informed by the California Supreme Court's opinion in *City of Burbank v. State Water Resources Control Board*, 35 Cal.4th 613 (2005), the Board is "free to enforce [California] water quality laws [including application of the Porter-Cologne balancing factors] so long as its effluent limitations are not 'less stringent' than those set out in the Clean Water Act." *Id.* at 620. Here, the Board enjoys broad discretion under section 402(p)(3) of the Clean Water Act, which allows the permitting to impose whatever controls it (i.e., the permitting agency) deems practicable. *See, e.g., Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1165-67 (9th Cir. 1999). Therefore, even if one were to assume that the Board's issuance of the instant MS4 permit is entitled to the utmost judicial deference, the Board's broad discretion is constrained and must assure that the Board's action is not arbitrary, capricious, lacking in evidentiary support, or unlawful or procedurally unfair. *See Western States Petroleum Association v. Superior Court (Air Resources Board)*, 9 Cal.4th 559, 574 (1995). Accordingly, despite the deference that the Regional Board enjoys, it must (1) exercise its discretion in the manner dictated by state and federal law and policy, in order to (2) fashion pollution control requirements in the instant Tentative Order that are appropriately supported by substantial evidence, and (3) they must describe the relationship between the Tentative Order requirements and available evidence and information, providing the regulated community with a reasonable "analytical roadmap" explaining the requirements chosen.

The Tentative Order fails to accomplish the three requirements. Most importantly, the requirements of the Tentative Order clearly indicate that the Regional Board has failed to exercise its discretion in developing those requirements as required by state and federal law and policy. As described in the attached Comment Chart, applicable case law, Porter-Cologne and the federal Clean Water Act (including EPA's delegation of permitting and enforcement authority to the State of California), require that, in exercising discretion to determine permit requirements that properly establish MEP, Regional Boards must evaluate, consider and reconcile Tentative Order requirements in light several carefully-prescribed factors. The factors that most prominently must be addressed are set forth in California Water Code Section 13241. Those factors (the "Section 13241 Factors"), which the Board's staff expressly stated in the Tentative Order, were not taken into account in developing Tentative Order requirements, are:

(a) Past, present, and probable future beneficial uses of water.

(b) Environmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto.

(c) Water quality conditions that could reasonably be achieved through the coordinated control of all factors,which affect water quality in the area.

(d) Economic considerations.

(e) The need for developing housing within the region.

(f) The need to develop and use recycled water.

In addition to these requirements, as described more fully in the attached Comment Chart, State Board guidance mandates consideration of a number of additional factors in determining whether permit requirements achieve the MEP standard. These additional requirements (the "State Board Factors") include:

1. Effectiveness: will [permit requirements] address a pollutant of concern?
2. Public Acceptance: [Do permit requirements] have public support?
3. Cost: Will the cost of implementing the [permit requirements] have a reasonable relationship to the pollution control benefits to be achieved?
4. Technical Feasibility: [Are permit requirements] technically feasible considering soils, geography, water resources, etc?

State Water Resources Control Board Memorandum, entitled "*Definition of Maximum Extent Practicable,*" prepared by Elizabeth Jennings, Senior Staff Counsel, dated February 11, 1993.

2. Adverse Affects of Legal Issues on Water Quality Policy. When the Regional Board properly considers the State Board Factors and the Section 13241 Factors (collectively, the "Balancing Factors") in exercising its discretion to adopt municipal storm drain permits, the resulting permit requirements will be properly designed and reasonably tailored to implement MEP and comply with federal water quality mandates. Cal. Water Code § 13263(a). However, when the Balancing Factors are ignored, improper permit conditions and requirements result, which results in water quality requirements that are not available, technically feasible, cost-effective, or are otherwise not amenable to sufficient implementation to improve water quality.

Given failure to evaluate several Tentative Order requirements in the context of the Balancing Factors as required by law and as a matter of good policymaking, the Board rework the affected Tentative Order provisions. Consideration of the Tentative Order requirements in light of the Balancing Factors, taking into account appropriate scientific, technical, economic, and existing watershed planning information, will lead the Board to make revisions to affected provisions of the Tentative Order, correcting its current deficiencies.

Examples of particular Tentative Order provisions that have not been considered in light of the Balancing Factors, and therefore that should be reconsidered properly include:[20]

- The application of 'one-size-fits all' interim hydromodification control standards (which are not derived from and in some cases are contrary to approaches recommended in the scientific literature) and minimum prescriptive BMP programs to all Priority Development and Redevelopment projects, regardless of project location within a watershed, impervious

[20] Where possible, we have attempted to reflect within the Comment Chart and referenced materials the specific Balancing Factors that the Regional Board failed to evaluate in preparing provisions in the Tentative Order.

nature of a watershed, project site soils and runoff conditions, receiving water in-stream conditions, and susceptibility of receiving waters to destabilization;

- Mandatory site design BMPs and hydromodification control requirements governing small infill Priority Development and Redevelopment Projects (< 1 acre) which will be infeasible to implement, pushing such developments out of the urban core areas;
- Application of low impact development (LID) principles and other hydromodification controls on an improper "lot-by-lot" scale, rather than on a regional, sub-regional or community level, resulting in technical infeasibility;
- Mandated interim hydromodification controls for certain Priority Development and Redevelopment properties discharging to channels that are either already substantially degraded or are physically modified (hardened) such that heroic and expensive hydromodification control efforts will be wasted;
- An express bias against implementation of regional volume reduction and treatment BMPs, although such BMPs technically constitute an effective tool for water quality control;
- Provisions that discourage creation of natural wetlands and riparian habitat to restore or create water quality function within degraded watersheds;
- Provisions that unnecessarily limit and constrain use treatment control and volume reduction BMPs that rely upon infiltration and related processes to achieve water quality benefit;
- Prescriptive BMPs for Priority Development and Redevelopment Projects that fail to provide flexibility for alternative approaches that may better benefit water quality, including: combined treatment and volume control BMPs; dry weather flow diversions; low flow diversions to restore and create wetland and riparian areas with higher function and value; and BMP programs developed with site specific consideration and recognition of soils types, infiltration and runoff characteristics, and other factors relevant to volume and treatment control; and
- Mandated Advanced Sediment Treatment for all "high risk" construction sites, regardless of construction site size, topography, and other technically relevant factors;
- Mandated Advanced Sediment Treatment for all "high risk" without prior analysis, contrary to recommendations of the Blue Ribbon Panel Report;[21] of scientifically important factors that determine whether Advanced Sediment Treatment will technically result in water quality benefit, including the following:
    - baseline receiving water conditions (particularly with respect to sediment loads), which must be analyzed to assure that Advanced Sediment Treatment does not cause erosion or adversely change the natural water quality condition of runoff and receiving waters; and
    - potential toxicity of chemicals added to stormwater in Advanced Sediment Treatment systems, which must be analyzed to assure that widespread and long term additions of chemicals associated with Advanced Sediment Treatment do not create chronic toxicity in receiving waters.

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[21] The Blue Ribbon Panel Report is the report entitled *The Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial and Construction Activities*, Storm Water Panel Recommendations to the California State Water Resources Control Board, dated June 19, 2006, prepared by a Blue Ribbon panel of runoff water quality control experts assembled by the State Water Resources Control Board.

With respect to these and other provisions of the Tentative Order as detailed in the Comment Chart, the Regional Board failed to properly exercise its discretion by evaluating the Tentative Order requirements in light of the Balancing Factors. As a result, the Regional Board should reconsider Tentative Order and Technical Report provisions in light of the Balancing Factors, and should revise those provisions and requirements that are not properly consistent with MEP, and therefore are not properly or reasonably tailored to control water quality.

IV. CERTAIN PROVISIONS AND FINDINGS OF THE TENTATIVE ORDER DO NOT PROVIDE ADEQUATE DUE PROCESS OR ARE NOT SUPPORTED BY SUFFICIENT AND/OR CREDIBLE TECHNICAL AND SCIENTIFIC EVIDENCE.

A. The Tentative Order Requires Significant Clarification to Avoid Violating the Due Process Rights of Regulated Community.[22]

1. Legal Issues. The Tentative Order deprives the regulated community of due process because some of the terms, conditions and requirements are so vaguely stated that the regulated community does not have adequate notice of what is required to comply. In addition, the Tentative Order fails to provide adequate notice as to what constitutes a violation of its provisions.

"Notice is fundamental to due process." 7 Witkin § 638 (10th ed. 2006). The lack of an adequate definition constitutes improper notice to the regulated community in violation of due process. Cal. Const. Art. I, §§ 7, 15; Cal. Gov. Code § 11340 et *seq*. (A "standard that has no content is no standard at all and is unreasonable." *Wheeler* v. *State Bd. of Forestry*, 144 Cal.App.3d 522, 527-528 (1983).

2. Adverse Affect of Legal Issues on Water Quality Policy. Perhaps the most critical example of insufficient notice in the Tentative Order involves the level of water quality control that Copermittees must attain. Specifically, the Tentative Order as interpreted by the Technical Report, p. 65 appears to provide that even when Copermittees are implementing water quality controls to the MEP, as required by federal law[23] and other provisions of the Tentative Order,[24] but receiving water violations are nonetheless detected, the Copermittees shall be liable for civil/criminal enforcement actions. The receiving water violations may be technically infeasible for Copermittees to correct, particularly if (i) it is not possible to determine whether discharges from MS4 systems are proximately causing or contributing to receiving water violations, and/or (ii) if no additional best management practices (BMPs) can be identified to provide additional water quality control. As a result, Copermittees cannot discern from the current Tentative Order whether their planned water quality activities are sufficient and in compliance, or insufficient and the basis for criminal/civil enforcement.

The creation of a "moving target" for water quality compliance will discourage Copermittee and regulated stakeholder water quality control activities. The Tentative Order must be revised to make it clear that when Copermittees implement water quality control measures meeting the MEP standard, which standard inherently requires review and implementation of better

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[22] See, *inter alia,* Comment Chart Items 1,2, and 9.

[23] Clean Water Act § 402(p)(3)(B)(iii).

[24] *Tentative Order* § D.1.A. provides that the provisions of the Tentative Order are merely intended to implement federal law requirements to control pollutants in stormwater discharges to the MEP.

available BMPs if MS4 system discharges are causing or contributing to receiving water quality standard violations, they are in full compliance with the Tentative Order. These clarifications to provisions of the Tentative Order and Technical Report, including Discharge Prohibition A.3, are critical to providing adequate notice to the regulated community of, and encouraging implementation of appropriate water quality activities required under to establish compliance and avoid enforcement actions.

B. The Regional Boards' Findings and Requirements Are Not Supported by Sufficient Evidence in the Record[25]

1. Legal Issues. The Regional Board must support the requirements in the Tentative Order with specific findings supported by sufficient evidence. *City of Rancho Cucamonga v. Regional Water Quality Control Board*, 135 Cal. App. 4th 1377, (2006). In addition, the Regional Board must "set forth findings to bridge the analytical gap between the raw evidence and the ultimate decision or order." *Topanga Ass'n. for Scenic Community v. County of Los Angeles,* 11 Cal 3d 506, 515 (1974*); see also* In the Matter of the Petition of the City and County of San Francisco, et. al., SWRCB Order WQ 95-4 (1995 WL 576920 (Cal. St. Wat. Res. Bd. at pp. 4-5.)). All the technical and scientific data on which the Regional Board has relied in creating the Tentative Order must be made available to Copermittees and the public via at least a summary or reference to the data in the Technical Report.[26] However, as discussed in detail in the Comment Chart and summarized below, the Technical Report does not summarize or reference scientific or technical information that is critical to consider in making findings and conclusions that support requirements related to: urban discharge characteristics, hydromodification control, and application of Advanced Sediment Treatment systems, and treatment control efficacy of end-of-pipe, regional or shared BMPs. This absence of information makes it impossible to determine whether the Tentative Order requirements are necessary or appropriate and denies the regulated community a full and complete opportunity to comment on the Tentative Order, and to participate in the regulatory process, in violation of state and federal rights to due process and the public participation requirements of the Clean Water Act, 33 U.S.C. § 1342(a)(1) and Water Code §13262(a).

Under *City of Rancho Cucamonga,* BIAOC and BILD are compelled to object to those Tentative Order and Technical Report findings and conclusions that are identified in this letter and the Comment Chart as unsupported by sufficient, complete and/or credible technical and scientific data.

2. Adverse Affect of Legal Issues on Water Quality Policy. As a result of these unsupported findings and conclusions, many Tentative Order requirements and mandates are not consistent with a proper determination of MEP, are not properly focused or tailored to assure water quality benefit, or are otherwise flawed because they are based on incomplete, insufficiently specific, or inaccurate findings or data. Examples of inadequate evidence and conclusions in the Technical Report, as necessary to sufficiently support Tentative Order findings and requirements, include the following.

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[25] See, *inter alia,* Comment Chart Items 4, 5, 6,7,8,14, 15, and 23.

[26] If the Regional Board is using its technical staff, or consultants to interpret the cited studies, copies of any analysis or interpretive documents that inform the findings and conclusions in the Tentative Order and Technical Report must be included in the record and made reasonably available to the public.

a) Inadequate Evidence and Findings Regarding Discharge Characteristics in South Orange County to Support Prescriptive Water Quality Control Requirements of the Tentative Order

The Regional Board has failed to properly provide and consider a complete summary of available, local monitoring and scientific evidence as a whole related both generally to pollutants of concern in South Orange County runoff potentially causing receiving water quality standard excursions, and, specifically the presence of bacteria in South Orange County urban runoff and resulting potential for human illness. As a result, the Tentative Order and Technical Report findings and conclusions are misleading and do not constitute a comprehensive summary of locally applicable and available scientific evidence.

For example, the Tentative Order and Technical report conclude that South Orange County runoff contains several pollutants of concern linked to receiving water quality problems, but the sole support for these conclusions is comprised of national urban runoff reports and data. The Technical Report does not reference or summarize any of the local runoff or receiving water quality data for South Orange County, though such data has been collected for several years, and, for the most recent MS4 Permit term, is included in the Report of Waste Discharge Requirements (ROWD) and other monitoring report submitted by the Count of Orange to the Regional Board. While the ROWD, taken in its entirety, substantially supports its conclusion that there is no reason for the Tentative Order to mandate sweeping changes due to significant water quality control progress that has been made under existing local programs, the Technical Report and Tentative Order reach the opposite conclusion based on citations to national data and studies. As a result, more prescriptive requirements and measures are included in the Tentative Order than may be necessary if a proper evaluation of local water quality conditions is performed.

By way of further example, the Tentative Order and Technical Report conclude that runoff leaving the developed urban areas is significantly greater in pollutant load than pre-development runoff. However, this conclusion is not supported by a review of local monitoring data set forth in monitoring reports or the ROWD, and does not accurately reflect the very complex relationship between pollutant loads and land use, as reflected in various studies including a land use specific runoff monitoring studies conducted in Los Angeles County and Ventura County. Whether runoff from urban areas contains significantly greater pollutant loads than runoff from the same areas in the pre-development condition will depend on a number of factors, including pre-development land use, and the type of pollutant at issue. As a result, while this sweeping conclusion may be true for some pollutants depending upon pre-urban land uses, it certainly is not true for all situations. For example, urbanized areas typically contribute far smaller loads of TSS, nitrate, chloride and other pollutants that adhere to sediment in runoff from open space and agricultural uses. Similarly, urban areas generally contribute lower pesticide and nutrient loads than prior land uses associated with agriculture.

Perhaps more importantly, this finding fails to take into account the substantial effect that post-development BMPs have on urban runoff water generally. The ROWD concluded that BMP implementation is positively affecting receiving water quality, but the Tentative Order and Technical Report reach opposite conclusions without addressing available data. Before the findings and conclusions with respect to urban runoff can be used as a bases for regulation in the Tentative Order, the Regional Board must consider the condition of locally generated urban runoff, the

pollutants of concern in that runoff, and the affects of that runoff on specific water bodies within the watershed.

By way of final example, the Tentative Order concludes, based on references to only two studies, one in Santa Monica and one in Huntington Beach, that bacteria in urban runoff have been linked to human illness for people recreating near storm drains flowing to coastal waters, justifying additional water quality controls in South Orange County. Missing from the Technical Report and Tentative Order is any indication that the Regional Board has considered a host of other studies evaluating the link between bacteria in urban runoff and human illness, including a study conducted by PBS&J in coastal watersheds near Laguna Beach in Orange County (PBS&J, 1999); analysis conducted by Paulsen and List (Paulsen and List, 2005); a recent field study conducted by Schroeder et al. (Schroeder et. al. 2002); and a study conducted in Mission Bay by the Southern California Coastal Research Projects (SCCWRP)(Colford, J.M., Jr., T.J. Wade, K.C. Schiff, C. Wright, J.F. Griffith, S.K. Sandhu, S.B. Weisberg, *Recreational water Contact and Illness in Mission Bay, California*, SCCWRP Technical Report #449, 2005). These studies suggest that bacteria loads in urban runoff are not substantially different than those in runoff from natural areas, and that bacteria are not necessarily a proper indicator of pathogens or associated human health risk. Therefore, the far-reaching statement in Finding § C.4 suggesting that human illness has unequivocally been directly linked to urban runoff, impliedly in South Orange County, is not supported by sufficient evidence. As a result, changes to Tentative Order requirements to incorporate more prescriptive provisions are not justified based on available evidence.

b) Inadequate Evidence and Findings to Support Hydromodification Requirements of the Tentative Order

The Regional Board not accurately interpreted or considered the complete body of technical evidence regarding hydromodification and the effect of impervious surfaces on receiving water channel stability. Further, the Tentative Order must provide for proper evaluation of all local factors relevant to geomorphological change in drainage systems in establishing standards for hydromodification control. As a result, the conclusions set forth in the Tentative Order and Technical Report regarding appropriate controls for the impact on receiving water geomorphology caused by increases in volume and duration of flow associated with impervious surface (hydromodification) are inappropriate because they do not take into consideration the many factors that contribute to this issue, including but not limited to:

- The fact that all studies of hydromodification impacts and potential control strategies have been conducted at the watershed and subwatershed scale, and specifically state that the principles that may derived from them are only applicable at that broad planning scale;

- The fact that the conclusion that 2 to 3% impervious area creates geomorphic channel response is valid only for small watersheds with certain in-stream characteristics;

- Dischargers who use treatment controls or combined volume reduction/and treatment controls can assure runoff characteristics that avoid channel degradation; and

- Only uncontrolled runoff from impervious surfaces may be significantly greater in volume, velocity, and duration.

Increased runoff volume, velocity, and duration *may* increase erosion, or *may not*, depending on a variety of other factors in addition to site-specific runoff characteristics including: in-channel grade, bed and bank materials, channel susceptibility to destabilization v. reset events, condition of other areas (impervious/pervious/soils conditions) in tributary catchment. As a result, to properly tailor hydromodification requirements in the Tentative Order and achieve water quality benefit therefrom, the Regional Board must take into account all of the factors it has, to date, failed to consider, including:

- proper subwatershed and watershed scale of implementation for site design/low impact development BMPs
- proper watershed scale for consideration of relationship between disconnected, rather than total, impervious surface and natural channel stability
- receiving waters that can benefit from hydromodification control v. those that cannot
- the scientific need to assess local soils, runoff characteristics, tributary catchment area characteristics and in-stream receiving water conditions to set appropriate hydromodification control standards.

Proper consideration of the complete body of scientific and technical information available regarding hydromodification impacts and controls will lead to substantial changes in several sections of the Tentative Order, including those mandating prescriptive site design BMPs, those undermining the use of subregional volume control BMPs, those mandating compliance with inflexible interim hydromodification control criteria, and those related to waiver of hydromodification controls. We endorse the recommendations provided in the GeoSyntec Memorandum, submitted by CICWQ, for modification of the provisions of the Tentative Order related to hydromodification.

c) No Evidence or Findings to Support Advanced Sediment Treatment Requirements of the Tentative Order

Neither the Tentative Order nor the Technical Report set forth evidence, studies, monitoring data or other technical or scientific information considered in establishing Tentative Order requirements for implementation of Advanced Sediment Treatment at construction sites. There is no evidence of consistent Stormwater Pollution Prevention Plan (SWPPP) violations in South Orange County, or evidence of construction site monitoring data or other information that indicates that construction sites are causing or contributing to receiving water violations in a manner that requires imposition of Advanced Sediment Treatment to properly protect receiving water beneficial uses. As a result, there appears to be no reason for the Tentative Order to mandate extremely expensive Advanced Sediment Treatment technologies, which are available only on a limited basis, rather than, for example, requiring implementation of enhanced construction BMPs, as recommended in the GeoSyntec Memorandum.

In addition, the Regional Board has failed to consider or address in the Technical Report and Tentative Order the recommendations of the Blue Ribbon Panel Report prior to proposing Advanced Sediment Treatment. As a result, the Tentative Order broadly mandates Advanced Sediment Treatment for many sites in South Orange County based on the broad definition of "high risk construction site," but the Regional Board has failed to perform recommended studies regarding baseline sediment production, discharge and transport under natural conditions and toxicity associated with Advanced Sediment Treatment. Scientific literature shows that depriving highly alluvial systems of course sediment in runoff can create "hungry" water that results in greater erosion impacts and hydromodification in natural stream channels, and therefore Advanced Sediment Treatment should not be mandated without consideration of existing sediment conditions. Similarly, toxicity of chemicals associated with Advanced Sediment Treatment used on widespread, long term basis is not well understood. The Regional Board should develop and/or compile information related to potential toxicity as recommended by the Blue Ribbon Panel before imposing Advanced Sediment Treatment Requirements.

* * *

This letter, the attached Comment Chart, and the documents attached to and referenced in this letter and in the Comment Chart, set forth in detail the ways in which the Tentative Order reflects proposed terms, conditions and requirements that are inappropriate legally, scientifically, and/or as a matter of good policy. The enclosed materials also indicate support for alternative terms, conditions and requirements that will achieve the Regional Board's laudable water quality goals in an appropriate and effective way. BILD and BIAOC therefore respectfully request the Regional Board to consider this information carefully, as well as the input from learned scientists and others, and revise the Tentative Order substantially before finalizing it. Thank you for the opportunity to provide comments on the Tentative Order and Technical Report. We look forward to working with the Regional Board and Regional Board staff to effect necessary revisions to the Tentative Order.

Sincerely,

Mary Lynn Coffee
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cc: Executive Office John Robertus
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Building Industry Legal Defense Foundation ("BILD")
Building Industry Association of Orange County ("BIAOC")
Major Issues and Comments on Tentative Order No. R9-2007-0002
Orange County MS4 Permit
4/4/07

The following are the preliminary comments of the above-referenced parties on the February 9, 2007 Tentative Order No. R9-2007-002 For Discharges of Urban Runoff from Municipal Separate Storm Sewer Systems (MS4s) for the County of Orange, Incorporated Cities of the County of Orange, and the Orange County Flood control District within the San Diego Region (the "*Tentative Order*"). Given the process for comment, and status of the *Tentative Order* reviewed, please consider these comments preliminary. The submitting parties intend to participate fully in the public process for adoption of a renewed *Tentative Order*, and therefore must reserve the right to submit additional comments and information for inclusion in the administrative record, and for consideration by San Diego Regional Board staff and board members as the process for preparation and adoption of the subject MS4 Permit proceeds. All documents, attachments, comments memoranda and other materials referenced or cited in this document are hereby incorporated by reference into these comments. Capitalized terms and acronyms used herein and not otherwise defined have the meaning ascribed to them in the *Tentative Order*

Issue	***Tentative Order* Requirement/Concern**	**Comments**
Threshold Issue: Failure to give proper notice of agency action. *Violates due process and statutory mandates*	Review of documents the Regional Board's website fail to advise the public concerning the nature of these proceedings. The Notice of Hearing simply states that the Regional Board intends "to hold a public hearing"… and "Upon adoption, at a later date, Order R9-2007-0002 will replace R9-2002-0001." The Tentative Order and the Fact Sheet/Technical Report.	• **Comment:** As a threshold matter, the Regional Board has not identified the procedural nature of the present proceedings. Neither the Tentative Order nor any other document on the Regional Board's website advises whether the Regional Board considers the instant proceeding quasi-legislative or quasi-adjudicative, subject to Cal. Gov. Code §11400 *et seq*. If the Regional Board considers the action quasi-legislative, we would have expected a "Notice of Proposed Rulemaking." If the Regional Board considers this action to be an administrative adjudication, we would expect full compliance with Cal. Gov. Code §11425.10 *et seq*. (Administrative Adjudication Bill of Rights), which requires, among other things, that a copy of the procedures to be followed be given to the individuals at whom the adjudication is directed. Cal. Gov. Code §11425.10 (a)(2). The nature of the proceeding, whether rulemaking or adjudication, has immense bearing on all aspects of the action, from the initial form and service of notice, to the specificity of the Findings and the substance of the evidence that

Issue	***Tentative Order* Requirement/Concern**	**Comments**
		supports the Regional Boards' decision. In addition to satisfying the Government Code, the Regional Board must also clarify the nature of the proceedings at the onset to ensure that the regulated community and other affected individuals' fundamental rights to due process under both the California and federal constitution are protected. Clearly, where the nature of the proceeding has not been disclosed adequate "notice" has not been given, and a full opportunity to be heard, including the right to challenge evidence and supplement the record, has not been provided.
1. Improper Regulation of Discharges "Into" Storm Drain Systems *Exceeds Legal Authority*	While we agree that source controls should generally be encouraged, Tentative Order No. R9-2007-0002 ("*Tentative Order*") provides: "Discharges *into* and from municipal separate storm sewer systems (MS4s) in a manner causing, or threatening to cause, a condition of pollution, contamination, or nuisance …are prohibited." *Tentative Order,* Findings §§ D.3.b., D.3.c., D.3.d., D.3.e., at pp. 10-11; and § A.1., at p. 15. *See also*, Fact Sheet/Technical Report (Technical Report) Discussion of Finding § D.3.d, at p. 55. This provision shifts to Copermittees liability for pollution in stormwater, as well as non-stormwater discharges that may enter their MS4s as a result	• **Comment:** The Federal Water Pollution Control Act ("Clean Water Act" or "CWA") and its implementing regulations require that MS4 operators adopt means, measures and methods to control discharges into storm drains that may cause pollution (illicit discharges, non-stormwater discharges and other discharges that may be significant contributors of pollutants); but the CWA and federal regulations do *not* contemplate that Copermittees would be liable for, and subjected to civil and criminal penalties for the discharges of others into storm drains that could cause pollution if the methods, means and measures adopted by MS4 operators are ineffective in any particular instance to control such a discharge. *See* 33 U.S.C. § 1342(p)(3); 40 C.F.R. §122.26(d)(2); 40 C.F.R. §122.34(3). To the extent that the Board seeks to impose this requirement under its independent state authority, the requirement is both an unfunded mandate and, more importantly, a requirement that lacks any feasibility. As a result, the *Tentative Order* should be revised to mandate that Copermittees adopt means, methods and measures to control improper discharges into the MS4 system, and require investigation and follow up to control improper discharges if they occur. The *Tentative Order* should not, however, create a prohibition against discharges into the MS4, and in turn, a violation by, and liability for the Copermittees if those discharges occur, because the discharges are not in the immediate control of the MS4 operator. Per SWRCB Order WQ 2001-

Issue	*Tentative Order* Requirement/Concern	Comments
	of unknowing, accidental, and even *intentionally illicit* activity. These discharges may include, but are not limited to, industrial discharges, sewage discharges, residential hazardous materials spills, nursery and farming discharges, and non-compliant discharges from upstream MS4 systems. Even if the MS4 operator properly adopts, implements and enforces appropriate measures, ordinances and programs to control and prevent these types of unpermitted discharges in accordance with the Clean Water Act and its implementing regulations. While the Clean Water Act mandates that MS4 operators shall adopt means, methods and measures, and/or interagency agreements with other MS4 operators to identify and control illicit discharges that would introduce pollutants into an MS4 system, it does not contemplate that, as set forth in the proposed provision of the *Tentative Order*, the Copermittees would have strict	15, the Regional Board may encourage control of discharges into the MS4, but there is not authority for creating civil/criminal penalties for Copermittees due to the improper discharges of others to the MS4. The Basin Plan provision cited in the Technical Report as supporting prohibition of discharges "into" MS4s similarly prevents discharges of waste to waters of the state – not to MS4s. • **Comment:** State Water Resources Control Board ("State Board" or "SWRCB") Order 2001-15 found the exact language used in *Tentative Order* § A.1. invalid and overly broad because it regulates stormwater and non-stormwater discharges "into" MS4s, when the Clean Water Act and Porter-Cologne Water Quality Control Act ("Porter-Cologne") regulate discharges of waste and pollutants *from* MS4s to receiving waters. SWRCB Order WQ 2001-15 at pp. 9–10; *see also id*. at p 10 n.21. 33 U.S.C., §1342(p)(3)(B) authorizes the issuance of permits for discharge "from municipal storm sewers." 40 C.F.R. §122.26(a)(3). • **Comment:** Regional Water Quality Control Boards ("Regional Board" or "RWQCB") can emphasize control of discharges into the MS4 to improve the quality of discharges from MS4s, and can emphasize that dischargers into MS4s continue to be required to implement a full range of Best Management Practices ("BMPs"), and must establish legal authority to control discharges to the MS4. SWRCB Order WQ 2001-15, at pp. 9-10; 40 C.F.R. §122.26(d)(2)(iv)(D). However, MS4 permit prohibitions may not broadly restrict all discharges *into* an MS4 and subject Copermittees to civil/criminal enforcement and liability for such discharges, for policy as well as legal reasons. Discharges "into" MS4s should not be restricted in part because that approach does not allow flexibility to use regional solutions where they could be applied in a manner that fully protects receiving waters. *Id*. These provisions are therefore inconsistent with the provisions of the

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	liability for non-compliant stormwater and non-stormwater discharges as an NPDES Permit violation.	*Tentative Order* that allow implementation of 'shared BMPs.' • **Comment:** The *Tentative Order* attempts to justify control of discharge "into" MS4s and liability for Copermittees for the discharges of others into MS4s based on a finding that MS4 facilities often include natural water bodies as both receiving waters and MS4 facilities, thereby placing responsibility for any water quality impairment of those combined waterbodies/MS4s on Copermittees. *Tentative Order,* Findings §§ D.3.c. and D.3.d. These findings together supply the basis for *Tentative Order* requirements that create significant liability exposure for local governments for discharges of others "into" MS4s, regardless of whether Copermittees in fact own or operate natural receiving waters considered by the *Tentative Order* to be MS4 facilities. The State Board has already rejected the proposition that because some receiving waters are part of the MS4s, Regional Boards can broadly restrict discharges "into" the MS4 system, and hold Copermittees liable for violations of MS4 permits for such discharges. SWRCB Order WQ 2001-15, at p. 10. Therefore, *Tentative Order* provisions should be revised to be consistent with the State Board's holding. *See* Items 2, 9 and 10 below
2. Improper attempt to demand that Copermittees "terminate" access to MS4s. *Exceeds legal*	The Technical Report discussion of Finding § D.3.b. provides: "the municipality must demonstrate that it has adequate legal authority to control the contribution of pollutant in stormwater…*control* in this context, means not only to require disclosure	• **Comment:** The Regional Board misconstrues its authority under 33 U.S.C. § 1342(p)(3)(B)(ii) to prohibit illicit and non-stormwater discharges into MS4s. Instead, the Regional Board attempts in the Technical Report to bootstrap this provision into a requirement that MS4 operators ("municipalities") must "cut-off" access to MS4s for certain stormwater inflows. For reasons set forth more fully in Item 1 above, the *Tentative Order* exceeds the scope of the Regional Board's jurisdiction and authority. Even if it were technically possible for municipalities to

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authority and creates significant liability for Copermittees. *Imposes technically infeasible requirement, and therefore is inconsistent with a proper interpretation of MEP. See Items 12 & 13 below.*	of information, but also to limit, discourage or *terminate* a stormwater discharge to the MS4. Technical Report at p 53. Regional Board staff comments at the March 12 public Workshop on the *Tentative Order* indicate that municipalities must *physically* terminate discharges from upstream dischargers, including small MS4s, as necessary to comply with the requirements of the *Tentative Order*. The imposition of an obligation to physically terminate stormwater discharges to a public MS4 system, is an interference with Copermittees governmental function and would exposure them to significant liability associated with any consequential flood and flood hazards. *See Geosyntec Memorandum* at p. 10.	terminate certain upstream discharges, such "closure" could cause significant flood damage to personal and public property, violating statutes and regulations related to the operation and maintenance of flood control structures and interfering with public and private agreements setting forth drainage rights. Cal. Water Code §§ 8100, 8128, 8157, 8158. *See generally*, Cal. Water Code § 8100 *et seq*.; 23 Cal. Code Regs. § 1 *et seq*. Compliance with this Regional Board mandate would pose significant legal consequences for the municipalities. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977). *See generally*, *Hopkins v Clemson Agricultural College*, 221 U.S. 636 (1911) (counties, municipalities and other public corporations are not exempt from suit where it is alleged that their actions have injured private parties or their property.) Thus, it is likely that any state imposed permit condition that require municipalities to terminate stormwater inflows to their MS4 system in a manner that could result in a flood hazard, or 1) violate stormwater drainage rights would be unenforceable and void. EPA has argued that the obligation for municipalities to implement "*management -type controls*" to restrict third party discharges that would enter their MS4s does not violate the Tenth Amendment. 64 Fed. Reg. 68722, 68765-66 (Dec. 8, 1999). However, the federal government is not able to compel state (or municipal) governments in a way that would "excessively interfere with the functioning" of their political subdivisions. *Id. citing Printz* v. *United States,* 117 S.Ct. 2365, 2383 (1997). Here, the Regional Board is seeking to go well beyond "management type controls." To impose requirements like blocking access to MS4s, which would interfere with Copermittees obligations as a political subdivision to protect human health and property from the effect of flooding and to protect innocent parties property and drainage rights. Consequently, the Regional Board has no legal basis for this requirement and cannot use EPA's guidance to

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		justify its more draconian approach. • **Comment**: In many circumstances, it is likely to be not only legally infeasible, but ***impossible*** to terminate discharges to an MS4, particularly those from upstream MS4s or relatively large tributary catchments. As a practical matter, there is no available technology or other known mechanism to safely terminate discharges to the MS4s taking into consideration the need to sever thousands of discharges - particularly storm flows rather than solely dry weather flows, which simply cannot be accomplished given soils, infiltration and/or sewer system capacity constraints. *See* Geosyntec Memo at p. 10.
3. Improper definition of runoff as "waste" *Exceeds Legal Authority* **-**	The *Tentative Order* incorrectly characterizes runoff as "waste." Findings §§ C.1. and C.3, at p. 3 Specifically, *Tentative Order,* Finding § C.1. at p. 3 states: "***The discharge of urban runoff from an MS4 is a 'discharge of pollutants*** from a point source into the waters of the U.S.(emphasis added.). *Tentative Order* § C. 3 also misstates this important point: "The discharge of pollutants ***and/or increased flows from MS4s*** may cause or threaten to cause the concentration of pollutants to exceed applicable receiving water quality objectives. . . ." *Tentative*	• **Comment:** Discharge of "runoff" is not a discharge of "waste." The State Board has clearly stated recognized this point, by finding: "An NPDES permit is properly issued for discharge of a pollutant to waters of the United States. Clean Water Act § 402(a).".SWRCB Order WQ 2001-15 at p.9. Further, the Clean Water Act regulates the discharge of pollutants, which may be contained in stormwater, rather than the discharge of stormwater without pollutants. 33 U.S.C. § 1342 (a). Notably, the Clean Water Act defines "pollution" as "the man-made or man-induced alteration of the [water's] chemical, physical, biological, and radiological integrity…." 33 U.S.C. § 1362(19). Similarly, Porter-Cologne regulates the discharge of waste to waters of the State. Cal. Water Code §§13260-1370, 13370-13389, and 13399.25-13399.43. Further, Cal. Water Code § 13241(b) requires the Board to take into account the "environmental characteristics of the hydrological unit at issue, including the quality of water available thereto." Similarly, the State Board has recognized this point: "…it is the waste or pollutants in the runoff that meet these definitions of "waste" and "pollutant" [under Cal Water Code § 13050(d) and 40 C.F.R. § 122.2], and not the runoff itself." SWRCB Order WQ

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	Order § C. 3 at p. 3 (emphasis added.).	2001-15, p. 12. While stormwater may contain waste, it is improper to characterize stormwater as waste *per se* or pollution *per se.* The *Tentative Order* should be revised to be consistent with SWRCB Order WQ 2001-15. • **Comment:** Moreover, in many instances, storm water will naturally contain significant loads of, for example, sediment. Such natural loads are not "pollution" as defined by the Clean Water Act. 33 U.S.C. § 1362 (19). Instead, the Clean Water Act has as its objective or aspiration "restor[ing] and maintain[ing]" the natural characteristics of waters. Similarly, California Water Code section 13241(b) requires considerations of the "[e]nvironmental characteristics of the hydrographic unit at issue, including the quality of water available thereto." Inherent in this balancing factor is the *natural* environmental characteristics – of course (i.e., natural loads). The Regional Board's definition of all storm water as "waste" violates these fundamental principles • **Comment:** By inappropriately equating runoff flows as waste, rather than correctly regulating the constituent pollutants, the Regional Board sets up an expansive jurisdictional framework for regulating treated and clean stormwater, and runoff volume, rather than pollutants. The Boards' authority is limited to regulating the discharge of pollutants. Per *Tentative Order* § A.3. at p. 2, the *Tentative Order* is intended to be inconsistent with SWRCB Orders WQ 2000-11 and 2001-15, and should be revised. Revision of the Tentative Order is necessary to assure that the requirements imposed are reasonably related to the control of specific pollutants, specifically and expressly found, based on current and local data and information, to cause excursions of receiving water quality standards. Cal. Water Code § 13263(a). In this way, Copermittees and the regulated community can better target their water quality efforts as needed to protect beneficial uses.

Building Industry Legal Defense Foundation ("BILD")
Building Industry Association of Orange County ("BIAOC")
Major Issues and Comments on Tentative Order No. R9-2007-0002
Orange County MS4 Permit
4/4/07

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4. Findings are an abuse of discretion and not supported by sufficient evidence. *Denies Due Process* *Results in improper determination of Maximum Extent Practicable ("MEP").* *See Items 12 13, 38 below.*	The RWQCB has failed to support many of its technical findings concerning discharge characteristics, hydromodification impacts and controls, and efficiency of BMPs with sufficient evidence in the record. Technically insufficient findings result in improper Tentative Order requirements and over-prescriptive and/or ineffective mandates. *Tentative Order*, Findings §§ C.3, C.4, C.5, C.8, C.9, C.10, D.1.b., D.1.c., D.2.b., D.2.c., D.3.b., D.3.c. We address technical deficiencies of the individual findings in Items 5,6,7,8,14,15,16,17,19 & 19 below.	• **Comment:** The Regional Board must support the requirements in the *Tentative Order* with specific findings supported by sufficient evidence. *City of Rancho Cucamonga v. Regional Water Quality Control Board*, 135 Cal. App. 4th 1377, (2006). In addition, the Regional Board must "set forth findings to bridge the analytical gap between the raw evidence and the ultimate decision or order." *Topanga Ass'n. for Scenic Community v. County of Los Angeles,* 11 Cal 3d 506, 515 (1974*); see also* In the Matter of the Petition of the City and County of San Francisco, et. al., SWRCB Order WQ 95-4 (1995 WL 576920 (Cal. St. Wat. Res. Bd. at pp. 4-5.)). • • **Comment:** The Regional Board fails to support *Tentative Order*, Findings §§ C.3, C.4, C.5, C.8, C.9, C.10, and D.1.b. with sufficient evidence presented in either the Technical Report or the *Tentative Order.* This failure makes it impossible to determine whether the Tentative Permit requirements are necessary or appropriate and denies the regulated community a full and complete opportunity to comment on the *Tentative Order*, and to participate in the regulatory process, in violation of state and federal rights to due process and the public participation requirements of the Clean Water Act, 33 USC § 1342(a)(1) and Water Code §13262(a). • **Comment:** In general, the *Report of Waste Discharge* ("ROWD") submitted by the County indicates that, based on available evidence and monitoring data, the Drainage Area Management Plan and locally adopted water quality ordinances and Model Water Quality Management Plans (called JURMPs in the *Tentative Order*) ***are sufficient*** and substantial water quality control progress has been made. Taken

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		in its entirety, the ROWD clearly shows that there is no reason for the *Tentative Order* to mandate sweeping changes to the existing local agency programs. Further, to the extent that changes are needed, they should be tailored to the specific areas in which the local programs have identified weaknesses, and any such weaknesses can only be assessed after evaluating available data. • **Comment:** In issuing the Tentative Order, the Regional Board has abused its discretion by 1) failing to support its findings with best available science, and 2) failing to consider current available and peer reviewed science that reaches conclusions that are different than those set forth in the findings. *See generally*, *Geosyntec Memo* identifying a numerous of cited studies as technically deficient and/or not supporting the positions that the Regional Board's use of them. • **Comment:** All the technical and scientific data on which the Regional Board has relied in creating the Tentative Order must be made available to Copermittees and the public. Further, if the Regional Board is using its technical staff, or consultants to interpret the cited studies, copies of any analysis or interpretive documents that inform the Findings in the Tentative Order must be included in the record. *See City of Rancho Cucamonga v. Regional Water Quality Control Board*, 135 Cal. App. 4th 1377, 1384-85 (2006). BILD and BIAOC hereby object to the present record as noted and hereby request that a full and complete copy of the administrative record be made available to Copermittees and the public in a timely manner so that they can consider the body of evidence and supplement it as necessary. *Id.* • **Comment**: The Regional Board's failure to evaluate and build upon any the many successful watershed management programs identified in the ROWD is of

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		grave concern. We note that the Regional Board staff has been invited to participate in some of these programs. See generally, ROWD, especially Executive Summary, and Section 9 DAMP and Section 12 Watershed Action Plans. The Regional Board has failed to consider these current and on-going watershed efforts, and instead seeks to overlay a system of its own devising. There is no evidence in the record that would explain why the Regional Board has disregarded Copermittees programs. *See also* discussion in Items 5 - 7 below.
5. Findings not supported by sufficient evidence. *Denies Due Process* *Results in improper determination of MEP (See Items 12 and 13 below)*	In *Tentative Order*, findings §§C.3, C.4, and C.5, at p.3 and, the Regional Board makes a number of conclusory statements concerning urban storm water, but has failed to support these findings with current, local and relevant technical data.	• **Comment:** At present, the administrative record does not contain sufficient evidence to support the Regional Board's findings. Specifically, the Regional Board must identify all of the technical data that is relevant to making each finding, whether it supports or controverts the finding made, and should provide a weight of the evidence analysis to support its conclusions. *See Costle v Pacific Legal Foundation*, 445 U.S. 198 (1980) (Evidentiary public hearings are available and appropriate when NPDES permits are issued.). • **Comment:** In making *Tentative Order* Findings §§C.3. C.4, and C.5., at p.3 to support this rulemaking, the Regional Board failed to evaluate the totality of the available evidence to support conclusions. We note that the Technical Report at pages 8 and 25 reference monitoring data in the watershed, but this data has not been summarized or placed in the record, denying a proper opportunity for public review, comment and public participation. Moreover, the ROWD suggests that significant monitoring and assessment data has been developed for Southern Orange County, but these data and a summary of them are also missing from the record. Report of Waste Discharge ("ROWD") at p.1.

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		• **Comment:** The few studies that have been identified in support of Finding § C.3 of the *Tentative Order* at p. 23 of the Technical Report are national studies and/or are significantly outdated, and do not reflect local conditions or post-MS4 Permit runoff water quality controls and programs. Further, more current and relevant data is available, but has not been evaluated or placed in the record.
6. Finding C.4. is not supported by sufficient evidence *Denies Due Process* *Results in improper determination of MEP (See Items 12 and 13 below).*	Finding § C.4 of the *Tentative Order* provides that "human illnesses have been linked to recreating near storm drains flowing to coastal waters" and that urban runoff pollutants can bioaccumulate in humans. *Tentative Order*, Finding, § C.4. at p.3. In reaching this conclusion the Regional Board has failed to review current data and studies reaching conclusion that differed than the conclusion in the finding. .	• **Comment:** The Regional Board has failed to provide sufficient evidence that supports Finding § C.4, and the Finding is contrary to a proper and complete summary of available scientific evidence as a whole. As a result, the finding is misleading and does not constitute a comprehensive summary of available scientific evidence. By way of example, a study conducted by PBS&J in coastal watersheds near Laguna Beach in Orange County (PBS&J, 1999) found that indicator bacteria concentrations in receiving waters downstream from the developed/urban watersheds were not significantly different than concentrations in receiving waters downstream from undeveloped watersheds. Additional analysis conducted by Paulsen and List (Paulsen and List, 2005) further supported these findings. These studies conclude that the occurrence of bacteria in surface water, and the resulting *assumed* potential for illness, cannot be directly linked to urban runoff, as opposed to runoff from natural areas. Further, Paulsen and List summarize the debate over the use of bacteria monitoring for pathogenic indicators, and point out that scientific studies show no correlation between bacteria levels and pathogens and therefore bacteria may not indicate a significant potential for causing human illness (Paulsen and List, 2005). In a recent field study conducted by Schroeder et al., pathogens (in the form of viruses, bacteria, or protozoa) were found to occur in 12 of 97 samples taken, but the samples that contained pathogens did not correlate with the concentrations of indicator organisms (Schroeder et. al.

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		2002). Further study by the Southern California Coastal Water Research Project ("SCCWRP") in Mission Bay, where efforts have been made to eliminate human sources of sewage, has demonstrated no link between concentrations of indicator bacteria and either an increased risk of human illness or the presence of human pathogens. Colford, J.M., Jr., T.J. Wade, K.C. Schiff, C. Wright, J.F. Griffith, S.K. Sandhu, S.B. Weisberg, *Recreational water Contact and Illness in Mission Bay, California*, Southern California Coastal Water Research Project (SCCWRP) Technical Report #449, 2005. These studies suggest that bacteria are not necessarily a proper indicator of pathogens or associated human health risk. The far-reaching statement in Finding § C.4 suggesting that human illness has unequivocally been directly linked to urban runoff is not supported by sufficient evidence, and contradicts the available scientific evidence.
7. Hydromodification position does not include in the record or take into account available information and data *Denies Due Process* *Results in improper determination of MEP (See Items 12 and 13 below)*	Finding § C.8 makes general and sweeping statements about the effect of hydromodification on the watershed. Technical Order Finding § C.8. at p.6, Technical Report at pp. 28-32. These findings should be revised to properly summarize available scientific and technical information as summarized in this comment and more specifically described in the Geosyntec Memorandum dated April 4, 2007, attached hereto and incorporated by reference. ("*Geosyntec Memo*")	• **Comment:** The conclusions set forth in the Regional Board's *Tentative Order,* Finding § C.8 regarding the impact of impervious surfaces (hydromodification) are arbitrary as well as inappropriate because they do not take into consideration the many factors that contribute to this issue – in particular all six of the Water Code section 13241 balancing factors (*see* discussion Item 12 below). As discussed in the *Geosyntec Memo* at pp. 1-3, the Regional Board has not accurately interpreted or considered the body of technical evidence regarding hydromodification and the effect of imperious surfaces on stormwater runoff. Some specific concerns include, but are not limited to: 1) the effect of imperiousness on hydromodification is more complicated than the Technical Order suggests. *Geosyntec Memo* p.1. 2) all cited studies of hydromodification impacts and potential control strategies have been conducted at the watershed and subwatershed scale,

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		and specifically state that the principles that may derived from them are only applicable at that broad planning scale; 3) the finding that the conclusion that 2 to 3% impervious area creates geomorphic channel response is valid <u>*only*</u> for small watersheds with certain in-stream characteristics; 4) dischargers who use treatment controls or combined volume reduction/and treatment controls can assure runoff characteristics that are substantially the same as runoff from pervious "natural" settings. This can assure runoff characteristics that avoid channel degradation. 5) only ***uncontrolled*** runoff from impervious surfaces may be significantly greater in volume, velocity, and duration. 6) increased runoff volume, velocity duration *may* increase erosion, or *may not*, depending on a variety of other factors in addition to site-specific runoff characteristics including: in-channel grade, bed and bank materials, channel susceptibility to destabilization v. reset events, condition of other areas (impervious/pervious/soils conditions) in tributary catchment. Not all watersheds respond to addition of impervious surface in the same manner, or even in accordance with general rules or formulas. 7) the fact that the studies cited by the Regional Board have not been conducted with sufficient scientific rigor to allow them to be used to support the conclusions the Regional Board has drawn. The *Tentative Order* must provide that any hydromodification control standard adopted should be based upon a watershed or subwatershed scaled

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		study and evaluation that takes into account all appropriate local factors to determine required level of hydromodification control. • **Comment:** As a result of the overgeneralization of information, the finding fails to provide an appropriate analytical link between the data summarized in the Technical Report in support of the finding and the regulatory requirements in the *Tentative Order* governing hydromodification. This lack of analytical link and thorough evaluation of available studies in turn creates an improper determination with respect to requirements that constitute MEP. See Items 12 & 13 below.
8. Insufficient relevant evidence to properly characterize the relationship between urbanization in Southern Orange County and increased pollution. *Denies Due Process* *Results in improper determination of MEP (See Items 12 and 13 below)*	*Tentative Order,* Finding § C.9 states: "Urban development creates new pollution sources as human population density increases and brings with it proportionately higher levels of car emissions, car maintenance wastes, municipal sewage, pesticides, … As a result, the runoff leaving the developed urban area is significantly greater in pollutant load than the pre-development runoff…" *Tentative Order*, Finding, § C.9. at p. 6. However, there is no evidence in the record to suggest that the Finding applies to urbanization in Orange County. *Tentative Order,* Finding § D.1.e	• **Comment:** Available data indicate that the relationship between pollutant loads and land use is a much more complicated than *Tentative Order* Finding § C.9 indicates. *See Geosyntec Memo*, at pp. 3-4. Moreover, Finding § C.9. is not true of Orange County generally, although it may be true in some circumstances. Before this finding can be used as the basis for rulemaking, the Regional Board must support the finding with sufficient evidence in the record for each MS4 system to which it is applied. • **Comment:** Whether runoff from urban areas contains significantly greater pollutant loads than runoff from the same areas in the pre-development condition will depend on a number of factors, including pre-development land use, and the type of pollutant at issue. *See Geosyntec Memo*, at pp. 3-4. As a result, while the statement Finding § C.9 may be true for some pollutants depending upon pre-urban land uses, it certainly is not true for all situations. For example, urbanized areas typically contribute far smaller loads of TSS, nitrate, chloride and other pollutants that adhere to sediment in runoff from open space and agricultural uses. Similarly, urban areas generally contribute lower pesticide and nutrient loads than prior land

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	"Significant urban runoff challenges remain, broadly stating that Urban Runoff continues to be the leading cause of water quality impairment in the region." Technical Report p 8. *Tentative Order*, Finding § C.10 states: "[d]evelopment and urbanization especially threaten environmentally sensitive areas (ESAs) such as water bodies designated as supporting a RARE beneficial use and CWA § 303(d) impaired water bodies. *Tentative Order* § C.10. at p. 6.	uses associated with agriculture. *See Geosyntec Memo*, at p. 3. Further, this finding fails to take into account the substantial effect that post-development BMPs have on urban runoff water generally. This Finding should be revised to accurately reflect the complex relationship of pollutant loads for urbanized areas v. those associated with pre-development conditions. In its current form, Finding § C.9. is too simplistic and, as a result is inaccurate and misleading. • **Comment:** New development and redevelopment do not necessarily *increase* atmospheric deposition on regional basis. While population growth can increase air emissions that, in turn, can result in increased water quality issues related to atmospheric deposition, to the extent that new development or redevelopment is only accommodating an existing population level, that activity alone does not increase emissions or atmospheric deposition. It may change the location in a watershed of emissions and their deposition within the air basin, but new development does not generate new or increased emissions or atmospheric deposition. This finding lacks sufficient evidence to the extent that it intends to affirmatively establish a link between land use and atmospheric deposition. • **Comment:** The Regional Board cites no evidence to support Finding § C.10 at p. 6. The only study cited, *Mitigation of Storm Water Impacts From New Developments in Environmentally Sensitive Areas*, deals with mitigation measures *not* the alleged causal connection between new development and water quality impairment. Technical Report p. 32. The Regional Board must have evidentiary support for the connection relevant to the waterbodies of the South Orange County subregion at issue. Once the causation element is established, the Finding must take into account treatment control BMPs as well as creation /restoration and mitigation required for direct and indirect impacts to function, values, habitat and

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		hydrology when a new development or redevelopment impacts an ESA. Such restoration, mitigation, and creation is required by *inter alia,* NEPA, CEQA, CWA §§401, 401,and implementing regulations, Cal. Fish & Game Code 1600, *et. seq.,* and state and federal Endangered Species Acts. • **Comment:** Although the first clause of Finding § C.10 concludes that "[d]evelopment and urbanization especially threaten environmentally sensitive areas (ESAs)", the remainder of the sentence lumps ESAs together indiscriminately with all CWA 303(d) listed waterbodies. To the extent that the Regional Board acts to implement this Finding by imposing additional restrictions on discharges of urban runoff, it must do so with regard to *specific* ESAs (such as those with RARE beneficial uses, ASBA, and/or NCCP/Reserve areas), and then solely based upon the listed POCs that have been shown by sufficient evidence to be related to land use activity. The *Tentative Order* and/or the Technical Report should identify with specificity these ESAs and the POCs related to urban developments that threaten them. Further, guidance for where to apply the restrictions that implement this Finding and the content of those restrictions should be both ESA and pollutant specific and clear. • **Comment:** Further, to the extent that the Regional Board intends to make Findings §§ C.9. and C.10 the bases for regulation in the *Tentative Order,* both state and federal law require that water quality regulation be linked to listed pollutants of concern for specific water bodies on the CWA 303(d) list. 33 U.S.C. §1313(d). We note that *Tentative Order* Table 2a fails to support either Finding § C 9 or §C.10.
9. Misstatement of Municipal	The Technical Report discussion of *Tentative Order*, Finding § D (2)(f.)	• **Comment:.** MS4 Permits are ***NOT*** issued to municipalities ***because*** of their

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Authority and Improper Copermittee Liability. *Exceeds Legal Authority*	(at pp. 43-44), (i) misstates the basis on which MS4 permits are issued to municipalities, and (ii) improperly expands Copermittee liability for illicit or noncompliant discharges. For example, the Technical Report improperly states that the permits are issued to municipalities "because of their land use authority." The Regional Board further claims "the ultimate responsibility for the pollution discharges, increased runoff, and inevitable long-term water quality degradation that results form urbanization lies with local government." Technical Report p.43. In addition, the Technical Report states: "The Order holds the local government accountable for this direct link between its land use decisions and water quality degradation." Technical Report discussion of finding D.1.f., p. 44. In addition, other provisions of the	land use authority. Under the CWA, MS4 permits are issued to municipalities because they are owners/operators of MS4s and as such are required to apply to NPDES permits. 40 C.F.R. §122.26(a)(3); §122.26(d). Similarly, under Porter-Cologne, waste discharge requirements are issued to dischargers of waste, not to local agencies due to their land use authority. *See* Cal. Water Code § 13374, (wastewater discharge requirements established by the regional boards are the equivalent of the NPDES permits required by federal law.). • **Comment:** There is no liability under CWA or Porter Cologne for land use decisions made by municipalities. The Regional Board statements of municipal liability are not correct under CWA or Porter Cologne, which holds dischargers liable for their discharges. See, *e.g.,* Technical Report, Discussion of Finding, § D(2)(f)., at pp. 43-. 44. Under the CWA, municipalities must adopt, implement and enforce legal authority to detect, inspect, prevent and provide recourse against illegal, improper or pollutant-laden discharges, but ***municipalities are not responsible for insuring the absence of illegal or noncompliant discharges by others***. 40 C.F.R. §§ 122.26(a)(3); 122.26(d); 122.34. By way of example, the discussion at Technical Report at p. 44 states that municipalities must regulate and inspect construction sites to assure compliance with the MS4 and the SWRCB General Construction Permit because if improper construction discharges occur, the Copermittees will be liable for those discharges. However, it is the construction site owner/operator who is legally responsible—not the municipality—so long as the municipality is implementing and enforcing an adopted water quality control ordinance governing construction site discharges. (*See* 40 C.F.R. §122.34(a).) This approach is consistent with the environmental regulatory scheme generally, which is designed to hold polluters responsible for pollution they create. Water

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	Tentative Order mandate that the Copermittees perform compliance actions for other dischargers under their jurisdiction, or risk enforcement for non-compliance with the Permit. *See*, *e.g., Tentative Order* §§ 2(d)(c) and (d); 3(c)(d) and (e). The combination of these provisions results in an improper statement of the legal basis for issuance of MS4 permits, and an improper expansion of Copermittee liability for the discharges of others.	Code §§ 13350(a),(b) and (c)(4)-(5). • **Comment:** The Regional Board's broad-brush statements create major liability issues for municipal governments. These statements are not only without basis in law, but are also both unwarranted and counter productive. Further, these statements ignore that local government land use discretionary actions must be taken in compliance with CEQA. Pub. Res. Code §21151. Under CEQA, the Regional Board is a trustee and a responsible agency, and as a result must be consulted by local agencies and provided an opportunity to comment on, and demand provision of additional information regarding, and imposition of additional mitigation measures for land use approvals. Cal. Pub. Res. Code §15040 – 15045 (Authorities Granted to Public Agencies by CEQA). Further, any land use review for a project involving an Army Corp of Engineers CWA § 404 permit necessarily entails Regional Board review of the project and its impacts, and issuance of a CWA § 401 water quality certification containing appropriate conditions and mitigation measures to address water quality impacts associated with the land use project permitted. In light of the Regional Board's role in approving discretionary land use and development decisions, the statements of the Technical Report not only create significant liability for local government, but also fail to recognize the substantial role that the Regional Board is authorized to play in the issuance of land use approvals. • **Comment:** The *Tentative Order* may require each municipality to mandate BMPs for others in their jurisdiction, but should only do so at a programmatic level. SWRCB Order WQ 2001-15, at pp. 2-4. However, the *Tentative Order* goes farther than mandating programmatic requirements for runoff control, and includes provisions that require the municipality to implement BMPs to control

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		specific discharges from construction sites and high threat residential areas if certain dischargers fail to respond to the local agency Ordinance mandating them. See, *e.g., Tentative Order* §§ 2(d)(c) and (d); 3(c)(d) and (e). These provisions are not authorized under the CWA, and are improper in that they create improper Copermittee liability for implementation of local ordinances and for noncompliant discharges of other operators. 40 C.F.R. §§126.26(a)(l)(i); 122.34.
10. Legal Exposure of Local Governments with Regard to Water Quality Standards *Exceeds Legal Authority* *Creates a stricter standard for discharge control and Copermittee compliance than MEP* *Denies due process*	The *Tentative Order* improperly exposes local governments to legal liability for receiving water exceedances, even when their MS4 discharges comply with MEP requirements. While the receiving water limits language of *Tentative Order* § A.3.a. and b. do comply with SWRCB Order WQ 99-05, the requirements of *Tentative Order* § A.3.c and the discussion at Technical Report p. 65 do not. The Technical Report states: "While implementation of the iterative BMP process is a means to achieve compliance and water quality objectives, it does not shield the discharger from enforcement actions for continued non-compliance with	• **Comment:** Pursuant to *Tentative Order* § A.3.c, as interpreted by the Technical Report, Copermittees are subjected to liability that regardless even when they are properly implementing measures to control MS4 discharges to the MEP, and regardless of whether it is technically feasible, or even possible to take further action. Good faith pursuit of the "iterative process" does "not shield the discharger from enforcement actions if discharges cause or contribute to a violation of water quality standards" for receiving waters. Technical Report at p. 65. These provisions are clearly intended to impose liability on Copermittees when receiving waters fail to achieve water quality standard, which is inconsistent with State Water Board orders, federal regulations, and state and federal policy and guidance. • **Comment:** Per SWRCB Orders WQ 99-05 and WQ 2001-11 the iterative process (adaptive management of BMPs) is the appropriate recourse for failure to comply with all discharge prohibitions of MS4 Permits. In addition, the iterative process is the proper response to all receiving water limit violations, including violations of Attachment A Basin Plan Prohibitions. *Id.* There is *no* State or federal order or guidance recommending or requiring that Copermittees be or remain liable for civil/criminal enforcement of MS4 Permits due to receiving water limit violations when the Copermittee is proceeding with the requirements of the iterative process. As a result, *Tentative Order* § A.3.c and the Technical Report

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	water quality standards. Consistent with EPA guidance, regardless of whether or not an iterative process is being implemented, discharges that cause or contribute to a violation of water quality standards are in violation of Order No R9-2007-002." *Tentative Order*. *See also*, Technical Report, at p. 74. The *Tentative Order* does not adequately address situations where Copermittees implement water quality controls to the MEP as required by federal law (Clean Water Act, § 402(p)(3)(B)(iii)), but receiving water violations are nonetheless detected. *Tentative Order*, § A.3, at p. 15.	language at p. 65 and p. 74 should be deleted or revised to comport with that appropriate implementation of the iterative process constitutes compliance with the MS4 Permit. See also, 64 Fed. Reg. 68722, 68753,(December 8, 1999)(the BMP iterative process is designed to achieve MEP). • **Comment:** By requiring Copermittees to take further action beyond the adaptive management of BMPs, particularly when the Copermittee is requiring implementation of all available water quality controls that are technologically feasible for use at a cost that is reasonably related to pollution control benefits (Memorandum dated February 11, 1993, entitled "Definition of Maximum Extent Practicable," by Elizabeth Jennings, Senior Staff Counsel, SWRCB), the *Tentative Order* requires implementation measures that exceed an appropriate determination of requirements and measures necessary to control water quality to the MEP. • **Comment:** The *Tentative Order* and Technical Report should be revised such that the iterative process of improving and adaptively managing BMPs is the sole required response to address persistent exceedances in receiving water quality conditions caused or contributed to by MS4 discharges. Without these revisions, the *Tentative Order* requirements exceed an appropriate application and determination of measures necessary to control water quality to the MEP. Clean Water Act, 33 U.S.C. §1342(p)(3)(B)(iii); Cal. Water Code §§ 13256, 13375, and 13376.
11. Nullifies Copermittee's Land Use Authority *Exceeds Legal*	The *Tentative Order* mandates certain planning and design decisions, such as requiring construction of streets to minimum widths, minimizing the impervious footprint of the project,	• **Comment:** Federal law specifies that "permits for discharges from municipal storm sewers…shall require controls to reduce the discharge of pollutants to the maximum extend practicable ("MEP"), including management practices, control techniques and systems, design and engineering methods,…" 33 U.S.C. §

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Authority	directing runoff into landscaping, and to minimize soil compaction. *Tentative Order*, § D(1)(c)(2) at p. 21. The Regional Board's mandate of certain planning and design activities is an unlawful usurpation of the authority of local jurisdictions, which do have legal authority to make these decisions with respect to land use planning and development in their jurisdictions. These requirements go beyond the programmatic specification of available storm water quality controls and technologies.	1342(p)(3)(B)(iii). In California, the State and regional boards are vested with the primary responsibility for controlling water quality. Cal. Water Code § 13001; *County of Los Angeles v. State Water Resources Control Bd.* 143 Cal.App.4th 985, 1003, (2006). Local jurisdictions, however, retain the authority to determine appropriate land use and planning decisions. Cal. Const. art. XI, section 7. "Under the police power granted by the Constitution, counties and cities have plenary authority to govern…" *Candid Enterprises, Inc. v. Grossmont Union High School Dist.* 39 Cal.3d 878, 885 (1985). Thus, the local jurisdictions, not the Regional Board, have plenary authority over local land use decisions. "[L]and use planning in essence chooses particular uses for the land; while environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits." *California Coastal Com'n. v. Granite Rock Co*. 480 U.S. 572 (1987). Further, "The CWA is not a land-use code; it is a paradigm of environmental regulation..." *Solid Waste Agency v. United States Army Corps of Engineers*, 531 U.S. 159, 191 (2001) dissent by Justice Stevens. The Porter-Cologne respects the authority of state and regional boards, on the one hand, and local jurisdictions, on the other. For example, California Water Code § 13360(a) expressly precludes regional boards orders and waste discharge requirements from specifying the particular design location, type of construction or particular manner in which compliance with water quality standards must be achieved. In short, the Regional Board has the job of enforcing the Clean Water Act and the Porter-Cologne, but it does not have the job of making land use decisions. When the Regional Board very specifically mandates certain planning and design activities to local jurisdictions with respect to their land use planning decisions, the Regional Board is unlawfully usurping the authority of the local jurisdictions whose job it is

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		to make decisions with respect to land use planning and development. In considering the current MS4 Permit previously adopted by the San Diego Regional Board, the State Water Resources Control Board (SWRCB) recognized the importance of respecting the very different roles of local agencies and regional boards in the issuance of MS4 Permits. In reviewing the current MS4 Permit, the SWRCB found that the best management practices (BMPs) specified as controls to reduce the discharge of pollutant to the MEP consisted of "programmatic and planning requirements for the permittees…similar to those in other MS4 Permits" and designed to control pollutants in stormwater. SWRCB Order WQ 2001-15, p.2, The SWRCB concluded that it was appropriate to include *programmatic* requirements in MS4 Permits to control pollutants to the MEP, including numeric design criteria for certain treatment control BMPs. The *Tentative Order* goes too far in mandating certain development planning approaches as BMPs, and therefore unlawfully exercises land use authority in violation of the separation of powers doctrine, unnecessarily contrary to Cal. Water Code §13360, and contrary to SWRCB Order WQ 2001-15. Instead of identifying a menu of land use related BMPs and design standards for those BMPs that are necessary to protect water quality, the proposed requirements of the *Tentative Order* mandate certain planning and design decisions, and thereby impinge upon the exercise of discretion by the local agencies with planning and land use jurisdiction. As a result, the Regional Board's approach to site design BMPs and hydromodification control, including the set forth in the *Tentative Order* comprise an unlawful usurpation of the Constitutional land use authority of local jurisdictions.
12. Cal. Water	The Regional Board's position is that	• **Comment:** Cal. Water Code §13241 balancing is not "elective", it is the sole

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Code §13241 Balancing *Improper, arbitrary and capricious exercise of discretion* *Failure to follow State and federal law requirements and to comply with conditions under which EPA has delegated NPDES permitting authority*	"[r]equirements in this Order that are more explicit than the federal storm water regulations . . . are prescribed in accordance with the [Clean Water Act]" and are the measures "necessary to meet the [Maximum Extent Practicable] standard." *Tentative Order*, Findings § E.6., at p. 13. Although federal law does not preclude California from adopting "more stringent standards," in exercising their discretion to determine the degree to which they regulate stormwater discharges, in establishing requirements for the	method sanctioned under state and federal law for the Regional Board to exercise discretion when establishing MEP**.** In May 1973, the United States Environmental Protection Agency ("EPA") delegated responsibility for enforcing the CWA, including the authority to issue NPDES permits, to the State and Regional Boards. Porter-Cologne is the statutory framework that sets forth the obligations of Boards when setting permit conditions for the protection of water quality. In delegating responsibility for CWA enforcement and permitting, EPA expressly embraced the Porter-Cologne legislative scheme and statutory framework as adequate to protect the waters of the United States under the Clean Water Act. 54 Fed.Reg. 40664 (Oct. 3, 1989); *WaterKeepers Northern California v. State Water Resources Control Bd.*, 102 Cal. App. 4th 1448, 1452 (2002); Cal. Water Code § 13370 *et seq***.** When the federal government delegated enforcement and permitting powers under the CWA to the State and Regional Boards, EPA consented to the *entire* statutory scheme under the Porter-Cologne, including Cal. Water Code §§ 13241[1] and 13263.[2] *See generally NPDES Memorandum of Agreement Between*

[1] "Each regional board shall establish such water quality objectives in water quality control plans as in its judgment will ensure the reasonable protection of beneficial uses and the prevention of nuisance; however, it is recognized that it may be possible for the quality of water to be changed to some degree without unreasonably affecting beneficial uses. Factors to be considered by a regional board in establishing water quality objectives shall include, but not necessarily be limited to, all of the following: (a) Past, present, and probable future beneficial uses of water; (b) Environmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto; (c) Water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area; (d) Economic considerations; (e) The need for developing housing within the region; and (f) The need to develop and use recycled water." Cal. Water Code § 13241.

[2] "The regional board, after any necessary hearing, shall prescribe requirements as to the nature of any proposed discharge, existing discharge, or material change in an existing discharge, except discharges into a community sewer system, with relation to the conditions existing in the disposal area or receiving waters upon, or into which, the discharge is made or proposed. The requirements shall implement any relevant water quality control plans

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to the State. *Results in improper determination of MEP. See Also, Item 12 below.*	control of water quality to the MEP, the Regional Boards are not free to disregard either 1) applicable California law, or 2) the terms and conditions under which EPA delegated to the State the authority to administer the federal program. State and federal law and guidance, including Cal. Water Code§ 13241, set forth factors to be considered and evaluated in determining requirements of a permit necessary to control runoff water quality to the MEP. As a result, Regional Boards do not have unfettered discretion in establishing MEP, but must as a matter of law and good policy and practice, exercise discretion in a disciplined manner that	*US Environmental Protection Agency and the California State Water Resources Control Board,* approved September 25, 1989. The plain language of Sections 13241 and 13263 require that when a Regional Board considers waste discharge requirements ("WDRs") and permit conditions, it must consider all of the factors described in Section 13241, including costs of compliance with those WDRs and permit conditions. *City of Burbank v. State Water Resources Control Board*, 26 Cal. Rptr. 3d 304, 35 Cal. 4th 613, 625 (2005). These statutes were adopted and in place at the time that EPA approved State delegation of the federal water quality program. *Id.* Thus, EPA accepted and approved such balancing by Regional Boards in the exercise of their permitting authority when EPA approved the delegation of the federal water quality program to the State of California. Within Porter-Cologne, Cal. Water Code §§13241 and 13263 combine to obligate the Regional Board to consider a number of carefully prescribed, individual balancing factors whenever fashioning WDRs and permit conditions for discharges into waters of the State. In addition, Regional Boards must assure that all permits and WDRs are in compliance with the Clean Water Act, as amended. Cal. Water Code § 13377. *City of Burbank,* supra, 35 Cal. 4th at p. 626. These two obligations are not in conflict. *See id.* ("[S]ection 13377 forbids a regional board's consideration of any economic hardship … if doing so would result in the *dilution*

that have been adopted, and shall take into consideration the beneficial uses to be protected, the water quality objectives reasonably required for that purpose, other waste discharges, the need to prevent nuisance, and the provisions of Section 13241." Cal. Water Code § 13263(a).

[3] The consideration of cost is also part of CWA §404 (b)(1) implementation. As directed by statute, the Army Corp of Engineer Guidelines for dredge and fill provides in pertinent part: "No discharge of dredged or fill material shall be permitted if there is a *practicable alternative* to the proposed discharge. . . (2) An *alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project."* 40 C.F.R. § 230.10 (a) 1-2 (emphases added).

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	is transparent to the regulated community by explicitly evaluating *Tentative Order* requirements in light of Cal. Water Code § 13241, and other applicable factors, including those discussed in comment 12 below. Such an explicit and express evaluation is absent from the Technical Report and administrative record.	of the requirements set … in the Clean Water Act.") (emphasis added); *see also id.* at p. 627 ("The Clean Water Act reserves to the states significant aspects of water policy (33 U.S.C. § 1251(b)), and it specifically grants the states authority to 'enforce any effluent limitation' that is not '*less stringent*' than the federal standard (*id.* § 1370, italics added [by the Court])." Section 13377 does not forbid Regional Boards from evaluating appropriate factors when exercising its discretion to determine technology based standards consistent with, and as mandated by the CWA. The Regional Board may not use the MEP requirement as a rationale for avoiding its obligation to undertake section 13241 balancing. The Regional Board's obligation to conduct a proper and thorough balancing of pertinent factors under Section 13241 is an integral part of determing permit requirements. In fact, it is *the method* that a Regional Board must use to exercise its discretion to determine appropriate permit requirements to meet the broadly worded and discretion-intensive MEP standard. The Regional Board cannot simply avoid complying with the balancing mandate of Porter-Cologne by holding out *everything* they do in their municipal storm water permits as 'within' or 'necessary to comply with' the MEP standard. In exercising the broad discretion to determine what constitutes MEP under the Clean Water Act, the Regional Board must comply with Porter-Cologne, including the consideration of the factors in section 13241, as determined to be appropriate by EPA when it approved delegation of permitting and enforcement authority to the State of California. Further, in the case of stormwater permits, there is nothing in state or applicable federal law that prevents the Regional Boards from considering costs or other section 13241 factors in determining those permit requirements and pollutant restrictions that are necessary to *meet* the MEP standard, particularly because federal and state law provide broad discretion to the

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		Regional Boards to undertake this task along with guidance in Cal. Water Code Section 13241 and 13263 with respect to accomplishing it. See, *City of Burbank v. State Water Resources Control Board,* supra, 35 Cal. 4th at pp. 613, and 628 ("The states are free to manage their own water quality programs so long as they do not compromise the federal clean water standards"). *Cf.* 33 U.S.C. § 1311(a); 33 U.S.C. § 1342(p). A prohibition that precludes consideration of costs in establishing MEP would be a particularly nonsensical prohibition, because the very definition of MEP - a technology-based standard - mandates consideration of cost and economics. SWRCB Order WQ 2000-11 at p. 20; *Building Industry Ass'n., supra*, 124 Cal. App. 4th at p. 883. [3] In issuing the Tentative Order, the Regional Board has stated that it is not required to, and has not fully considered the requirements proposed pursuant to Section 13241. This position is not tenable in light of the broad discretion the Board has to determine what constitutes MEP under federal law, and the direction that state law gives the Regional Boards for exercising that discretion. Given the breadth of the Board's delegated discretion, the Board cannot fairly argue that it lacks the discretion to apply and reconcile the six specific balancing factors which the California Legislature carefully prescribed in Water Code section 13241 when determining what controls are necessary to comply with MEP. Accordingly, BILD and BIAOC individually call out in the comments below many specific aspects of the Tentative Order, which reflect the Board's failure follow Porter-Cologne in determining permit requirements that constitute MEP. • **Comment: The Balancing Requirements of Section 13241 Are Not Preempted by the Federal Clean Water Act.** Recent California case law creates some confusion about whether the MEP standard is itself "preemptive" so as to

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		nullify a Regional Board's state-law obligation to undertake the Section 13241 balancing. The confusion is reflected particularly in two recent cases, *City of Burbank* and *City of Rancho Cucamonga*. In *City of Burbank v. State Water Resources Control Board*, 35 Cal.4th 613 (2005), the California Supreme Court ruled that the state and regional agencies responsible for regulating state water quality (*e.g.*, the Board) must comply with Porter-Cologne – including the need to balance the Section 13241 factors – to the extent the agencies impose terms or restrictions that "exceed the requirements of the Clean Water Act." *Id*. at p. 627. In doing so, the Court concluded that the record before it was insufficiently developed for it to determine whether the permit conditions at issue there exceeded the requirements of the Clean Water Act. *Id*. at p. 628. In addressing the confusion regarding preemption of balancing, two preliminary notes are important. First, while confusion exists in recent cases, it has long been settled that the question of whether federal preemption exists is a question of law - not of fact. *See, e.g., Industrial Trucking Association v. Henry*, 125 F.3d 1305, 1309 (9th Cir. 1997), citing *Inland Empire Chapter of Associated Gen. Contractors v. Dear,* 77 F.3d 296, 299 (9th Cir. 1996) and *Aloha Airlines, Inc. v. Ahue,* 12 F.3d 1498, 1500 (9th Cir. 1993). *Bammerlin v. Navistar International Transportation Corp.*, 30 F.3d 898, 901 (7th Cir. 1994). Second, the burden of demonstrating to a court that federal preemption rests with the agency asserting the preemption. Preemption is an affirmative defense. *See Bronco Wine Co. v. Jolly*, 33 Cal.4th 943, 956-57 (2004); *United States v. Skinna,* 931 F.2d 530, 533 (9th Cir. 1990). Therefore, a Regional Board asserting that federal law preempts the application of the Porter-Cologne Act's balancing requirements in exercising

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		discretion to establish requirements that meet a federally mandated technology – based standard would itself bear the burden of demonstrating, as a matter of law, that actions required of the Board under state law are preempted by federal law. Accordingly, under a proper interpretation of preemption rules, the Regional Board faces an uphill battle procedurally to establish federal preemption. Substantive rules regarding finding preemption also must be considered. Second, the Supreme Court of the United States has opined that courts should always attempt to reconcile the clash of laws to *avoid preemption. See Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 127 (1973); *see also Rice v. Norman Williams Co*., 458 U.S. 654, 659 (1982) ("[T]he inquiry is whether there exists an *irreconcilable conflict* between the federal and state regulatory schemes.") (emphasis added). Both state and federal courts generally recognize a presumption against preemption, even when there is express preemptive language, and there is a strong presumption against preemption or displacement of state laws. *See Washington Mutual Bank, FA v. Superior Court*, 75 Cal.App.4th 773, (1999) *citing Cipollone v. Liggett Group, Inc*., 505 U.S. 504, 523 (1992) and *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). In the absence of express federal preemptive language, the presumption against preemption is even stronger: if preemption is not express, the federal statute must clearly indicate that Congress 'left no room' for supplementary state regulation. *Hillsborough County v. Automated Medical Labs*, 471 U.S. 707, 713 (1985). In light of these well-settled principles, despite the confusion of recent cases, the Regional Board cannot reasonably argue that the federal regulatory scheme at issue here preempts adherence to Cal. Water Code section 13241 balancing factors. First, there is no express federal preemption here that would

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		negate Section 13241 balancing. Accordingly, if preemption exists, it must be implied – and overcome the strong presumption against it. Second, it cannot be fairly argued that the federal regulatory scheme at issue here "left no room" for supplementary state regulation. To the contrary, the federal regulatory scheme here elevates the state agencies acting under Porter-Cologne to the level of the primary governmental actor, and EPA via its delegation has authorized the State to carry out its federal water quality duties *by following* Porter-Cologne, including Section 13241. Finally, as discussed in the Comment above, the Regional Board enjoys broad discretion under federal law to apply the Cal. Water Code section 13241 balancing factors (as mandated by the California Legislature) consistent with the requirement to issue stormwater permits controlling pollution to the MEP and pursuant to the broad delegation of authority from EPA that the Regional Board enjoys. Because determination of permit requirements that comply with MEP does not preempt Section 13241 balancing, the Regional Board should, but has not, considered the factors under Section 13241 in determining appropriate permit standards and requirements for inclusion in the Tentative Order.
13. The MEP Determinations Are Arbitrary and Not Supported by Sufficient Evidence. *Improper, arbitrary and capricious*	The Technical Report discussing Finding D.1. a. notes that MEP requires the use of the most effective BMPs available ***that are not cost prohibitive***. "Reducing pollutants to the MEP means choosing effective BMPs, and rejecting applicable BMPs only where other effective BMPs will	• **Comment:** Because the Regional Board has failed, to date, to conduct or document the proper analysis of proposed WDRs and permit requirements set forth in the *Tentative Order,* as required to properly implement the federal MEP standard in issuing the permit, numerous provisions in the *Tentative Order* are not reasonably designed to control pollutants in discharges to the MEP as circumspectly defined. As discussed above, the Regional Board must consider the WDRs and permits requirements of the *Tentative Order* in light of all of the factors set forth in Cal. Water Code §§ 13263 and 13241, including but not limited to costs

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exercise of discretion. *Failure to follow State and federal law requirements in exercising permitting authority.* *Results in improper determination of MEP.*	serve the same purpose, or the BMPs would not be technically feasible, or the cost would be prohibited." Technical Report Discussion of Finding D.1.a., at p. 34. See also, *Tentative Order,* Attachment C, at p. C-5. However, in developing the *Tentative Order*, the RWQCB has failed properly determine requirements that constitute MEP by failing to evaluate the proposed requirements of the *Tentative Order* in light of appropriate factors. Specifically, the RWQCB has failed to consider: 1. ***Cost***: Will the cost of implementing the Permit requirements have a reasonable relationship to the pollution control benefits to be achieved? 2. ***Technical Feasibility***: Are the Permit requirements technically feasible to comply with, considering	and natural baseline conditions, to determine WDRs and permit requirements that constitute regulation of discharges to the MEP. The Regional Board has failed to consider the *Tentative Order* provisions in light of Cal. Water Code § 13241 factors, as discussed above, and further, has failed to consider the *Tentative Order* provisions in light of the definition of MEP, as established by case law, and in light of other factors determined by the State Board to be appropriate to evaluating achievement of MEP. As a result, many of the current provisions of the *Tentative Order* do not comport with appropriate legal parameters that circumscribe MEP. Pursuant to case law and administrative determinations, MEP is a technology-based standard established by CWA § 1342(p)(3)(B)(iii). *Building Industry Ass'n. of San Diego County v. State Water Resources Control* Board, 124 Cal. App. 4th 866, 889 (4th Dist. 2004). MEP is a highly flexible concept that depends on balancing numerous factors, including the technical feasibility, cost, public acceptance, regulatory compliance and effectiveness of the controls mandated by the Permit designed to achieve that technology-based standard. Id. MEP generally emphasizes pollution prevention and source control BMPs (as a first line of defense), in combination with treatment BMPs (as a second line of defense). *Id.* MEP considers economics, and is generally less stringent than BAT, which is an acronym for "best *available* technology economically achievable." *Id.* MEP does not require that all *possible* water quality controls are implemented. *Id.* The State Board has also issued a guidance memorandum addressing the factors that should be considered in determining whether permit standards and/or compliance actions achieve the MEP standard. This guidance provides: "To achieve the MEP standard, municipalities must employ" [and therefore

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	soils, geography, water resources, etc. 3. **Public Acceptance:** Do the Permit requirements have Public support.	MS4 Permits should be designed to require,] "whatever Best Management Practices (BMPs) are technically feasible (i.e., are likely to be effective) and are not cost prohibitive. The major emphasis is on technical feasibility. Reducing pollutants to the MEP means [devising an MS4 Permit to require] choosing effective BMPs and rejecting applicable BMPs only where other effective BMPs will serve the same purpose, or BMPs would not be technically feasible, or the cost would be prohibitive." State Water Resources Control Board Memorandum, entitled "Definition of Maximum Extent Practicable," prepared by Elizabeth Jennings, Senior Staff Counsel, February 11, 1993; parenthetical added. To ascertain requirements necessary to achieve the MEP standard, the State Board recommends consideration of several factors, including, *inter alia*: • Effectiveness: Will BMPs address a pollutant of concern? • Public Acceptance: Does the BMP have public support? • Cost: Will the cost of implementing the BMP have a reasonable relationship to the pollution control benefits to be achieved? • Technical Feasibility: Is the BMP technically feasible considering soils, geography, water resources, etc.? *Id*. Accordingly, issuance by the Regional Board of WDRs and permit conditions that are reasonably designed to achieve MEP as required by Cal. Water Code §§ 13263, 13377 and Clean Water Act §1342(p)(3) requires that the Regional Board identify and incorporate standards and conditions into municipal permits that will result in Copermittee implementation of source and treatment control BMPs, that are, among other things: (i) available, (ii) effective to control pollutants of

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		concern, (iii) technologically feasible, (iv) not cost-prohibitive, and (v) the cost of which is reasonably related to pollution control achieved. In establishing the WDRs and permit requirements, many of the provisions set forth in the *Tentative Order* do not currently comport with a proper interpretation of MEP, and thus do not comply with either state or federal law. As explained in greater detail in the *Geosyntec Memo* and the Regional Board has failed to expressly and explicitly conduct a proper evaluation of *Tentative Order* requirements to the extent that the provisions Our concerns about the Tentative Order are summarized as follows: ❖ Require implementation of technologies that are not currently available (*e.g.*:(1) provisions requiring municipalities to physically exclude stormwater discharges from entering MS4 systems (see Item 2 above); (2) provisions requiring municipalities to develop technologies to comply with receiving water quality standards, even after all measures constituting MEP have been employed via an iterative process (See Item 10 above); (3) mandated use of Advanced Sediment Treatment for all construction sites regardless of size (no minimum acreage) (*Tentative Order* § D.2.3.(1)(c); ❖ Are not designed to consistently result in effective water quality benefits (*e.g.* (1), application of site design BMPs and buffer zones for all infill and redevelopment projects, regardless of relevant subwatershed conditions, including receiving water geomorphological conditions (*Tentative Order*, §§ D.1.c(2) and (3)); (2) pretreatment requirements before stormwater is discharged into treatment BMPs using infiltration processes (*Tentative Order*, § D.1.c (6); (3) "one-size-fits all" application of site design BMPs for

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		all Priority Development Projects, including infill and redevelopment, at the project scale, rather than at the subwatershed or watershed planning scale ((*Tentative Order*, § D.1.d(4);(4) interim hydromodification control requirements mandating hydrograph matching, infiltration and buffer zones regardless of existing site, soils and channel conditions for all project 20 acres and greater D.1.h.(5)) ❖ Are technically infeasible, unrealistic or too stringent to implement using BMPs (*e.g.:*,(1) pretreatment requirements before stormwater is discharged into treatment BMPs using infiltration processes (*Tentative Order*, § D.1.c (6); (2) application within 3 years from the adoption of the *Tentative Order* of all SUSMP requirements to all development and redevelopment projects disturbing 1 acre or more of land (*Tentative Order*, § D.1d.(1)(c)); (3) "one-size-fits all" application of site design BMPs for all Priority Development Projects, including infill and redevelopment, at the project scale, rather than at the subwatershed or watershed planning scale ((*Tentative Order*, § D.1.d(4); (4) interim hydromodification control requirements mandating hydrograph matching, infiltration and buffer zones regardless of existing site, soils, and channel conditions for all project 20 acres and greater (*Tentative Order* § D.1.h.(5)); (5) mandated use of Advanced Sediment Treatment for all construction sites regardless of size (no minimum acreage) (*Tentative Order* § D.2.3.(1)(c)); ❖ The cost would exceed the water quality benefit of implementation (*e.g.:*.(1) application of site design BMPs and buffer zones for all

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		infill and redevelopment projects, regardless of relevant subwatershed conditions, including receiving water geomorphological conditions (*Tentative Order*, §§ D.1.c (2) and (3)); (2) application within 3 years from the adoption of the *Tentative Order* of all SUSMP requirements to all development and redevelopment projects disturbing 1 acre or more of land (*Tentative Order*, § D.1d.(1)(c)); (3) "one-size-fits all" application of site design BMPs for all Priority Development Projects, including infill and redevelopment, at the project scale, rather than at the subwatershed or watershed planning scale (*Tentative Order*, § D.1.d(4)) ; (4) requirement to size and design treatment control BMPs landscaped areas, when infiltration in landscaping can be a BMP (*Tentative Order* § D.1.d.6(b)); (5) interim hydromodification control requirements mandating infiltration, hydrograph matching, buffer zones regardless of existing site, soils or channel conditions for all project 20 acres and greater (*Tentative Order* § D.1.h.(5)); (6) mandated use of Advanced Sediment Treatment for all construction sites regardless of size (no minimum acreage) (*Tentative Order* § D.2.3.(1)(c); 40 C.F.R. §122)
14. Pollution Source Reduction is laudable, but RWQCB exceeds its jurisdiction by regulating inflows, and	While we agree with Finding §D.1.e, that "pollutants can be effective reduced in urban runoff by a combination of pollution prevention, source control, and BMPs, the RWQCB must take care not to over-reach the extent of its jurisdiction by	• **Comment:** Although CWA § 402(p)(3) encourages control of illicit and non-stormwater discharges into MS4s, the point of regulation is the discharge ***from*** storm drains. (See discussion and legal analysis in Item 1 above). • **Comment:** We agree with Regional Board's conclusion that source controls are necessary to effectively reduce pollutant discharges. However we do not agree with the conclusions of Finding § D.1.e and the Technical Report discussion

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should avoid discouraging proper use of "end-of-pipe" controls. *Exceeds legal authority* *Findings are not supported by sufficient evidence.* *Results in improper determination MEP.*	regulating discharges "into" MS4s. *Tentative Order* Findings §§ D.1.e., D.1.b, regional and shared BMPs and related discussions at Technical Report p 39-42. In addition, the conclusion in Finding § D.1.c. Technical Report Discussion that studies cited demonstrate that "[t]reatment at MS4 outfalls for pollutants that have already been discharged into MS4s is generally unlikely to redress pollutant concentration to levels that would support water quality objectives," is not applicable to the types of treatment control BMPs concurrently in use in South Orange County. See Item 8 and15 below.	thereof. When considered in light of Findings §§ D.3.b. (S*ee* Items 1 & 2 above) and § D.2.b (*See* Item 15 below) and the Technical Report discussions of them, the Regional Board's position is that "end-of-pipe" BMPs can never effectively control water quality at the outfall. This conclusion is inaccurate, not supported by sufficient evidence, and undermines the regulated parties ability to implement shared BMPs and/or WQMPs (called SUSMPs in the *Tentative Order*) that incorporate a combination of source control and end-of-pipe or shared treatment control BMPs. Due to the effectiveness of certain end-of-pipe or shared BMPs, the inaccurate conclusion results in poor water quality policy. • **Comment:** d is not supported by sufficient evidence. In fact, studies indicate that a combination of source control and treatment control BMPs, including end-of-pipe BMPs can be the most effective water quality control strategy for urban development, providing a 'treatment train' effect when implemented.
15. Proposed BMPs do not provide for alternative approaches employing subwatershed and watershed level	While we agree with the Regional Board's statement in *Tentative Order* Finding § D.2.b. that it is important to control urban runoff by a combination of onsite source control and Low Impact Development ("LID") site design BMPs augmented with	• **Comment:** Federal law recognizes and authorizes "end-of-pipe" treatment of stormwater. • **Comment*:*** The *Tentative Order*'s conclusions regarding inefficacy of subregional, and "end-of-pipe", regional or shared BMPs are not supported by sufficient evidence, and they improperly discourage or eliminate the use of such BMPs despite the fact they are very effective tools in controlling urban runoff

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hydrologic, geomorphic and aquatic resource protection planning principles. *Exceeds legal authority* *Findings are not supported by sufficient evidence.* *Denies Due Process* *Results in improper determination MEP.*	treatment control BMPs, the conclusion that all of these BMPs must be implemented *before* the runoff enters the MS4 is not justified. *Tentative Order* Finding § D.(2).(b). p. 9, and Technical Report pp. at 47-48. Further, the conclusions of Finding § D.(2).(b) and the Technical Report discussion that end-of-pipe regional, or shared BMPs are generally ineffective and incapable of capturing and treating a wide range of storm events and pollutants is not supported by sufficient evidence. See *Geosyntec Memo* pp 5-7, 9.	water quality. *Geosyntec Memo* at pp. 5-7. The San Joaquin Marsh water quality wetlands water quality treatment program is a prime example of a regional treatment system designed to handle flows from existing development at the "end of the pipe." The treats stormwater flows from San Diego Creek immediately before they enter Upper Newport Bay. • **Comment*:*** The efficacy of shared or regional BMPs is explicitly recognized by the State Board. SWRCB Order WQ 2001-15. *See generally* State Water Resources Control Board- California Coastal Commission ("SWRCB-CCC"), *Nonpoint Source Program Strategy and Implementation Plan, 1998-2013 (PROSIP)*, SWRCB-CCC, Non Point Source-Coastal Zone Act Reauthorization Act (NPS-CZARA) Program, Fact Sheet 6. Further, the Environmental Protection Agency ("EPA") has also recognized the efficacy of creating and developing wetlands as BMPs. *See generally,* EPA NPS-CZARA guidance: http://www.epa.gov/owow/nps; http://www.epa.gov/OWOW/wetlands/facts/fact25.html; and http://www.epa.gov/owow/wetlands. In view of the acceptance by both the State Board and EPA of the value of such BMPS, it is inappropriate for the Regional Board to discourage or prevent subregional storm water mitigation planning in the *Tentative Order*. • **Comment:** Finding § D.(2).(b) and the related Technical Report discussion concludes that end-of-pipe treatment BMPs are ineffective for several reasons, many of those conclusions, including the following, are not supported by sufficient evidence because they do not take into account the types of treatment control BMPs being implemented in Orange County, the range of treatment control BMPs available, or the overall water quality control strategy , combining source control

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		and regional end-of-pipe BMPs, used in the region governed by the Tentative Order**:** 1) The Finding and Technical Report discussion assert end-of-pipe BMPs are ineffective because they do not capture and treat pollutants during significant storm events. However, the Finding and Technical Report discussion do not take into account that ***all*** structural BMPs are effective only for the design storm event they are constructed to address. All structural treatment control BMPs have limited capacity, whether deployed end-of-pipe or prior-to-pipe will not change the structural BMP capacity, which is determined by the sizing criteria set forth in the *Tentative Order*. While structural BMPs should be accompanied by source control and site design BMPs, the current MS4 Permit and Drainage Area Management Plan ("DAMP") do not preclude, prevent or discourage the use of end-of-pipe BMPs. The Finding and Technical Report discussion conclude that end-of-pipe BMPs do not have the ability to treat the same range of pollutants that onsite treatment control BMPs can treat. End-of-pipe structural BMPs have the ability to treat the same range of pollutants as pre-MS4 structural BMPs depending on this type of treatment control BMP chosen. The range of pollutants treated is determined primarily by the BMP chosen, not its location. Because different BMPs treat different pollutants of concern ("POCs" with different levels of efficiacy, a range of BMPs must be used as required by the current DAMP and MS4 Permit, but the location of their deployment does not primarily affect treatment efficacy. The combination of BMPs chosen does. 3) The Finding and Technical Report discussion conclude that end-of-pipe BMPs are not desired because they do not effectively educate the public

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		regarding water quality control. While we agree that the success of source minimization depends upon effective public education, appropriate use of offsite or end-of-pipe treatment control BMPs does not preclude public education. In fact, naturalization treatment BMPs, like the Natural Treatment System and San Joaquin Marsh present extensive public education materials. See *Geosyntec Memo*, pp 7-8, and http://nrs.ucop.edu/San-Joaquin-Marsh.htm. Moreover, the use of offsite shared or regional end-of-pipe BMPs does not exempt projects or municipalities from requirements to implement source controls or provide pubic education. • **Comment:** Several Regional shared or end-of-pipe BMPs implemented in Orange County, including the San Joaquin March, the San Diego Creek Sediment Basins, and the Natural Treatment System, have been an effective and useful component of the Copermittees water quality programs. See *Geosyntec Memo* pp 7-8. • **Comment:** To properly allow and encourage watershed planning, this Finding and its implementing provisions must be amended to recognize the water quality and educational value of subregional and regional, offsite and/or end-of-pipe treatment BMPs like those implemented in Orange County. The value of these BMPs is significant when they are implemented in combination with other source controls, consistent with current DAMP guidance and MS4 Permit requirements.
16. Mandatory BMPs and counter-productive site design and treatment control provisions reduce	The *Tentative Order* fails to allow consideration of relative resource values when mandating site design and treatment control policies. *Tentative Order* §§ D.1.(d)(1)(c)(3);	• **Comment:** Although the *Tentative Order* places considerable emphasis on hydrologic conditions of concern and watershed planning, many of the project-specific site design BMPs and treatment control BMPs fail to allow evaluation of site-specific factors to determine appropriate BMPs for implementation. This

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environmental benefit that could otherwise be achieved with watershed and sub-watershed planning efforts. *Poor Policy* *Results in improper determination MEP*	D.1.(d)(1)(c)(6); D.1.d(4), at p. 26; D.1.d(6)(c) at p. 28; D.1.d(9),at p. 31; Technical Report at pp. 34-73. In addition, the *Tentative Order* precludes restoration of habitat, water quality and infiltration values in jurisdictional waters exhibiting low function and value. *Tentative Order* § 26-29. The combination of these provisions prevents maximization of water quality benefit, and is therefore poor policy and contrary to legal principles supporting watershed planning.	failure will result in counter-productive site design and treatment control decisions. Watershed and aquatic resource planning statutes and regulations and associated planning guidelines provide regulatory and planning guidance defining factors conditions and factors must be evaluated in preparing watershed plans e.g., Corps 404(b)(1) Guidelines specifically addressing water quality, the SAMP Tenets for the Southern Orange County SAMP, The Southern HCP advisors reserve design tenet focusing on hydrologic/geologic planning principles, the Southern Orange County SAMP/HCP Watershed and Sub-Watershed Planning Principles]. Contrary to these principles, thee Regional Board has failed to allow for evaluation of several of these critical factors in implementing site design and treatment control decisions, which will undermine watershed planning efforts and will lead to results contrary to long-term water quality benefit and sustained hydrologic conditions necessary to support aquatic systems. Examples factors that the *Tentative Order* should specifically provide may be considered include: 1. <u>Soils/Terrains Differences</u> - Runoff/infiltration characteristics of sandy soils as contrasted with clayey soils are dramatically different. Sandy soils are extremely important to infiltration of stormwater runoff and serve as a source of coarse sediments beneficial to aquatic systems and beach sand. To the extent feasible, development should be sited away from sandy soils. In contrast, stormwater runoff is generally rapid from clayey soils and clayey soils generate fine sediments that do not benefit aquatic systems and beach sand replenishment. In many areas, it may be much more beneficial, from a sub-watershed and watershed perspective to actually concentrate development at higher densities

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		in clayey soils and hardpan and avoid sandy soils – in other words, in some circumstances more impervious surface is better than less. Evaluation of these considerations, which are critical to protection of water quality, are not permitted when site design BMPs are mandated for all Priority Development projects at a project-by-project scale. 2. Infiltration and Treatment of Runoff – Given the hilly terrain of Southern Orange County, vast areas qualify as Waters of the U.S. and Waters of the State. The prohibition on the use of any area that is considered Waters of the U.S. and Waters of the State (regardless of low resource value and permission for fill pursuant to CWA Section 404 permits and Section 401 water quality certifications) will preclude riparian and wetland restoration efforts, and the creation/restoration of chemical, biological and physical integrity of waters of the United States pursuant to CWA §404; 40 C.F.R. §122 via restoration of vegetation, water quality wetlands and infiltration functions and values in locations where they can be most effectively accomplished. The goal of achieving the most effective wetland, riparian, water quality treatment and infiltration prior to discharging runoff to mainstem creeks and wetlands cannot be achieved under the *Tentative Order* due to its prohibitions against siting water quality wetlands, restoration projects and similar projects with "treatment control" benefits in any area meeting broad jurisdictional standards notwithstanding a lack of resource values. 3. Buffers –The Tentative Order requirements for buffers should take into account the geographic sc ale at which the project is proposed

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		and the value of the drainages that may be present on sige. *Geosyntec Memo*, at p. 10. In addition, Copermittees must have flexibility to consider watershed and resource planning principles in determining whether and where buffers might be appropriate. *Geosyntec Memo*, at p. 10. This is particularily true where large-scale planning watershed and conservation planning has taken place within the framework of state and federal aquatic resource protection programs, as it has in South Orange County, buffers should be defined by the areas selected for inclusion in habitat reserves rather than continuing to apply buffer criteria on a project-by-project basis.
17. Certain *Tentative Order* LID requirements are inflexible "one-size fits all" requirements *Improper and an abuse of discretion.* *Failure to follow State and federal law requirements in exercising permitting authority.*	The *Tentative Order* includes requirements for municipalities to mandate that all Priority Developments Project implement certain LID site design BMPs. *Tentative Order,* Finding §D.2.c Technical Report, at pp. 48-49; *Tentative Order* §D.1.d(4).. As presently included in the *Tentative Order*, certain LID requirements are inflexible, applied on a project-by-project basis, at an improper scale, and without regard to need or efficacy in light or watershed planning, and CWA Section 404 permits and Section 401	• **Comment:** There is no sufficient evidence supporting the assertion that small scale (rather than sub-watershed or watershed scale) infiltration or application of LID practices is necessary to avoid degradation and prevent water quality and hydromodification impacts. In fact, those conclusions are contrary to the conclusions of *Coleman, Derrick et al. 2005, Effect of Increases in Peak Flows and Imperviousness on the Morphology of Southern California Streams*, Technical Report No. 450 of the Southern California Coastal Waters Research Project (SCCWRP Study)), the Santa Clara Valley Urban Runoff Pollution Prevention Program, 2005 Hydromodification Plan (SCVURPPP HMP), and other scientific literature. See *Geosyntec Memo* at pp. 1-3; 7-9. Further, there is no evidence that LID techniques applied on a project-by-project basis to even the smallest projects (in three years, all project disturbing 1 acre will be Priority Development Projects) are more effective for controlling hydromodification impacts than the implementation of IWRM strategies or vegetated regional BMPs. There is evidence that LID alone cannot fully mitigate hydromodification impacts,

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Results in improper determination MEP.	water quality certifications. See also, Findings §§ D.3.b; D.3.c; D.3.d; D.3.f. Technical Report at pp. 53-55; § D.1.d.(4).	particularly when applied to very small, infill and redevelopment projects that discharge to hardened or substantially degraded channels, and/or which are located in largely impervious sub-watersheds. See *Geosyntec Memo* at pp. 1-3; 7-9. • **Comment:** There is no evidence or discussion of the water quality benefits that will result from project-by-project, very small scale application of LID requirements. In fact, these requirements may actually preclude certain storm water conservation and reuse BMP. In many circumstances, the LID requirements would be contrary to implementing smart growth principles, which would concentrate development in already impervious areas, when viewed on the watershed scale. Similarly it precludes siting development in more impervious soils. Finally, it would prevent regional BMP solutions that benefit existing untreated development storm water. In circumstances where sites discharge to waterbodies that are not subject to destabilization (concrete channels, large lakes, bays estuaries), these measures will provide only a very small incremental water quality benefit, and will therefore not be cost effective. At the same time, there are extraordinary costs associated with these requirements. According to work done in San Diego, the additional costs associated with imposition of stringent LID requirements on a lot-by-lot basis for Priority infill and redevelopment projects with land constraints, particularly when combined with application of the other hydromodification standards set forth in the *Draft Permit,* results in significant land-take, and can result in costs averaging $30,000 to $50,000 per lot, for those projects where implementation of the standards is even technically feasible. For many types of projects, the application of standardized LID and other hydromodification control requirements will be technically infeasible based on local soils conditions, infiltration restrictions, groundwater conditions and similar

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		physical parameters. • **Comment:** The bias in the *Tentative Order* provisions against regional application of volume reduction BMPs eliminates tools that should be available to Copermittees and project applicants to address hydromodification control. • **Comment:** Stringent application of LID principles on a lot-by-lot scale are technically infeasible for a variety of sites, including small new development infill sites, most redevelopment sites, and sites with high groundwater, or contaminated groundwater that should not be impacted. • **Comment:** The *Tentative Order* LID requirements are technically infeasible, are not cost effective, and/or are ineffective in controlling water quality and hydromodification impacts, for the reasons outlined in the *Geosyntec Memo* at pp. 1-3; 7-9. Therefore, these requirements constitute an improper application of MEP, are arbitrary, and violate Cal. Water Code § 13263(a), which requires WDR requirements shall be those *reasonably* required to protect beneficial uses and implement water quality objectives. • **Comment:** The balancing of these provisions in light of the Cal. Water Code section 13241 and State Board recommended factors in properly determining the MEP standard is especially critical with respect to standardized Site Design BMP, LID and hydromodification requirements, which would apply on a 'one-size fits all' basis throughout the South Orange County region. *See* Cal. Water Code § 13241(b) ("Environmental characteristics of the hydrographic unit under consideration…"). Failure to engage in such balancing, which takes into account local conditions, including the need for housing and economic considerations and

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		the degree to which a particular development constitutes infill and therefore is consistent with LID at a watershed scale, violates the state and federal provisions applicable to the Regional Boards exercise of permitting authority under its federally delegated powers. • **Comment:** Application of LID to small Priority redevelopment projects is poor policy because (1) it will discourage infill because in many situations the requirements will not be capable of being met without reserving a great deal of project site area in newly created open space, (2) the costs of implementation will not provide significant water quality benefit since most redevelopment and infill sites will discharge to already concrete flood control channels and/or are located in substantially built-out and impervious watersheds, and (3) lot-by-lot application of the requirements prevents adoption of IWRM and other more regional solutions that would better benefit water quality, particularly in the context of redevelopment, by providing some volume reduction BMPs for existing development that isn't served by BMPs. There are some types of LID techniques that can be implemented on small sites, such as planter boxes; however, for many redevelopment projects meeting a broad mandate to incorporate significant site design and LID practices will be technically and/or economically infeasible. Further, improving water quality of runoff from one lot that is being redeveloped will not substantially improve overall water quality unless the adjacent lots are also redeveloped. And so in this case, lot-by-lot imposition of these requirements do not make policy sense and do not result in substantial water quality improvements, but will result in substantial compliance costs. • **Comment:** The *Tentative Order* should be revised to limit application of LID Site Design BMP requirements to projects of sufficient size, and with acceptable

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		site and groundwater conditions to allow for feasible and beneficial implementation of site design BMPs and LID technologies. Further, LID/Site Design requirements should be implemented at the planning and sub-watershed planning scale, and not on a lot-by-lot basis, and the bias against regional volume and treatment control BMPs should be eliminated from the *Tentative Order*. In addition to these revisions, we recommend replacing the LID and other hydromodification control standards proposed in the *Tentative Order* with the hydromodification control approach recommended in the *Geosyntec Memo* at pp. 1-3, 7-9,12-17. . *See* summary description of potentially appropriate hydromodification control approach as recommended by Geosyntec in Item 19 below.
18. Hydro-modification control assessments, strategy and criteria should be complete before implementation is mandated. *Premature mandatory compliance results in an abuse of discretion and improper determination of MEP.*	The *Tentative Order* Contains several provisions related to Site Design BMPs, infiltration of runoff, and hydromodification control, which create confusion in implementation. *Tentative Order* §§ D.1.h (1)-(4) appear to set forth requirements for Copermittees to follow in preparing a hydromodification control study to guide development of hydromodification criteria, which must be incorporated into an update of the DAMP and local Copermittee Model WQMPs, within 2 years of Permit adoption. It appears	• **Comment***:* The timing for compliance with the hydromodification requirements is unclear, and improper timing of mandatory compliance with hydromodification control measures will result in application of mandates for technically infeasible and cost-ineffective controls. .*Tentative Order* §§ D.1.h (1) – (4) should be clarified to expressly state that Copermittees are to comply with *Tentative Order* §§ D.1.h (1)-(3) in developing the hydromodification management strategy and criteria to be incorporated into the DAMP and the Model WQMPs within 2 years of Permit adoption pursuant to *Tentative Order* §§D.1.h(4). On the flipside, the *Tentative Order* should also be revised to clarify that compliance with *Tentative Order* §D.1.h.(3) is required as set forth in § D.1.h.(4), and in no event is required prior to the assessments mandated by §§ D.1.h.(1) and (2). Absent that clarification, it appears that compliance with hydromodification control requirements may be mandated before the work can be done to properly develop hydromodification strategies that are appropriate in light of the Copermittees' assessment of geomorphological conditions of receiving waters, pre- and post-development runoff characteristics for various subwatersheds, and other factors

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Failure to follow State and federal law requirements in exercising permitting authority.	Copermittees are required to comply with these provisions by conducting assessments of factors relevant to hydromodification control, then developing and a hydromodification control strategy and criteria within 2 years of Permit adoption. With some adjustments (*See* Item 18) such an approach would comply with MEP. However, mandated compliance with certain hydromodification control measures prior to completion of the contemplated hydromodification control assessments and preparation of a strategy and related control criteria would result in mandatory hydromodification control requirements that would be technically infeasible, and cost ineffective.	pertinent to hydromodification control. If the Regional Board requires immediate compliance with hydromodification standards without first giving proper consideration to relevant factors, this action would be inconsistent with the conclusions and recommendation of the technical studies cited in the Technical Report (*e.g.,* at pp. 28-32). Such premature mandated compliance would be an abuse of discretion and violate Cal. Water §13263(a), which mandates that waste discharge requirements (WDRs) shall be those *reasonably* required to protect beneficial uses and implement water quality objectives. See Item 17 below. • **Comment:** Mandating implementation of hydromodification control measures on a project-by-project basis under *Tentative Order* §D.1.h.(3) before the assessments mandated by §§ D.1.h.(1) and (2) are completed would also result in mandatory hydromodification measures for all Priority Development projects (resulting in an increase of only 5,000 square feet of impervious surface or more), even when such measures are (1) technically infeasible due to inappropriate soils or groundwater characteristics, or (2) not cost effective, in light of small incremental water quality benefit to be attained given in-channel conditions or tributary catchment runoff characteristics. As a result, such an interpretation would be inconsistent with a proper determination of MEP, and out of compliance with applicable State and federal law and guidance. *See* Items 12 and 13 above. • **Comment:** Mandating implementation of hydromodification control measures on a project-by-project basis under *Tentative Order* §D.1.h.(3) before the assessments mandated by §§ D.1.h.(1) and (2) are completed would result in a "one-size-fits all" approach to hydromodification control, As such, that interpretation of the *Tentative Order* would be inconsistent with the recommendations of the scientific community, which generally advocate an

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		approach to hydromodification control that involves appropriate assessment and evaluation of locate factors pertinent to channel destablization at a sub-watershed or watershed level, including amount of impervious surface in a tributary catchment area, soils characteristic, runoff characteristics, channel characteristics and project size. [*e.g., see* Southern Orange County SAMP/HCP Watershed Planning Principles] See *Geosyntech Memo* at pp. 1-3, 7-9, 12-15. • **Comment:** Clarification of the *Tentative Order* to assure completion of studies assessing relevant factors would be consistent with the approach advocated by the scientific community, (including *Coleman, Derrick et al. 2005,* Effect of Increases in Peak Flows and Imperviousness on the Morphology of Southern California Streams, Technical Report No. 450 of the Southern California Coastal Watersheds Research Project (SCCWRP Study)), and used in the development of the Santa Clara Valley Urban Runoff Pollution Prevention Program, 2005 Hydromodification Plan (SCVURPPP HMP). With some modification with respect to scale of implementation when developed (*See* Item 18 below), the preparation of hydromodification assessments and resulting strategies and control criteria is the scientifically supported approach for the *Tentative Order* to take in regulating hydromodification impacts, and, with some adjustments, complies with a proper determination of MEP.
19. Mandatory Interim Hydromodification Requirements are not consistent with the scientifically	*Tentative Order* § D.1.h (5) sets forth interim criteria for hydromodification control measures that must be adopted within 180 days of Permit adoption and applied to every Priority Development Project greater than 20	• **Comment:** Compliance with interim hydromodification standards is required within 180 days of Permit adoption. That period is not sufficient to conduct watershed and sub-watershed scale assessments of conditions and factors pertinent to technically feasible and cost-effective hydromodification control measures as recommended by the scientific literature cited and discussed in the Technical Report. As a result, develop appropriate and protective water quality control

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recommended approach to hydromodification control. *Abuse of discretion and improper determination of MEP.* *Failure to follow State and federal law requirements in exercising permitting authority.*	acres, prior to conducting, and without the benefit of the information to be developed and assessed in the hydromodification control study. These requirements include implementation of four mandatory control measures, regardless of site conditions, runoff conditions, or in-channel geomorphological conditions, including the following: ❖ Disconnect impervious areas from the drainage network and adjacent impervious areas regardless of soils or groundwater conditions ("DCIA requirements") ❖ Control runoff through hydrograph matching for a range of return period from 1 year to 10 years ("Hydrograph Matching Requirements") ❖ Establish buffer zones and setbacks for channel movement ("Buffer Requirements") *Tentative Order* § D.1.h (5)	measures are arbitrary and capricious and in violation of Cal. Water §13263(a), which mandates that waste discharge requirements (WDRs) shall be those *reasonably* required to protect beneficial uses and implement water quality objectives. • **Comment**: Mandating implementation of hydromodification control measures on a project-by-project basis under *Tentative Order* §D.1.h.(5) without allowing for assessment of pertinent to technically feasible and cost-effect hydromodification control measures as recommended by the scientific literature results in "on-size fits all" mandatory disconnection of impervious surface for all Priority Development projects (resulting in an increase of only 5,000 square feet of impervious surface or more), even when such measures are (1) technically infeasible due to inappropriate soils or groundwater characteristics, or (2) not cost effective, in light of small incremental water quality benefit to be attained given in-channel conditions or tributary catchment runoff characteristics. Similarly, all Priority Development Projects must implement buffer zones and setbacks for channel movement, regardless of in-stream channel conditions (*e.g.*, even when the channel is hardened and buffers are not required for "movement"). As a result, such an interpretation would be inconsistent with a proper determination of MEP, and out of compliance with applicable State and federal law and guidance. *See* Items 12 and 13 above. ***Specifically,*** the *Tentative Order* appears to preclude granting exemptions from the interim hydromodification control measures, even where such exemption is appropriate and scientifically warranted. Instead the *Tentative Order* only allows a waiver of hydromodification control requirements under *Tentative Order* provisions governing Copermittees' development of the long-term hydromodification control strategy and criteria. *Tentative Order* § D.1.h.(3)(c).

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		The interim hydromodification control provisions do not appear to allow the exemption of any Priority Development Projects from the mandatory measures based on scientifically appropriate facts, such an assessment of whether or not a project discharges to a receiving water susceptible to destabilization. Moreover, these mandatory requirements apply on a project-by-project basis without prior assessment and consideration of pertinent factors, raising the following issues related to compliance with scientific literature, technical feasibility, and cost effectiveness: ❖ The *Tentative Order* proposes mandatory hydromodification measures, including hydrograph matching, buffer and DCIA requirements, as interim 'one-size-fits all' hydromodification standards applicable to all Priority Development Projects greater than 20 acres. As such, the standard is inconsistent with the recommendations of the scientific community for hydromodification control, which generally advocate an approach to hydromodification control that involves appropriate assessment and evaluation of local factors pertinent to channel destabilization at a sub-watershed level, including amount of impervious surface in a tributary area, soils characteristics, groundwater characteristics, runoff characteristics, channel characteristics, and watershed and project size. ❖ The *Tentative Order* imposes mandatory hydromodification measures, including hydrograph matching requirements, on all Priority Development projects 20 acres or greater. There is no evidence in the record that application of these requirements is appropriate for projects of 20 acres (50 acres or 100 acres). In fact, hydromodification science supports application of hydromodification control measures at watershed

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		or subwatershed scale. Project-by-project application is not likely to effectively control hydromodification. ❖ Available scientific literature, such as the SCCWRP Study and SCVURPPP HMP, indicate that hydrograph matching, or matching of volume, flow and duration, is not an appropriate hydromodification control measure or strategy because some level of duration and flow increase is tolerated even by channels subject to destabilization, so pre- and post- development matching is not reasonably tailored to protect water quality as indicated by the best available science. Moreover, in some situations, hydrograph matching can actually hurt channel stabilization and water quality more than it helps. ❖ There is no scientific evidence in the record that such stringent hydrograph matching, buffer and DCIA standards are necessary to protect water quality and receiving water beneficial uses, particularly for sites that are (i) characterized by impervious (clayey) soils; (i) located in largely built-out and impervious watersheds,(iii) discharge to improved channels; or (iv) that discharge into already degraded channels, pipes, concrete channels or other receiving waters that are not susceptible to material further destabilization, erosion and sedimentation due to their size, configuration, or geomorphological regime (including "reset" systems). See *Geosyntec Memo.* ❖ Application of hydrograph matching requirements to infill and redevelopment projects is poor policy because (1) it will discourage larger infill projects because in many situations the requirements will not be capable of being met without a great deal of land take, (2) the costs of implementation will not provide significant water quality benefit since

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		most redevelopment and infill sites will discharge to already concrete flood control channels and/or are located in substantially built-out and impervious watersheds, and (3) project-by-project application of hydrograph matching requirements prevents adoption of IWRM and other more regional solutions that would better benefit water quality, particularly in the context of redevelopment, by providing some volume reduction BMPs for existing development that isn't served by BMPs. • **Comment:** As a result, the interim hydromodification control provisions are not based on the recommendations of scientific literature, and fail to consider technical feasibility, economic feasibility and effectiveness in light of substantial costs. As such, they are poor policy, an improper application of the MEP standard, are arbitrary and capricious, and violate Cal. Water Code § 13263(a), which requires WDR requirements shall be those *reasonably* required to protect beneficial uses and implement water quality objectives. These standards should be therefore be eliminated from the *Tentative Order* as interim requirements. The *Tentative Order* provisions should be revised to eliminate the "one-size fits all" hydromodification control interim requirements, and particularly the pre- v. post-development hydrograph matching requirements. Instead, the *Tentative Order* should rely on development by Copermittees and/or larger project applicants of (i) an appropriate and geomorphically referenced local interim hydromodification control tool for application on a sub-watershed basis within two years of *Tentative Order* approval (a short, but potentially sufficient time for this process, and (ii) the development of a long-term hydromodification control standard within three to four years of *Tentative Order* adoption after completion of the SMC study process and then to allow for consideration of SMC proposals. A

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		longer time frame is appropriate for development of the longer term hydromodification control standard because (1) the SMC study is not scheduled for completion until 2010 or 2011, and (2) using an appropriately developed geomorphically referenced interim hydromodification control tool at the proper scale and consistent with scientific literature will adequately protect water quality in the interim. the Regional Board should cure the current deficiencies in the *Tentative Order* by providing for the Copermittees and/or larger project (50 acres or greater) applicants to develop appropriate, local interim hydromodification control tools, applicable on a sub-watershed basis to Priority Development Projects within the sub-watershed that have the actual potential for substantial hydromodification impacts based on consideration of relevant factors. These tools should be developed by preparing a hydromodification assessment and strategy (HAS), and currently contemplated by *Tentative Order* §§ d.1.h.(1)-(3). As recommended by Geosyntec, the HAS should include an appropriate evaluation of pertinent local conditions on a sub-watershed basis, including total area of impervious surface, soils conditions, groundwater conditions, runoff characteristics, in-stream conditions and erosive flow potential and should apply the following protocol: First, an assessment of the physical sensitivity of the downstream system in light of tributary area characteristics should be conducted. If the downstream areas are not sensitive to destabilization due to their configuration, the existing condition of impervious surface within the tributary watershed, the size of potential projects in the tributary watershed, in-stream conditions, erosive flow potential, or other pertinent factors, hydromodification control requirements should not be applicable to development within the related watershed. Second, for those sub-watersheds susceptible to destabilization as determined in step one, a tool should be developed for sizing hydromodification control BMPs pending completion of the

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		SMC study process. This tool should be based on the relationship between percent impervious area soils type (infiltration rates) and runoff characteristics. The tool will then be applied to appropriate development and redevelopment projects in identified sensitive sub-watersheds to guide sizing of hydromodification control BMPs. Appropriate projects would then implement the tool to determine appropriate sizing for any one of a menu of potential hydromodification control BMPs necessary to protect sensitive down-stream systems from destabilization as a result of changes in flows. Shared hydromodification control BMPs could also be used. In addition to Copermittee HAS programs to develop such interim hydromodification control tools and standards, larger projects (sub-watershed or watershed scale) should be allowed to prepare their own HAS documents meeting similar requirements and using a similar protocol to that described above, allowing preparation by projects of sufficient scale of appropriate interim hydromodification control requirements. .
20. Hydro-modification waivers are unworkable *Improper, arbitrary and capricious exercise of discretion.* *Failure to follow State and federal law requirements in exercising permitting*	Technical Order § D.1(h)(3)(c) provides for hydromodification waivers, but the criteria for granting a waiver are too stringent to allow issuance of waivers.	• **Comment:** The hydromodification waiver policy will not be effective, and will not provide for exemption of Priority Development projects that cannot technically or cost effectively comply with hydromodification control mandatory measures. 1) Waivers are only possible when the total connection impervious area ("TCIA") will increase by less than 5% or when infill will decrease TCIA by 30%. This strategy is contrary to smart growth and discourages infill. This requirement is inconsistent with scientific literature for three reasons. First, it is inconsistent with the evolution of the science of hydromodification and geomorphological influence. The scientific literature now recognizes that DCIA, and not TCIA is the primary anthropogenic factor affecting channel stability. *Geosyntec Memo* at

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authority. *Results in improper determination MEP.*		pp. 12-15. Limiting increases in TCIA literally means that only 30% of the site can be developed with impervious surface, whether or not that impervious surface is appropriately "disconnected" from the MS4 system. As a result, for a 20 acre Priority Development site, only 6 of the 20 acres could be developed, making a waiver economically infeasible. Second, there is no evidence in the record that this 5% maximum TCIA prescriptive waiver standard is required to protect receiving waters susceptible to de-stabilization. The SCCWRP Study and other documents cited in the Technical Report do not recommend this prescriptive standard. See *Geosyntec Memo* at pp. 12-15. The Regional Board has not provided substantial evidence to support that the 5% limit is necessary or reasonably tailored to avoid impacts to beneficial. Therefore, the standard is arbitrary and capricious and violates Cal. Water Code § 13263(a), which requires WDR requirements shall be those reasonably required to protect beneficial uses and implement water quality objectives. Third, there is no evidence or discussion offered by the Regional Board that the 5% standard is necessary to protect water quality where sites discharge to waterbodies that are not subject to de-stabilization (concrete channels, large lakes, bays, estuaries, and large waterbodies subject to a "reset" geomorphological regime). In these situations, these measures will provide only a very small incremental water quality benefit. At the same time, there are extraordinary costs associated with the land necessary to these requirements, particularly for constrained infill and redevelopment projects, creates economic feasibility issues. 2) A waiver can only be granted if the entire drainage channel is concrete, even well beyond the point of any area of influence from a

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		particular outfall. Based on the scientific literature, hydromodification control requirements should target natural systems and should be applied in those locations where their application will improve stability of a channel. See, the SCVURPPP HMP. 3) All projects, even infill, must contribute to in stream measures that will address deficient in stream conditions that were not created by the proposed new development. This waiver requirement shifts responsibility for curing existing deficient channel conditions cause by others to Priority Development Projects. There is no nexus to require new development and redevelopment to correct the deficiencies created by historic development and flood control practices, yet obtaining a waiver requires Priority Development to accept an improper exaction. For these reasons, the waiver requirements are arbitrary and capricious and violate Cal. Water Code § 13263(a) which requires WDR requirements shall be those *reasonably* required to protect beneficial uses and implement water quality objectives. • **Comment:** Application of the interim hydromodification control standards to infill and redevelopment projects without sufficient waiver provisions is poor policy because (1) it will discourage infill because the requirements can't be met without a significant land take to accommodate infiltration and/or storage, (2) the costs of implementation will not provide significant water quality benefit since most redevelopment and infill sites will discharge to already concrete flood control channels, and (3) project-by-project application of the requirements prevents adoption of other more regional solutions that would better benefit water quality, particularly in the context of redevelopment, by providing some volume reduction

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		BMPs for existing development that isn't served by BMPs.
21. Unlawful Delegation of Authority to Define Hydromodification Criteria to Entities Other than the Regional Board. *Exceeds legal authority.* *Poor policy.*	The *Tentative Order* provides that "Within two years of adoption of this Order, each Copermittee must revise its SUSMP/WQMP (*see* Section D.1.d) to implement updated hydromodification criteria for all Priority Development Projects. "***If SMC and SCCWRP publications include descriptive or numeric criteria applicable to the San Juan Hydrologic Unit****, then those criteria must be used." Tentative Order* D.1.h(5), at p. 35. It is an improper delegation of authority to require adoption of criteria from a study that is not yet finished, much less at a point that it can be determined whether study conclusions are adequate for use as regulatory standards.	• **Comment**: As a regulatory agency, the Regional Board may not delegate its authority to set standards/criteria to a non-regulatory entity. Any proposed criteria that would be required to be applied as hydromodification criteria for all Priority Development Projects must be considered and approved for regulatory purpose by the Regional Board itself and must be subject to full public comment as a part of the Regional Board's hearing processes. Alternatively, such criteria, when developed (the study schedule does not propose completion of the SMC report within two years, but rather anticipates publication in 2010-2011) may be voluntarily implemented by Copermittees in the exercise of their discretion in complying with the MS4 Permit. • **Comment:** The Tentative Order should provide that Copermittees integrate the SMC with criteria where available into the subwatershed and watershed scale hydromodification assessments and should consider them in developing and updating their long-term hydromodification control strategies.
22. Redundant Local Review of SWPPP. *Results in improper determination MEP.*	*Tentative Order* requires local agency review of storm water pollutant prevention plan (SWPPP). *Tentative Order* § 2.c (2)	• **Comment:** The *Tentative Order* requires local agency review of the storm water pollutant prevention plan (SWPPP). This provision is burdensome for Copermittees and does not improve water quality in the field, so the cost does not bear a reasonable relationship to the water quality benefit. In addition, the additional review is unnecessary because the proposed Statewide General Construction NPDES Permit provides for public review of SWPPPs for 90 days.

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Poor policy		The local agency review is duplicative, of no substantial additional benefit and should be eliminated.
23. Advanced Treatment Requirements Are technically infeasible and constitute the addition of pollutants to runoff. *Results in improper determination MEP.* *Exceeds legal authority.*	The Regional Board has imposed requirements for advanced sediment treatment for 'high threat' construction project, regardless of project size. *Tentative Order* §D.2.d(i), at p. 41. Mandated implementation of Advanced Sediment Treatment is technically infeasible pursuant to *The Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm water Associated with Municpal, Industrial and Construction Activities* ("Blue Ribbon Panel Report") and requires the addition of chemical polymers, the residue of which may constitute pollution of construction site discharges. Advanced Treatment is neither "cost effective" nor "available" for every site the Tentative Order requires that it be used to control.	• **Comment:** Contrary to the Blue Ribbon Report, the *Tentative Order* mandates identification of "high threat" construction sites for which Advanced Sediment Treatment (AST) will be required, but has failed to perform recommended studies regarding baseline sediment production and discharge under natural conditions prior to proposing AST. Depriving highly alluvial systems of course sediment in runoff can create "hungry" water that results in greater erosion impacts in natural stream channels, and therefore ATS should not be mandated without reference to existing sediment discharge conditions. • **Comment**: As the Blue Ribbon Report discusses, the chemical substances that serve to assist in the removal of sediment in ATS systems result in alteration of natural sediment loads, and requires the addition of chemicals which may leave residues in runoff, both in derogation of the Clean Water Act, which defines "pollution" as the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of the water. 33 U.S.C. § 1362(19). The introduction of polymers and resulting "pollution" of the waters also is an improper application of MEP because it runs contrary to the section 13241 balancing factors in that it actively corrupts the physical integrity of the waters. • **Comment:** The findings and recommendations of the Blue Ribbon Report set forth at least 5 prerequisite studies and conditions that need to precede imposition of ATS to control construction site runoff, including consideration of issues associated with toxicity associated with active treatment systems, issues associated with long-term use of chemicals and consideration of runoff flow and peak volume.

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		See Blue Ribbon Report, at pp. 16-17. The Regional Board has not done any of these prerequisite studies and conditions, and therefore the imposition of numeric limits is technically infeasible, does not constitute an appropriate application of MEP, and is contrary to the findings and recommendations of the Blue Ribbon Panel. • • **Comment:** Research conducted by CICWQ determined that implementation of an advanced treatment system using chemical polymer addition would result in direct costs between $2400 and $9000 per acre for an example site handling anywhere from 1-inch to 20-inches, respectively, of total runoff per season. Key variables include the size of the construction site, total gallons of stormwater treated (direct correlation to amount of polymer required), flow rate, and the amount of detention time needed and associated mixing, piping and pumping systems to treat and release stormwater. All advanced treatment vendors interviewed by CICWQ stated that advanced treatment systems achieve 10 NTU effluent *when combined* with existing erosion control BMPs that reduce the concentration of influent sediment. Therefore, the cost of advanced treatment is *in addition to* existing erosion and sediment control stormwater BMPs that are required in Orange County. • **Comment**: An effective set of erosion and sediment control BMPs could accomplish the goal of reduced construction site erosion and sediment transport without requiring advanced treatment; however, based on the way that the *Tentative Order* is written, that option, even if it would be adequately protective of water quality, taking into account background levels, would not be permitted. Therefore, we recommend the Regional Board cure this arbitrary and capricious provision by implementing the recommendations of the *Geosyntec Memo* for

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		application of enhanced construction site runoff water quality controls to 'high threat' sites.
24. Construction BMP requirements for very small lots and/or projects *Not cost effective so results in improper determination MEP.* *Poor policy*	• All construction sites must implement a prescriptive set of construction BMPs at all times, regardless of site or receiving water conditions. While BMPs are appropriate for all construction sites, implementation of a prescriptive set of BMPs is not likely to attain water quality benefit.	• **Comment:** EPA stormwater regulations determined that regulation of small grading projects less than one acre is typically not necessary for adequate protection of water quality. 40 C.F.R. §122.26 *et seq*. There is no evidence in the documents provided that control of such small construction sites, is necessary to protect water quality. As a result, the requirements are arbitrary and capricious and violate Cal. Water Code § 13263(a), which requires WDR requirements shall be those *reasonably* required to protect beneficial uses and implement water quality objectives. Further, it is unclear why certain sites, like strip malls, are subject to these requirements while other sites that have similar characteristics are not subject to these requirements. The Regional Board has failed to adequately provide why certain sites are subject to these requirements while other are not. As a result, the requirements are arbitrary and capricious in and violate Cal Water Code § 13262(a), which requires WDR requirements shall be those *reasonably* required to protect beneficial uses and implement water quality objectives. • **Comment:** The imposition of such requirements is not an effective approach to storm water regulation of these types of sites because important site-specific and receiving water considerations are not taken into account, and these conditions will impose significant costs as compared to the water quality benefits. A better approach to regulation of these types of sites is through ordinances that require preparation of an erosion control plan for construction sites of all sizes. In preparing an erosion control plan, site-specific conditions, receiving water conditions and site hydrology must be considered.
25. Unnecessary	The Regional Board is creating and	• **Comment:** The *Tentative Order* Section E includes pro forma requirements to

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New Watershed Programs *Poor policy*	implementing two new watershed activities is not justified. *Tentative Order,* §E.	create and implement two new watershed activities. These requirements do not make sense in view of the fact that there already are several watershed activities underway in the region. The imposition of these programs will re-direct already sparse funding from implementation of existing programs, which are designed to address water quality problems, to new activities directed to meet the arbitrary new requirements. Instead, the Regional Board should assess the existing programs, identify any gaps in these watershed efforts and redirect resources only if the Board finds gaps in water quality protection. *See also* Item 4 above for a discussion of the Regional Board's failure to evaluate and consider existing watershed programs.
26. Under Appropriate Circumstance Wetlands Should Be Allowed As BMP. *Poor policy.* *Exceeds legal authority to extent it precludes compliance with CWA §§ 404 and 401 and Cal. Fish and Game Code §§ 1600 et seq.*	As drafted, *Technical Order* Finding § E.7 would prohibit establishing a wetland as a BMP. *Technical Order* Finding § E.7, at p. 14. Technical Report at p. 70.	• **Comment:** Finding E.7 must be revised to exempt "structural BMPs" such as natural wetlands, which are created in receiving waters as well as in MS4s with natural bottoms, etc. While some look at wetlands as BMPs, they are designed under CWA § 404, 401 and Cal. Fish and Game Code §§ 1600 *et seq*. 1) to restore the physical, biological and chemical integrity of existing receiving waters; 2) to restore wetland and riparian function and value; 3) to assure no net loss of wetlands 4) to replace historical losses of wetlands; and 5) to mitigate for permitted losses of wetlands pursuant to Army Corps of Engineers and Regional Board approvals. See *Constructed Wetlands for Wastewater Treatment and Wildlife Habitat,* EPA832-R-93-005 (1993). The *Tentative Order* must be revised to allow creation of wetlands for these purposes and to avoid conflict with state and federal laws prescribing wetlands.
27. Failure to Conduct	The Regional Board takes the position that compliance with California	• **Comment:** Unless an appropriate determination of *Tentative Order* requirements necessary to achieve MEP is made, the requirements of the *Tentative*

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Environmental Review of State-Authorized MS4 Provisions As Required by CEQA *Invalid Approval*	Environmental Quality Act ("CEQA") is not required in issuing the *Tentative Order*. *Tentative Order*, Findings § E.8., at p. 14, Technical Report at pp. 70-71. Finding § D.3.b, *Tentative Order* §§ A.1, A.3; Technical Report at pp. 72-74	*Order* do not comport with proper implementation of MEP and the Clean Water Act, and by default must be adopted pursuant to State law. CEQA analysis (using functional equivalent) must be conducted for provisions of the *Draft Permit* adopted pursuant to State law. *County of Los Angeles v. State Water Resources Control Board,* 143 Cal.App.4th 985, (2006) *modified by* Cal.App.LEXIS 1744 Cal App. 2d Dist. Nov. 6, (2006). • **Comment:** Cal Water Code § 13389 was part of Porter-Cologne adopted to accomplish the delegation of administration of the Clean Water Act, including the issuance of NPDES permits, to California. It does not exempt from CEQA other permits and/or requirements imposed by the Regional Board under Porter-Cologne. Cal. Water Code § 13372. Cal. Water Code § 13372 provides that the provisions of Chapter 5.5 of Porter-Cologne "apply only to actions required under the Federal Water Pollution Control Act and acts amendatory thereof or supplementary thereto." Section 13389 is part of Chapter 5.5 of Porter-Cologne. • **Comment:** The court in *Committee for a Progressive Gilroy v. State Water Resources Control Board*, 192 Cal.App.3d 847 (1987) held that orders restoring water waste discharge levels to originally approved levels for a wastewater treatment plant were not exempt from compliance with CEQA by section 13389 because that section applies only to actions required under the Clean Water Act. Orders of the Regional and State Boards regarding wastewater discharge issued under the authority of the Porter-Cologne Water Quality Control Act were not required by the Clean Water Act and thus not exempt from CEQA review. In its discussion of Cal. Water Code Section 13389 a California appellate court stated, "Chapter 5.5 of the Porter-Cologne Act was enacted to allow the State of California to administer the National Pollutant Discharge Elimination System (NPDES)

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		permits program. This chapter was patterned after the Federal Water Pollution Control Act, which created the NPDES permit system. Section 1371 of that act excludes the issuance of NPDES permits from the requirements of the National Environmental Policy Act after which CEQA was patterned. It is fairly apparent that the exemption for the promulgation of waste discharge requirements from CEQA contained in Water Code section 13389 was meant to parallel the exemption for the issuance of NPDES permits from the requirements of NEPA found in section 1371 of the federal act." *Pacific Water Conditioning Ass'n., Inc. v. City Council,* 73 Cal.App.3d 546, 557 (1977). Thus, the purpose of section 13389 was to exempt from CEQA permits issued by the State under the Clean Water Act – not WDRs that are adopted under Porter-Cologne. Because the Regional Board is adopting WDRs under Porter-Cologne rather than simply implementing the NPDES program mandated by the Clean Water Act, section 13389 does not apply to exempt such an action from CEQA review.
28. State Unfunded Mandates	The *Tentative Order* imposes significant fiscal burdens on local governments, by imposing a number of stringent mandatory duties on Copermittees. We illustrate with four examples of many unfunded mandates: "Watershed Permittees must annually assess the success of ***each*** implemented BMP through monitoring, surveillance, and other effective means." *Tentative Order*,	• **Comment:** Regional Board has the legal authority under State law to impose mandates that "exceed" or are "more explicit" than the mandates or specific requirements of federal law. However, this discretion is not unbounded. When the Regional Board elects to use its discretion to impose mandates that are "more explicit" than or "exceed" the requirements of federal law, it is electing to impose a state mandate within the meaning of California Constitution, Art. XIII B, Section 6. The Board may impose such state mandates; but once imposed the California Constitution requires that the cost of meeting them must be funded by the State. Since portions of the permit "are more explicit" than and "exceed" the specific requirements of federal law, these provision are illegal unless they are funded by the State. The California Supreme Court explained that the purpose of

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	§ E.1.e. (2), at p. 70, emphasis added. *Tentative Order*, §§ D.1.(f); D.3.a.(6) Impose unnecessarily stringent inspection and inventory requirements for each approved treatment control BMP within a particular jurisdiction creates a huge cost burden for relatively little water quality gain when compared to the existing rolling inspections "Each Copermittee must conduct an annual fiscal analysis" that "must include a qualitative or quantitative description of fiscal benefits realized from implementation of the storm water protection program" and prior to the expiration of the Order "must submit to the Board a Municipal Storm Water Funding Business Plan that identifies a long-term funding strategy for program evolution and funding decisions." *Tentative Order*, § F. at p.74. The *Tentative Order* prescribes a specific methodology for undertaking	Art. XIII B, section 6 is to "preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill-equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose." *Dept. of Finance v. Commission on State Mandates* 30 Cal.4th 727, 735, (2003) *quoting County of San Diego v. State of California* 15 Cal.4th 68, 81 (1997).

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	Urban Stream Bioassessment Monitoring that has inherent fiscal implications and that has not been subject to review until the publication of the *Tentative Order*. (*Tentative Order*, Attachment E, at pp. 5-6) The Regional Board's position is that the Copermittees are responsible for funding the implementation of all provisions of the *Tentative Order* from general funds, district assessments, plan review fees, permit fees, industrial/commercial user fees, revenue bonds, grants or other **local** funding mechanisms. *Tentative Order* § F.1., at p. 74.	
29. Unclear Protections for Vested /Approved Projects.	The grandfathering provision of the *Tentative Order* does not appear to be tailored for the various timeframes set forth for implementation of new site design BMPs, hydromodification requirements and other SUSMP requirements of the Order. As a result, the grandfathering provision provides only partial relief. *Tentative Order,* §D.1.d, n. 4.	• **Comment:** Because the *Tentative Order* contains several different mandatory site design BMP provisions and hydromodification control provisions, in addition to new SUSMP requirements, it is not clear the extent to which footnote 4 will "grandfather" projects that have reached that stage in the development process where re-design is impractical. Footnote 4 states that if a "lawful prior approval exists, whereby application of an updated SUSMP or hydromodification requirement of the project is illegal," the new requirement need not apply. However, the footnote is unclear as to how "illegal" is to be determined and whether the Copermittee has the authority to make such a determination. The provision should be clarified.

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		For example, a project that is nearing completion of the design/approval process it may still be required to redesign its streets, sidewalks, and storm drain systems under *Tentative Order* §§ D.1.c. and D.1.d.(4) despite the provisions of footnote 4. Tentative maps, final maps and development agreements are intended to provide protection-- allowing the developer to proceed with development in substantial compliance with the ordinances, policies and standards in effect on the date on which the subdivider's application was deemed complete, or in the case of a development agreement, on the effective date of that agreement. Cal. Gov. Code, § 66498.1(b). The applicable statutes related to vested rights are not unconditional, but they only provide an exception 1) when the project would pose a danger to the health and safety of residents of the community, or 2) when the condition or denial is required by federal or state law. *See*, *e.g.*, Cal. Gov. Code § 66498.1(c). • **Comment:** Failure to properly consider effects of the *Tentative Order* provisions on projects that are vested, approved, and/or under construction is arbitrary and capricious, constitutes a misapplication of the MEP standard, and violates Cal. Water Code section 13262(a), which requires adoption of conditions r*easonably* required to protect beneficial uses and implement water quality objectives. • **Comment**: Footnote 4 (p. 23) of the *Tentative Order* should be made a stand-alone provision of the Order, and its language should be revised to clearly define the scope of the grandfathering clause. The following grandfathering provision is an example of a provision that would be appropriate to incorporate into the *Tentative Order* to address the issues outlined in the preceding comments:

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		"Updated Development Planning requirements set forth in Sections D.1. (a) through (h) of this Order shall apply to all projects or phases of project, unless, at the time any updated Development Planning requirement commences, the projects or project phases meet any one of the following conditions: (i) the project or phase has received final tentative tract map approvals; (ii) the project or phase has begun grading or construction activities; or (iii) a Copermittee determines that lawful prior approval rights for a project or project phase exist, whereby application of the Updated Development Planning requirement to the project is practically or legally infeasible. Where feasible, the Copermittees shall utilize the SUSMP and hydromodification update periods to ensure that projects undergoing approval processes include application of the updated SUSMP and hydromodification requirements in their plans."
30. Requirements to Condition all Development to provide Water Quality Mitigation consistent with New Permit, Regardless of Legal Authority of Local Agencies to do so	The *Tentative Order* requires that the Copermittees develop authority to condition projects to provide storm water mitigation consistent with new *Tentative Order* requirements, regardless of whether any further discretionary permits for the project are necessary. *Tentative Order* §§ D.1.c.(1)-(5), at p. 21; D.2.c, at p. 39; Technical Report, at p. 77.	• **Comment:** Local agencies have limited land use authority to condition projects that have already completed CEQA review and received all discretionary permits and approvals. By definition, issuance of ministerial permits do not involve discretionary action, and, while local agencies can enforce all conditions or approval and mitigation measures specified for a project prior to issuance of ministerial permits, they cannot impose new conditions to ministerial permits. 14 C.C.R. § 15041; Cal. Pub. Res. Code § 21166. Further, common law and statutory vested rights can impact the ability of any local agency to impose additional requirements on certain projects. *See* Cal. Gov. Code § 65864 *et seq*. (development agreements); Cal. Gov. Code § 66498.1 *et seq.* (subdivision map act); *Avco Community Developers, Inc. v. South Coast Reg'l Comm'n*, 17 Cal.3d 785, 791 (1976) (common law vesting rights). As a result, this mandate that projects be

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		conditioned, regardless of whether any discretionary approvals are still necessary for development of the project, by the Regional Board forces municipalities to violate State law and therefore constitutes an *ultra vires* act on the part of the Regional Board.
31. Collaboration on SUSMPs *Poor policy.*	The *Tentative Order* requires Copermittees to implement an updated Standard Urban Storm water Mitigation Plan ("SUSMP") within 12 months of adoption of the Order. *Tentative Order*, § D.1.d., at p. 23.	• **Comment:** The *Tentative Order* requires Copermittees to develop and then require project applicants to use specific criteria for determining the applicability and feasibility of BMPs within one year of permit adoption. This short time frame does not provide Copermittees sufficient opportunity to work together in developing the criteria and undercuts public participation. This also assures different criteria will be developed and implemented in each Copermittee's jurisdiction. • **Comment:** A collaborative approach should instead be pursued requiring Copermittees to work together to update the Model SUSMP to include site design BMPs instead of individually tasking each Copermittee with developing and implementing significant new content in a single year.
32. Collaboration with HOAs, COAs, and other groups *Poor policy*	The *Tentative Order* requires Copermittees to regulate, but does not allow Copermittees to collaborate with other groups and entities, including Homeowners Associations ("HOAs"), Commercial Property Owners Associations ("COAs"), and similar associations and industry groups. *Tentative Order* § D.3.c.(5), at p. 60.	• **Comment:** The *Tentative Order* does not sufficiently encourage cooperation of Copermittees with other groups in a manner that can benefit water quality. Agreements with HOAs, COAs and similar entities may improve water quality and such collaboration may allow the Copermittees to expand their water quality reach, which allows for greater water quality benefits. • **Comment:** Copermittees should be allowed to collaborate with HOAs and COAs on methods for oversight of residential areas and on the regional residential education program requirements. *See* § D.3.c.(5), at p. 60. The HOAs are likely going to play an important part in implementing such programs, and thus it makes

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		sense for the HOAs to be involved in development of such program requirements. Involvement of the HOAs during the creation of such programs will allow for more effective programs to be developed that have a greater chance of success in terms of implementation, education, and ultimately greater water quality benefits.
33. Collaboration on Inspection should be encouraged. *Poor policy*	The *Tentative Order* does not allow sufficient flexibility for the Copermittees to collaborate with third parties on certain compliance responsibilities, including Provisions §§ D.1.e, D.1.f., D.3.a.(6) and D.3.a.(8) which require BMP maintenance, inspection and verification be undertaken by the Copermittees and do not allow such activities to be performed by third parties, eliminating assistance to the Copermittees that can be provided by proprietary BMP vendors, HOAs, COAs, etc.	• **Comment:** The Regional Board should encourage Copermittees and the regulated community to collaborate on all aspects of storm water program implementation, inspection and enforcement. The Tentative Order takes a contrary position - precluding Copermittees from entering into cooperative agreements with third parties to perform maintenance, verification and/or inspection activities. If allowed to cooperate with third parties, like vendors, subcontractors, HOAs and COAs, with respect to maintenance, inspection and BMP implementation obligations, Copermittees will be able to implement more effective programs, which will result in greater water quality benefits. Thus, these provisions should be revised to allow sufficient flexibility for Copermittees to engage in partnerships with third parties to more effectively implement programs and achieve greater water quality benefits.
34. Program effectiveness provisions	The Program Effectiveness conditions in the *Tentative Order* seem to require that when "water quality problems" are determined to exist, that the Copermittees must "correct" those problems. The *Tentative Order* appears to mandate nothing less than	• **Comment:** The Program Effectiveness provisions seem to apply regardless of whether the water quality problems at issue are factually related to MS4 discharges, regardless of whether they are the result of a failure of Copermittees to implement BMPs and water quality controls to the MEP standard, and regardless of whether there are additional water quality controls that are available and technologically feasible to implement.

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	that Copermittees implement a solution for receiving water quality, whether or not the primary source of the receiving water quality problem is a proximate result of the MS4 discharges. *Tentative Order*, § G., at p. 75.	• **Comment:** It is unclear that the Copermittees' implementation of water quality control measures addressing discharges from the MS4 to the MEP will be sufficient to establish Copermittees' compliance with the Order in the event that receiving waters continue to exhibit exceedances.
35. The *Tentative Order* appears to impermissibly expand the application of CEQA, Cal. Pub. Res. Code § 21000 *et seq*., by mandating environmental review of projects not already subject to environmental review under CEQA. *Exceeds legal authority.*	*Tentative Order***,** Attachment C defines "development project" as "new development or redevelopment with land disturbing activities; structural development, including construction or installation of a building or structure, the creation of impervious surfaces, public agency projects or land subdivision." *Tentative Order* § D.1.b requires Copermittees to review and revise their current environmental review processes to require evaluation of water quality impacts and cumulative impacts and identification of appropriate measures to avoid, minimize and mitigate those impacts for *all* Development Projects. The definition contained in the *Tentative*	• **Comment:** The Tentative Order appears to impermissibly expand the application of CEQA, Cal. Pub. Res. Code § 21000 *et seq*., by mandating environmental review of projects not already subject to environmental review under CEQA. Sections D.1.b. and D.1.c. of the *Tentative Order* apply to all development projects, as no acreage or other thresholds are applied in the current definition of "development project" found in Attachment C to the *Tentative Order*.). The RWQCB has no authority to mandate environmental review for projects not otherwise subject to CEQA. The Regional Board should revise the *Tentative Order* to clarify that these requirements only apply to those projects that are already subject to environmental review under CEQA.

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	Order encompasses projects that are not already subject to environmental review under CEQA (*e.g.,* nondiscretionary projects, exempt projects, ministerial actions, and emergency projects.)	
36. Failure to Integrate Existing Programmatic Water Quality Program *Poor policy*	The *Tentative Order* should recognize, approve and integrate the programmatic water quality management programs comparable to the Special Area Management Plan ("SAMP"), Habitat Conservation Plan ("HCP"), Southern Subregion Natural Community Conservation Plan ("NCCP") and other large-scale aquatic and uplands resource programs that have been carried out in Orange County.	• **Comment:** Many of the prescriptive measures in the *Tentative Order* do not take into account-and may even contradict-conditions of approval in programs, such as the SAMP and HCP, that are specifically directed toward the protection of aquatic systems. Similarly, the *Tentative Order* does not allow the requisite flexibility to allow coordination between adaptive management undertaken within the framework of SAMP and HCP provisions and adaptive management undertaken as part of the Water Quality Management Program ("WQMP"), which is identified as a "coordinated management program" by SAMP and HCP. Some examples of pertinent and relevant information include: 1. Section I. D. of the Corps Special Permit Conditions for the Southern SAMP contains geographic specific conditions for the protection of aquatic resources and water quality that must be factored into the implementation of the WQMP. Likewise, the HCP Appendix U contains similar provisions that were coordinated with the SAMP. 2. Section II of the Corps Special Permit Conditions set forth detailed "Project Construction" conditions for controlling sediment runoff and protecting aquatic resources that must be coordinated with implementation of the WQMP. 3. The SAMP and HCP provide for an integrated Habitat Reserve

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		Management Program with which the WQMP is required to be coordinated. The provisions of the *Tentative Order* must allow for flexibility in assuring such coordination. 4 Thus, some form of programmatic review and approval by the Regional Board of the WQMP framework and strategies is required to assure integration with the SAMP and HCP and with other watershed planning efforts in Southern Orange County.
37. Groundwater protection provisions conflict with site design BMP and hydro-modification controls *Inconsistent requirements, precluding compliance.* *Technically infeasible requirements*	The provision of *Tentative Order* §D.1.c (6), at p. 22., and their location in D. 1 related to planning BMPs for development, appears to limit the use of treatment control BMPs functioning as infiltration devices, and sets stringent requirements with respect to design of such BMPs so as to discourage and minimize their use. At the same time, *Tentative Order* §§ D.1.c, D.1.d, and D.1.h, among other provisions, strongly encourage and even mandate the use of Site Design and hydromodification BMPs that increase infiltration and rely on natural infiltration functions to control volume and pollution loads and treat urban runoff.	• **Comment:** This provision seems to limit and/or discourage BMPs relying on infiltration for treatment control or volume reductions. See, *e.g., Tentative Order* §§ D.1.c.(2); D.1.h.. At the workshop, staff indicated these restrictions are only necessary where recharge facilities and spreading grounds are contemplated. Therefore this provision should be substantially revised to apply only in the situation where such facilities are concerned, and to eliminate conflict with other provisions of the Order encouraging or mandating infiltration. • **Comment:** The substantive limitations on infiltration created by §D.1.c.(6) of the *Tentative Order* related to infiltration of dry weather flows and minimum depth to groundwater, soil specifications, and types of land uses required to permit infiltration are to strict to permit proper implementation of infiltration to accomplish treatment and hydromodification control. The language of this section must be revised to allow implementation of BMPs employing infiltration as described in the *Geosyntech Memo*, at pp. 10-12.
38. *Denies due*	In its entirety and as to individual	• **Comment**: The Tentative Order deprives the regulated community of due

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process because permit conditions and requirements are vague and or overbroad .and do not give notice concerning how to comply or when a violation occurs.	provisions noted above, the Tentative Order is vague as to its terms and conditions and fails to provide adequate notice as to what constitutes a violation. We address technical deficiencies of the individual findings in Items 4, 5,6,7,8, 10, 12, 13,14,15,16,17,& 19 above.	process because many of the terms, conditions and requirements are so vaguely stated that the regulated community does not have adequate notice of what is required to comply. In addition, the Tentative Order fails to provide adequate notice as to what constitutes a violation of its provisions. "Notice is fundamental to due process." 7 Witkin § 638 (10th ed. 2006). The lack of an adequate definition constitutes improper notice to the regulated community in violation of due process. Cal. Const. Art. I, §§ 7, 15; Cal. Gov. Code § 11340 *et seq*. (A "standard that has no content is no standard at all and is unreasonable." *Wheeler* v. *State Bd. of Forestry*, 144 Cal.App.3d 522, 527-528 (1983) • **Comment:** Perhaps the most critical example of insufficient notice in the Tentative Order involves the level of water quality control that Copermittees must attain. Specifically, the Tentative Order as interpreted by the Technical Report, at p. 65 appears to provide that even when Copermittees are implementing water quality controls to the MEP, as required by federal law and other provisions of the Tentative Order, but receiving water violations are nonetheless detected, the Copermittees shall be liable for civil/criminal enforcement actions. The receiving water violations may be technically infeasible for Copermittees to correct, particularly if (i) it is not possible to determine whether discharges from MS4 systems are proximately causing or contributing to receiving water violations, and/or (ii) if no additional best management practices (BMPs) can be identified to provide additional water quality control. As a result, Copermittees cannot discern from the current Tentative Order whether their planned water quality activities are sufficient and in compliance, or insufficient and the basis for criminal/civil enforcement. *See* Items 4, 10, 12 and 13. • **Comment:** The creation of a "moving target" for water quality compliance will discourage Copermittee and regulated stakeholder water quality control

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		activities. The Tentative Order must be revised to make it clear that when Copermittees implement water quality control measures meeting the MEP standard, which standard inherently requires review and implementation of better available BMPs if MS4 system discharges are causing or contributing to receiving water quality standard violations, they are in full compliance with the Tentative Order. These clarifications to provisions of the Tentative Order and Technical Report, including Discharge Prohibition A.3, are critical to providing adequate notice to the regulated community of, and encouraging implementation of appropriate water quality activities required under to establish compliance and avoid enforcement actions