ATTACHMENT A

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

INTRODUCTION

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

PRINCIPAL LEGAL AND POLICY COMMENTS

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

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

> Historic and current development makes use of natural drainage patterns and features as conveyances for urban runoff. Urban streams used in this manner are part of the municipalities MS4 regardless of whether they are natural, man-made, or partially modified features. *In these cases, the urban stream is both an MS4 and a receiving water.* (Emphasis added.)

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

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

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

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

(ii) Designed or used for collecting or conveying storm water;

(iii) Which is not a combined sewer; [and]

(iv) Which is not part of [a POTW].

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

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

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

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

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

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

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

> In sum, on its only plausible interpretation, the phrase "the waters of the United States" includes only those relatively permanent, standing or continuously flowing bodies of water "forming geographic features" that are described in ordinary parlance as "streams[,] . . . oceans, rivers, [and] lakes." *See* Webster's Second 2882. The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> No waste discharge requirement or other order of a regional board or the state board or decree of a court issued under this division shall specify the design, location, type of construction, *or the particular manner in which compliance may be had with that requirement, order, or decree*, and the person so ordered *shall be permitted to comply with the order in any lawful manner.* (Emphasis added.)

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

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

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

Finding E.6 of the Tentative Order provides:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Proper Limits Of The Copermittees' Obligations

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> No waste discharge requirement or other order of a regional board or the state board or decree of a court issued under this division shall specify the design, location, type of construction, *or particular manner in which compliance may be had with that requirement, order, or decree*, and the person so ordered *shall be permitted to comply with the order in any lawful manner.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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