

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD,
SAN DIEGO REGION**

Response to Comments V

Section X.5 of the Fact Sheet / Technical Report for

Tentative Order No. R9-2009-0002

November 18, 2009

A. Background

This document provides responses to the written comments received on the draft permit for reissuance of NPDES Waste Discharge Requirements for Discharges of Runoff from the Municipal Separate Storm Sewer Systems (MS4s) draining the watersheds of the County of Orange, the Orange County Flood Control District, and the incorporated Cities of Aliso Viejo, Dana Point, Laguna Beach, Laguna Hills, Laguna Niguel, Laguna Woods, Lake Forest, Mission Viejo, Rancho Santa Margarita, San Clemente, and San Juan Capistrano within the San Diego Region (Tentative Order No. R9-2009-0002, formerly Tentative Order Nos. R9-2008-0001 & R9-2007-0002, NPDES Permit No. CAS0108740).

The fifth version of revised the Tentative Order was distributed on August 12, 2009. The original Tentative Order was distributed on February 9, 2007. Four previous responses to comments documents (RTC I, II, III, and IV) have addressed written comments on the four previous versions of the Tentative Order. One additional round of written comments occurred following close of the deadline for written comments to receive a written response on the December 2007 version. These comments were received prior to the close of the public comment period at the February 13, 2008 adoption hearing and were responded to verbally by Regional Board staff at the February 13, 2008 Board Meeting. This document summarizes and responds to written comments received between May 15, 2009 and September 28, 2009 on the fourth and fifth versions of the revised Tentative Order. A public hearing on the fourth version of the Tentative Order was held on July 01, 2009 at the Ocean Institute in Dana Point. At the July 01, 2009 public hearing on the Tentative Order, the Regional Board members directed staff to incorporate draft proposed changes to the March 12, 2009 version and to release the Tentative Order again for further public comment. Interested parties had a full 45-days to review the fifth version prior to the deadline for submission of written comments that would be responded to in writing prior to the November Hearing on the Tentative Order.

B. Contents of This Document

Twenty-two interested parties submitted comments on the March 13, 2009 version of the Tentative Order and thirty submitted comments on the August 12, 2009 version. This resulted in the submission of over 400 comments. Comments came from the public, MS4 Copermittees, governmental and non-governmental organizations, and businesses. Fifteen commenters from homeowner associations submitted identical comment letters. Their comments have been collected, considered, and responded together. The Regional Board reviewed and considered every written comment received. Responses to specific comments

are provided within this document. Each specific comment has been assigned a comment number, and comments are generally grouped by commenter. A legend for commenters can be found on the Page 2 of the coversheet and in Table 1 (below).

Comments received were concerned with a variety of topics in the Tentative Order. Most comments reiterated concerns that were previously addressed in RTC I, II, III and IV. Some comments requested changes that had already been made in RTC I, II, III and IV. New responses have not been drafted for repeat comments that lacked sufficient new information. Consideration of written and verbal comments has resulted in proposed revisions to the requirements in the Tentative Order and can be found in the Tentative Errata and Updates Sheet. In this document, the comments have not been summarized or paraphrased. When comments received from one commenter were similar to other comments received, the Regional Board response usually references back to a previous comment number in order to minimize redundancy. Please note that due to limitations of the comment database system employed to handle these numerous comments, some formatting from the original comment has been lost. Readers are recommended to review the comments as submitted in their original format to fully appreciate the commenter's sentiments. The original comments can be found as Supporting Document 7.

C. Order Adoption

The California Regional Water Quality Control Board, San Diego Region (Regional Board) is scheduled to consider adoption of the Tentative Order on November 18, 2009.

Table 1. Commenter Legend.

Commenter	Commenter Number
Development Resource Corporation	19
Penny Elia	20
Village Laguna	21
Jinger Wallace, Citizen of Laguna Beach	22
Sierra Club	23
Friends of Harbors Beaches and Parks	24
Clean Water Now! Coalition	25
City of Laguna Beach	26
City of Santee	27
Verna Rollinger, City of Laguna Beach	28
United States Environmental Protection Agency	29
NAIOP	30
Rancho Mission Viejo	31
Natural Resources Defense Council	32
United States Marine Corps, Marine Corps Base Camp Pendleton	33
Riverside County Flood Control and Water Conservation District	34
Construction Industry Coalition on Water Quality	35
City of Laguna Niguel	36
Orange County Public Works	37
San Diego County Water Authority	38
Clean Water Now! Coalition	39
Fire Prevention Services	40
Michael Bailey, Citizen of Mission Viejo	41
Jim Fitzpatrick, Pronto Car Wash	42
United States Environmental Protection Agency	43

Table 1 continued. Commenter Legend.

Commenter	Commenter Number
Contech Stormwater Solutions	44
City of San Diego	45
Rancho Mission Viejo	46
City of Laguna Niguel	47
Natural Resource Defense Council	48
County of Orange	49
Construction Industry Coalition on Water Quality	50
Orange County Coastkeeper	51
San Diego Coastkeeper	52
City of Mission Viejo	53
City of Lake Forest	54
City of Dana Point	55
David M. Sinth*	56
Douglas E Savard*	56
Lynn Holmes*	56
Barbara Barry*	56
Walter Storch*	56
Rancho Santa Margarita Landscape and Recreation Corporation*	56
Dennis Pearson*	56
Rancho Cielo Homeowners Association*	56
Community Association of Rancho*	56
David Pearson*	56
Robert Rebholz*	56
Lee Anne Woods*	56
Trabuco Highlands Community Association*	56
Laura Quebbemann*	56
Ira Fleischer*	56

* These persons and groups submitted identical comments that received a group response.

Comments on R9-2009-0002

Comment No.	1	Commenter No.	19	Comment Subject	Finding
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Comment Finding C14
 This Finding seeks to prohibit all types of non-storm water (dry weather) discharges from a project site. Specifically, landscape irrigation, irrigation water and lawn water will no longer be allowed to enter an MS4 stormwater conveyance system. This runoff has been established to carry pollutants that can be detrimental to the downstream receiving waters.

Comments. The first question that arises is how can this prohibition be practically achieved? Also, will this prohibition apply to both existing and proposed developments? Will compliance involve application of efficient irrigation techniques and simple reduction of watering times for each zone? Or, will compliance require upgrading existing irrigation system components (i.e. heads and controllers) so that overspray and surplus runoff are minimized? Compliance may possibly require the capture of low flows and irrigation flows in basins or underground chambers so that the dry weather runoff does not leave the site. What is certain is that some capital expenditures will be required for both existing and new developments to eliminate the prohibited discharges. Doing so, however, would appear impossible from a practical viewpoint.

Recommendation. As written, the prohibition of "no non-storm water (dry weather) discharges," including irrigation runoff, is too restrictive and too rigid. It would be reasonable to apply a percent reduction to non-storm water discharges rather than requiring total elimination. The regulation should include the framework of a program stating how this measure will be achieved, what levels of discharge are considered compliant, who will be responsible for the implementing the program, and how the program can be phased over time. If the permit was adopted as written, there would be thousands of residential and commercial properties operating in violation of the regulations. In comments prepared by Orange County, they recommend leaving the reduction of irrigation runoff in the realm of public education and water conservation. DRC agrees with that assessment.

Response The Clean Water Act section 402(p)(3)(B)(ii), permit requirements for municipal dischargers, states that municipal storm water NPDES permits: "shall include a requirement to effectively prohibit non-storm water discharges into the storm sewers." This prohibition of non-storm water discharges has been in every MS4 permit to date. The Copermittees already have in place a program to detect and eliminate non-storm water discharges. The requirement to prohibit non-storm water discharges into the MS4 applies to the Copermittees. The specific method of compliance is up to the Copermittees to develop and enforce their ordinances. It is not certain that some capital expenditures will be required for existing and new developments to eliminate non-storm water discharges. As this is a specific, direct requirement of the Clean Water Act, we are not at liberty to apply a percent reduction to non-storm water discharges. The Regional Board expects the Copermittees to treat irrigation runoff, through ordinance and inspection, like any other prohibited non-storm water discharge.

Comment No.	2	Commenter No.	19	Comment Subject	SAL
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Comment Finding D.1.h

Municipal Action Levels (MALs) will establish the requirement for numeric effluent limits for specific stormwater runoff pollutants.

Comments. It is not clear who is responsible for compliance with MAL levels, the co-permittee (ie. city or county) or the private land owner. The text does not establish the time interval for sampling and monitoring. Is it one time after project completion, or on an annual basis? It is likely that the co-permittees will enact ordinances that will require the discharger to take samples of stormwater discharges and process them with a certified lab in accordance with accepted testing protocols. The Fact Sheet states that exceedance of MALs could result in enforcement actions such as stop work orders or cease and desist orders. Even if current treatment measures are adequate to satisfy the numeric effluent criteria, periodic sampling and testing will result in significant costs to the discharger.

Recommendation. The application of MALs is not justified or warranted according to comments from the County of Orange. They describe the Tentative Order's proposed use of MALs as not being legal in the manner proposed, and not technically supportable or valid. In fact, the Blue Ribbon Panel Report referred to in the Supplemental Fact Sheet does not support the use of numeric effluent criteria on stormwater discharges at this time. We would recommend the deletion of MALs and numeric effluent limits from the proposed General Permit changes. It will be cost prohibitive to comply with, unenforceable based on its scope and size, and not justified according to current CWA interpretations.

Response The Copermittee(s), as holders of the NPDES permit to discharge from the MS4, are responsible for compliance with MALs. Please note the nomenclature for MALs has been changed to SALs (Stormwater Action Levels). SAL compliance points are for discharges from the MS4, not individual project sites and current language in Attachment E (Monitoring and Reporting Requirements) allows the Copermittees to propose a monitoring program for SALs, including monitoring locations and frequency. SALs are action levels, not effluent limitations.

Please also see responses to Comment nos. 25 and 33 in the July 1, 2009, Response to Comments IV.

Comment No.	3	Commenter No.	19	Comment Subject	LID
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Comment Finding D.2.c

Sets the requirement that Low Impact Development (LID) site design strategies will be incorporated into new and existing projects.

Comments. Based on this change, LID will need to be considered in the early stages of site planning. As a developer works with an architect on a development proposal, it will be important to bring the civil engineer and landscape architect into the project at an early stage, in order to ensure that LID, Site Design BMPs and Treatment Control BMPs for stormwater quality are incorporated into the design layout. The cost impact from LID is the potential loss of developable land and the cost of additional treatment control BMPs.

Recommendation. While LID can be applied to new projects, there needs to be flexibility in how it is applied to a project based on site specific needs and constraints. The proposed changes should not impose compliance standards with respect to incorporating LID into a project design. LID should not be applied to retrofitting existing projects because the Regional Board and the co-permittees do not have the right to force private property owners to make improvements to their property at their expense.

Response The Clean Water Act requires the reduction of pollutants in storm water to the maximum extent practicable (MEP). Current management, knowledge, practices, and technology has resulted in the use of LID BMPs to meet the MEP standard. Any pollutant reduction required less than the MEP standard could be considered a violation. As such, some sites have specific technical conditions that may limit the site's ability to infiltrate, retain or evapotranspire the complete design storm volume. In those cases, the Tentative Order provides flexibility for a site to use other means of reducing pollutants.

The retrofitting requirements do not force private property owners to make improvements to their property at their expense. Rather, the Copermittees are required to cooperate with private property owners to encourage retrofitting through various means. LID may be used in retrofitting where feasible, but a project's potential to be retrofitted should not be limited by a site's capability to implement LID practices.

Comment No.	4	Commenter No.	19	Comment Subject	Hydromod
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Comment Finding D.2.g

Requires a development to analyze and mitigate potential impacts due to increased volume, velocity, frequency and discharge duration of stormwater. The objective here is to minimize hydromodification impacts to the downstream drainage courses and downstream habitat.

Comments. This is a difficult criteria to satisfy from an engineering standpoint because land development does in fact alter the natural drainage patterns on a site. Increased volume, higher velocities and earlier time of concentration are the result of introducing rooftops, paved parking lots, streets and hardscape. The use of detention basins is one of the main tools engineers employ to control the site discharge and limit it to the pre-development peak runoff rate. This Finding expands on the solutions to be applied to site development including hydrologic distribution using LID features, determining effective impervious area and preparation of a Hydromodification Management Plan. Mitigating these factors may require extraordinary storm drainage measures and off-site improvements. Expenses will increase as the need for physical mitigation measures increase.

Recommendation. This regulation cannot be reasonably satisfied when developing a project site. Hydromodification impacts from a project site need to be limited to industry standard of practice which is to regulate the developed condition discharge rate, in cubic feet per second, to be no greater than the undeveloped condition discharge rate. The project can also reduce velocities at the discharge point to non-erosive rates in order to minimize downstream erosion potential and habitat impact. What should not be controlled by regulation are the total volume of runoff and the duration of discharge into a natural drainage course or unimproved channel. These parameters are not easily modified to match the undeveloped condition and doing so places an unreasonable burden on the property owner and developer.

Response Specific hydromodification requirements are increasingly recognized as being needed to prevent impacts to water quality and beneficial uses from increased volume, duration, and intensity of flows from developed areas. This is because traditional methods to date have been ineffective, and more stringent controls are needed.

Similar hydromodification requirements to those stated in the Tentative Order have been required in other MS4 permits throughout the State of California. It is too soon to judge the difficulty and cost in implementing hydromodification controls in southern Orange County. Collectively using distributed LID features onsite and site design measures, along with conventional detention basins and regional controls, may defray the costs associated with simply expanding traditional methods to control flows. To protect water quality, matching the peak flow rate is not sufficient by itself without matching duration as well. Matching the peak flow rate, but extending the duration of that peak flow, may result in downstream erosion in a receiving water that cannot accommodate the increased duration of the peak flow.

Comment No.	5	Commenter No.	19	Comment Subject	Retrofitting
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Comment Finding D.3.i

Requires the cooperation of existing land owners to retrofit projects for the preservation, restoration and enhancement of water quality.

Comments. The main question here is how does the co-permittee identify which existing properties need to be retrofitted and who will pay for the cost of the required retrofit? The Regional Board and the co-permittees do not have the right to force a private property owner to make improvements to their property at their expense.

Recommendation. This Finding should be deleted from the General Permit because it cannot be effectively implemented.

Response Copermittees must identify and rank retrofitting opportunities through an analysis of several factors listed in the permit (e.g. feasibility, pollutant removal effectiveness, etc). The Tentative Order does not force a private property owner to make improvements to their own property. The Tentative Order requires Copermittees to cooperate with private property owners in seeking out retrofitting opportunities. Identifying the funding source for retrofitting projects is ultimately up to the Copermittees. Some potential funding sources at the Copermittees discretion may include general funds, development fees, grant funds, and pollutant mitigation accounts.

Comment Finding E.10

This Finding moves to establish Total Maximum Daily Loads (TMDLs) for 303(d) impaired water bodies in Orange County. We understand this to mean that measurement of pollutants in a water body will be taken at the most downstream point of the watershed and compared with numeric limits set for each pollutant originating from the subject watershed. The Supplemental Fact Sheet lists bacteria, phosphorous, toxicity and turbidity as target pollutants. Cease and desist orders or cleanup and abatement orders would be the primary enforcement mechanisms under the TMDL regulation.

Comments. The EPA has been working to implement TMDLs for many years now and originally started with major water courses such as the Los Angeles River and Santa Ana River. Progress has been slow and is behind schedule because of the complexities of analysis and implementation. One main obstacle is determining who is responsible for reducing the pollutant load in the watershed. How to equitably apply reduction measures that involve thousands of property owners and numerous cities is another significant problem to solve.

According to a presentation given by Dr. Cindy Lin with the EPA on April 16, 2008 in Corona, CA, the TMDL process requires identifying the problem pollutants, setting numeric targets for maximum concentrations, determining the sources of the pollutants in the watershed, linking the target pollutants and sources, and allocating pollutant loads to the sources. The last part is the hardest one to complete. In order to set a maximum discharge rate for a specific discharger, you need to have knowledge of the entire watershed and the point source and non-point source origins of the target pollutant. The process requires analysis of watershed subareas along with the cooperation of counties, municipalities and individual stakeholders. Assuming the Regional Board can set the TMDLs for the several 303(d) water bodies within their jurisdiction and the State and EPA approve them, it is not possible to determine the impact that this regulation would have on individual property owners.

Recommendation. The introduction of TMDLs into the General Permit should only be done if the entire program can be clearly identified. DRC recommends that TMDL Programs should be instituted via separate Board actions that address only one impaired water body and its associated watershed at a time. As presented, monitoring TMDL loads and effectively implementing pollutant reduction measures is unworkable. You only need to look at the efforts that have been underway for years on the Santa Ana River Watershed TMDL Program to know that this stormwater quality parameter is unworkable and impractical to impose on Orange County, its co-permittees and property owners.

Response

The Tentative Order only incorporates requirements consistent with the assumptions and waste load allocations of adopted TMDLs (see Finding E.11 and response to comment no. 79 for a discussion on adopted TMDLs). Finding E.10 does not establish TMDLs; the finding merely establishes cause for "early pollutant control actions and further pollutant impact assessments." Please see Directive J.1.a.1 for more information.

See the following web page for more information on TMDLs in progress:
http://www.waterboards.ca.gov/sandiego/water_issues/programs/

Comment No.	7	Commenter No.	19	Comment Subject	Hydromod
Comment	<p>Section III, Directives, of the Supplemental Fact Sheet Finding F.1.h</p> <p>For interim projects, a limit on the Effective Impervious Area (EIP) of 5% has been added.</p> <p>Comments: Taken literally, this Finding appears to limit the amount of impervious area on a project site to 5% of the total area. This is a completely unreasonable standard to impose on any project. Even if a project employed a green roof system, porous pavement and minimal concrete walks, this threshold would be extremely difficult to achieve. Under the USGBC LEED New Construction Reference Guide, Version 2.2, the credit for maximizing open space only requires 20% of the site to be set aside for vegetated open space. That leaves 80% of the site that can be impervious surfaces.</p> <p>Recommendation. The Regional Board should eliminate the 5% EIP limit from the General Permit. If an EIP limit must be established, it should be in a reasonable range of 50% to 75% of the available site area. Setting development restrictions that cannot be practically achieved is simply not acceptable.</p>				
Response	<p>The language regarding the Effective Impervious Area has been removed from section F.1.h.(6)(i). Through discussions with the Copermittees and the interested parties, a metric using Effective Impervious Area (EIA) was not included in the Tentative Order's requirements. In lieu of using EIA as a performance metric, the draft Tentative Order requires Low Impact Development BMPs to retain and/or biofilter the volume of runoff produced from the design storm (85th percentile storm event).</p>				

Comment No.	8	Commenter No.	20	Comment Subject	General
Comment	<p>FYI - this is something I have been trying to get City of Laguna Beach to do for several years.</p> <p>Yellow Tag Warning - Water Quality Violation</p> <p>Our Beach & Your Construction Site</p> <p>You Can Help Keep Our Beaches Clean (doorhanger)</p>				
Response	<p>The Tentative Order requires the Copermittees to implement an education program for developers, contractors, construction site personnel, municipal staff, industrial site operators, commercial site personnel, and their residents. The education and enforcement mechanisms proposed by the commenter are appropriate to meet the requirements of the Tentative Order and we support such efforts.</p>				

Comment No.	9	Commenter No.	21	Comment Subject	General
Comment	<p>Living as we do at the mouth of Aliso Creek, we have long been concerned about the pollution of the creek and the ocean that is caused by runoff from upstream. Recently we have also begun to worry about an Orange County proposal to clear the creek bed of vegetation, move some 1 million cubic yards of dirt there, and install concrete-and-rock drop structures in an attempt to control the excess flows caused by upstream development. The project would do nothing to reduce the excessive amount of water in the creek, and the version of it now being studied by the U.S. Army Corps of Engineers has no water treatment component.</p> <p>The proposed new MS4 regulations, which would prohibit dry weather discharges into the creek and require low impact development and retrofitting of existing development to control runoff, seem to promise a welcome solution to the creek's problems. We urge you to adopt them.</p>				
Response	<p>Comment noted. Please also see response to Comment No. 56.</p>				

Comment No.	10	Commenter No.	22	Comment Subject	General
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Comment SUBJECT: MS4 Permit

I am writing to give my complete support to approval of the proposed MS4 permit.

Inland cities have for far too long ignored their responsibilities and continue to allow urban runoff to pollute our ocean and coastal zones. Excuses such as "people like to wash their cars" or "People will be upset" are sad attempts by inland cities to avoid taking necessary and corrective action. At a recent public workshop I heard testimony from one city representative complaining how hard it is for people who live on hills to stop the runoff. This is a poor excuse. A simple remedy like a small grate with U-pipe below or low speed bump would send the water to plants on the side of a driveway rather than running off to the street, creeks and ocean. But, until SDWRQCB adopts the new MS4 permit, these solutions will be ignored.

There is broad public support for cleaning up our runoff and waste. This includes people who live in inland counties who are tired of their lakes and creeks being polluted as well residents of beach communities. Many inland residents go to the beach for weekends and holidays. The volume of urban runoff reaching and polluting the ocean appalls them as well as tourists and locals.

We now have laws requiring bicycle and motorcycle helmets, seat belts and the proper disposal of trash. This, too, is an issue whose time has come.

It is time that SDRWQCB took real, forceful action to stop cities from polluting. Cities have been out of compliance for the past 7 years. We need immediate relief.

Please insist that runoff be stopped or diverted to catchments/dissipaters or for filtration and beneficial reuse. Levy fines against offending violators. Until SDRWQCB uses their regulatory power to stop these polluting discharges, nothing will be done. Please do not postpone the inevitable and leave us with polluted creeks and coastal shores.

Response Comment noted.

The Regional Board has a progressive enforcement policy with multiple levels to ensure fair, firm and consistent enforcement. The possible enforcement actions at the Regional Board's discretion range from a verbal warning, staff enforcement letter, notice of violation, cleanup and abatement order, cease and desist order, time schedule order, referral to the State of California's attorney general's office, and assessment of civil liability up to \$10,000 per day per violation. When considering what enforcement action to take, the Regional Board examines the nature, extent and gravity of the violation, the magnitude of the violation, the water quality impacts resulting from the violation, and the compliance history of the violator.

Comment No.	11	Commenter No.	23	Comment Subject	General
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Comment As the Sierra Club Task Force Chair for Save Hobo Aliso, I have attended almost every stakeholders workshop on the new permit and have spoken at the Regional Board hearings in San Diego as to the negative impacts of the proposed SUPER Project on Aliso Creek. I also attended most of the workshops for the last MS4 Permit that was derailed by the Copermittees. During most of the workshops the Copermittees have been extremely vocal about how impossible the new permit will be to implement and enforce, how unfair this new permit will be, and the poor light it will put them in with businesses and residents that feel they have a God given right to not only waste water, but also pollute the very creek and receiving waters of the Pacific Ocean that the MS4 Permits attempts to protect and preserve.

At one of the first workshops for this current permit, the EPA representative was very clear in her refute to the Copermittees. She explained to them, and the rest of the audience, that non-compliance has been going on for almost 35 years. NOW is the time to stop polluting our watersheds and NOW is the time for the Copermittees to take responsibility for their runoff and pollution.

At a subsequent workshop a representative from NRDC made it very clear that NOW is the time for the Copermittees to comply and that their non-compliance has been tolerated since 2000, while our natural resources have been devastated. NOW is the time for clean up and abatement orders should the Copermittees continue to ignore existing permit requirements while they adamantly oppose strengthened regulations. Just as many businesses and residents feel it's their God given right to pollute, so do the Copermittees. This must stop and stop now, and the only apparent way to end this devastation to our watershed and natural resources is through adoption of the new MS4 Permit.

Response Comment noted.

Comment No.	12	Commenter No.	23	Comment Subject	General
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Comment The Sierra Club supports the entire permit with emphasis on the following:
Wet weather and dry weather discharges are subject to the conditions and requirements established in the San Diego Basin Plan for point source discharges. These water quality standards must be complied with at all times, irrespective of the source and manner of discharge.

Response Comment noted.

Comment No.	13	Commenter No.	23	Comment Subject	Hydromod
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Comment The Sierra Club supports the entire permit with emphasis on the following:
The increased runoff characteristics from new development must be controlled to protect against increased erosion of channel beds and banks, sediment pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force. Special note: With this implementation there would be no need for 26 concrete drop structures in Aliso Creek.

Response Comment noted.

Comment No.	14	Commenter No.	23	Comment Subject	General
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Comment The Sierra Club supports the entire permit with emphasis on the following:
Increased pollutant loads created by increased and uncontrolled urban development must be controlled to protect downstream receiving water quality.

Response Comment noted. The Tentative Order requires consideration of retrofitting existing development and the implementation low impact development controls at new development and redevelopment projects. These requirements are expected to address and control pollutant loads from urban developments.

Comment No.	15	Commenter No.	23	Comment Subject	SUSMP
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Comment The Sierra Club supports the entire permit with emphasis on the following:
Development that is ordinarily insignificant in its impact on the environment may become significant in a particularly sensitive environment. Therefore, additional controls to reduce pollutants from new and existing development must be required for areas adjacent to or discharging directly to an ESA. This holds particularly true for Aliso Creek. Development has been uncontrolled and unmonitored for far too long.

Response Comment noted.

Comment No.	16	Commenter No.	23	Comment Subject	Overirrigation
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Comment The Sierra Club supports the entire permit with emphasis on the following:
Non-storm water discharges should be effectively prohibited unless specifically exempted. Exempted discharges identified as a source of pollutants are required to be addressed through prohibition. Dry weather non-storm water discharges have been shown to contribute significant levels of pollutants and flow in arid, urban Southern California watersheds. The Copermittees have identified landscape irrigation, irrigation water and lawn water, previously exempted discharges, as a source of pollutants and conveyance of pollutants to waters of the United States. In the case of Aliso Creek this is a chronic problem that is leading to not only destruction of the watershed and associated wildlife, but also to our receiving waters.

Response Comment noted.

Comment No.	17	Commenter No.	23	Comment Subject	General
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Comment The Sierra Club supports the entire permit with emphasis on the following:
Copermittees MUST reduce the discharge of pollutants in storm water urban runoff. This can no longer be ignored and the ongoing pollution can no longer be tolerated.

Response Comment noted. The Storm Water Action Levels provide a measureable performance criteria on the reduction of pollutants discharged from the Copermittees MS4.

Comment No.	18	Commenter No.	23	Comment Subject	General
Comment	<p>The Sierra Club supports the entire permit with emphasis on the following:</p> <p>Pollutants can be effectively reduced in urban runoff by the application of a combination of pollution prevention, source control, and treatment control BMPs. Every available tool must be implemented now, with particular emphasis on construction and mobile businesses that include car detailing. Please see attached series of photos showing a car detailer that travels throughout the County detailing cars and allowing pollutants to run into the gutter and storm drains uncontrolled.</p>				
Response	<p>Comment noted. The Tentative Order includes requirements for the Copermittees oversight of mobile businesses such as car detailers.</p>				
Comment No.	19	Commenter No.	23	Comment Subject	General
Comment	<p>The Sierra Club supports the entire permit with emphasis on the following:</p> <p>With these photos in mind, I would like the Board to consider the adoption of a citizen based water quality monitoring program. Please see the attached draft graphics that have been developed by the City of Newport Beach. This concept has been shared with the City of Laguna Beach for several years, but due to a weakened MS4 Permit they have not seen the need to adopt.</p>				
Response	<p>Although not specifically required in the Tentative Order, a citizen based water quality monitoring program would have benefits to the Copermittees. Such a program could potentially defray monitoring costs and serve as a public education tool. Even though the Tentative Order does not require that the Copermittees develop a citizen based water quality monitoring program, the Tentative Order also does not prohibit a Copermittee from developing such a program. We leave it at the discretion of the Copermittee to develop such a program and feel that a citizen based monitoring program can be integrated with the existing requirements of the Tentative Order.</p> <p>The State is also available to assist interested citizens in forming their own monitoring group. http://www.waterboards.ca.gov/water_issues/programs/swamp/cwt_volunteer.shtml</p>				
Comment No.	20	Commenter No.	23	Comment Subject	SAL
Comment	<p>The Sierra Club supports the entire permit with emphasis on the following:</p> <p>Copermittees must be required to implement a timely, comprehensive, cost-effective storm water pollution control program to reduce the discharge of pollutants in storm water from the permitted areas so as not to exceed the MALs.</p>				
Response	<p>Comment Noted. Please note that the terminology has changed from "Municipal Action Levels" (MALs) to "Stormwater Action Levels" (SALs).</p>				
Comment No.	21	Commenter No.	23	Comment Subject	LID
Comment	<p>The Sierra Club supports the entire permit with emphasis on the following:</p> <p>Use of Low-Impact Development (LID) site design BMPs at new development, redevelopment and retrofit must be implemented.</p>				
Response	<p>Comment noted.</p>				
Comment No.	22	Commenter No.	23	Comment Subject	General
Comment	<p>The Sierra Club supports the entire permit with emphasis on the following:</p> <p>Enforcement of local urban runoff related ordinances, permits, and plans must be an essential component of every urban runoff management program and specifically required in the federal storm water regulations and this Order.</p>				
Response	<p>Comment noted.</p>				

Comment No.	23	Commenter No.	23	Comment Subject	Retrofitting
Comment	<p>The Sierra Club supports the entire permit with emphasis on the following:</p> <p>Retrofitting existing development with storm water treatment controls including LID, is mandatory to address storm water discharges from existing development that may cause or contribute to a condition of pollution or a violation of water quality standards. Cooperation with private landowners is mandatory to effectively identify, implement and maintain retrofit projects for the preservation, restoration, and enhancement of water quality.</p>				
Response	Comment noted.				
Comment No.	24	Commenter No.	23	Comment Subject	General
Comment	<p>The Sierra Club supports the entire permit with emphasis on the following:</p> <p>Runoff treatment and/or mitigation must occur prior to the discharge of urban runoff into receiving waters.</p>				
Response	Comment noted.				
Comment No.	25	Commenter No.	23	Comment Subject	SUSMP
Comment	<p>The Sierra Club supports the entire permit with emphasis on the following:</p> <p>Due to Orange County's significant, uncontrolled development, early pollutant control actions and further pollutant impact assessments by the Copermittees are mandatory.</p>				
Response	Comment noted.				
Comment No.	26	Commenter No.	23	Comment Subject	ASBS
Comment	<p>The Sierra Club supports the entire permit with emphasis on the following:</p> <p>Discharges of Waste to State Water Quality Protected Areas (SWQPAs) or Areas of Special Biological Significance (ASBS) must be prohibited except where allowable under a State approved Ocean Plan Exception or Special Condition.</p>				
Response	Please see response to Comment no. 49.				
Comment No.	27	Commenter No.	23	Comment Subject	SUSMP
Comment	<p>The Sierra Club supports the entire permit with emphasis on the following:</p> <p>Discharges from each approved development project must be subject to the most stringent of management measures.</p>				
Response	The standard for management measures is specified by the Clean Water Act. It specifies that controls are required to reduce the discharge of storm water pollutants to the maximum extent practicable and to effectively prohibit non-stormwater discharges.				
Comment No.	28	Commenter No.	23	Comment Subject	LID
Comment	<p>The Sierra Club supports the entire permit with emphasis on the following:</p> <p>It is mandatory that each Copermittee must require each Priority Development Project to implement LID BMPs which will collectively minimize directly connected impervious areas, limit loss of existing infiltration capacity, and protect areas that provide important water quality benefits necessary to maintain riparian and aquatic biota, and/or are particularly susceptible to erosion and sediment loss. With this in mind, it would be virtually impossible for the County of Orange or the Army Corps of Engineers to even remotely consider a project such as the SUPER Project.</p>				
Response	Comment noted.				

Comment No.	29	Commenter No.	23	Comment Subject	Hydromod
Comment	<p>The Sierra Club supports the entire permit with emphasis on the following:</p> <p>Each Copermittee must revise its SSMP/WQMP to implement a watershed specific Hydromodification Management Plan (HMP) to include specific criteria for minimizing and mitigating hydrologic modification at all development and redevelopment projects. Again, this would require the County of Orange and Army Corps of Engineers to discard any notion of a project that contains any characteristics similar to the SUPER Project. The Army Corps has been tasked with an ecosystem restoration of Aliso Creek. The Corps' implied support of the MS4 Permit will assist in this effort which would include disconnecting impervious areas by reducing the percentage of Effective Impervious Area (EIA) to less than five percent of total project area; also disconnect impervious area from receiving waters using on-site or off-site storm water reuse, evapotranspiration, and/or infiltration for small precipitation events, based on limitations imposed by soil conditions, groundwater contamination potential and considerations for the use of amendments to improve soil conditions.</p>				
Response	<p>The hydromodification requirements have been modified to be more consistent with the requirements in the San Diego County MS4 permit. Through discussions with the Copermittees and the interested parties, a metric using Effective Impervious Area (EIA) was not included in the Tentative Order's requirements. In lieu of the EIA metric, the draft Tentative Order now requires Low Impact Development BMPs to retain and/or biofilter the volume of runoff produced from the 24-hour 85th percentile storm.</p>				

Comment No.	30	Commenter No.	23	Comment Subject	Construction
Comment	<p>The Sierra Club supports the entire permit with emphasis on the following:</p> <p>Each Copermittee must annually notify the Regional Board, prior to the commencement of the wet season, of all construction sites with potential violations such as the SUPER Project or any other construction project in the Aliso Creek watershed.</p>				
Response	<p>Comment noted.</p>				

Comment No.	31	Commenter No.	23	Comment Subject	Retrofitting
Comment	<p>The Sierra Club supports the entire permit with emphasis on the following:</p> <p>Each Copermittee must implement a retrofitting program which meets the requirements of this section, solves chronic flooding problems, reduces impacts from hydromodification, incorporates LID, supports stream restoration, systematically reduces downstream channel erosion, reduces the discharges of storm water pollutants from the MS4 to the MEP, and prevents discharges from the MS4 from causing or contributing to a violation of water quality standards.</p>				
Response	<p>Comment noted.</p>				

Comment No.	32	Commenter No.	23	Comment Subject	WURMP
Comment	<p>The Sierra Club supports the entire permit with emphasis on the following:</p> <p>The Watershed Permittees must develop, implement, and update annually, a Watershed Water Quality Work Plan that ranks each watershed's highest priority issues. The Watershed Water Quality Work plan shall identify planned watershed assessment, BMP evaluation, BMP selection, and BMP implementation efforts for each watershed planning area for the full 5-year Permit cycle. The goal of the work plan to is to demonstrate a responsive and adaptive approach for the judicious and effective use of available resources to attack the highest priority problems on a watershed basis. This element should have special emphasis and be brought to the attention of the Army Corps of Engineers in light of their Aliso Creek Mainstem Ecosystem Restoration Project.</p>				
Response	<p>Comment noted.</p>				

Comment No.	33	Commenter No.	23	Comment Subject	General
Comment	<p>Restoration of a healthy ocean must be achieved. We cannot protect the ocean by poisoning it with our wastewater and urban runoff. No less an authority than Sylvia Earle, former Director of NOAA, went on national television recently (see MSNBC) to urge immediate efforts to end ocean pollution and protect the ocean's ability to naturally modulate climate conditions. Without swift action to restore a healthy ocean, we will witness even greater, devastating climate change. Similarly, Marcia McNutt, Director of the Monterey Bay Aquarium, reminds us that every second breath comes from the ocean's ability to produce oxygen.</p> <p>The solutions are readily technologically available as soon as citizens, resource agencies and elected representatives, working together, are ready to act.</p> <p>Sierra Club applauds Congresswoman Loretta Sanchez and her senior advisor, Dolores Gonzalez-Hayes for their proactive stance in bringing the environmental community, County of Orange Watersheds and Army Corps of Engineers together. It is imperative that these two agencies move forward with a plan that will eliminate concrete from Aliso Creek while adopting the policies of the new MS4 Permit which will dramatically minimize the runoff and current flow rates that are creating pollution and destroying the creek's natural resources. As discussed in our meeting of May 20th, these agencies are morally and ethically obligated to protecting and preserving our natural resources above all other mandates.</p>				
Response	Comment noted.				

Comment No.	34	Commenter No.	24	Comment Subject	General
Comment	<p>Friends of Harbors, Beaches, and Parks (FHBP) supports the proposed MS4 Permit requirements. Simultaneously, we oppose the County of Orange SUPER Project that proposes construction of 26 concrete drop structures in Aliso Creek, one of the last natural creeks in Orange County which flows through Aliso and Wood Canyons Wilderness Park. We also support efforts that would allow for restoration of this natural creek in conjunction with the implementation of a program that includes pollution prevention, upstream source control, and treatment-control Best Management Practices. Strengthened MS4 Permit regulations would be integral in this regard.</p>				
Response	Comment noted.				

Comment No.	35	Commenter No.	24	Comment Subject	General
Comment	<p>FHBP supports the entire MS4 permit with emphasis on the following:</p> <p>Wet weather and dry weather discharges are subject to the conditions and requirements established in the San Diego Basin Plan for point source discharges. These water quality standards must be complied with at all times, irrespective of the source and manner of discharge.</p>				
Response	Comment noted.				

Comment No.	36	Commenter No.	27	Comment Subject	Hydromod
Comment	<p>FHBP supports the entire MS4 permit with emphasis on the following:</p> <p>The increased runoff characteristics from new development must be controlled to protect against increased erosion of channel beds and banks, sediment pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force. Special note: With this implementation there would be no need for 26 concrete drop structures in Aliso Creek.</p>				
Response	Comment noted.				

Comment No.	37	Commenter No.	24	Comment Subject	General
Comment	<p>FHBP supports the entire MS4 permit with emphasis on the following:</p> <p>Increased pollutant loads created by increased and uncontrolled urban development must be controlled to protect downstream receiving water quality.</p>				
Response	<p>Comment noted. The Tentative Order requires consideration of retrofitting existing development and the implementation low impact development controls at new development and redevelopment projects. These requirements are expected to address and control pollutant loads from urban developments.</p>				

Comment No.	38	Commenter No.	24	Comment Subject	SUSMP
Comment	<p>FHBP supports the entire MS4 permit with emphasis on the following:</p> <p>Development that is ordinarily insignificant in its impact on the environment may become significant in a particularly sensitive environment. Therefore, additional controls to reduce pollutants from new and existing development must be required for areas adjacent to or discharging directly to an ESA. This holds particularly true for Aliso Creek. Development has been uncontrolled and unmonitored for far too long.</p>				
Response	Comment noted.				

Comment No.	39	Commenter No.	24	Comment Subject	WURMP
Comment	<p>FHBP supports the entire MS4 permit with emphasis on the following:</p> <p>Non-storm water discharges should be effectively prohibited unless specifically exempted. Exempted discharges identified as a source of pollutants are required to be addressed through prohibition. Dry weather non-storm water discharges have been shown to contribute significant levels of pollutants and flow in arid, urban Southern California watersheds. The Co-permittees have identified landscape irrigation, irrigation water and lawn water, previously exempted discharges, as a source of pollutants and conveyance of pollutants to waters of the United States. In the case of Aliso Creek this is a chronic problem that is leading to not only destruction of the watershed and associated wildlife, but also to our receiving waters.</p>				
Response	Comment noted.				

Comment No.	40	Commenter No.	24	Comment Subject	General
Comment	<p>FHBP supports the entire MS4 permit with emphasis on the following:</p> <p>Co-permittees MUST reduce the discharge of pollutants in storm water urban runoff. This can no longer be ignored and the ongoing pollution can no longer be tolerated.</p>				
Response	Comment noted. The Storm Water Action Levels provide a measureable performance criteria on the reduction of pollutants discharged from the Copermittees MS4.				

Comment No.	41	Commenter No.	24	Comment Subject	General
Comment	<p>FHBP supports the entire MS4 permit with emphasis on the following:</p> <p>Pollutants can be effectively reduced in urban runoff by the application of a combination of pollution prevention, source control, and treatment control BMPs. Every available tool must be implemented now, with particular emphasis on construction and mobile businesses that include car detailing.</p>				
Response	Comment noted. The Tentative Order includes requirements for the Copermittees oversight of mobile businesses such as car detailers.				

Comment No.	42	Commenter No.	24	Comment Subject	General
Comment	<p>FHBP supports the entire MS4 permit with emphasis on the following:</p> <p>We support the assertion of the Sierra Club that the Board consider adoption of a citizen-based water quality monitoring program.</p>				
Response	<p>Although not specifically required in the Tentative Order, a citizen based water quality monitoring program would have benefits to the Copermittees. Such a program could potentially defray monitoring costs and serve as a public education tool. Even though the Tentative Order does not require that the Copermittees develop a citizen based water quality monitoring program, the Tentative Order also does not prohibit a Copermittee from developing such a program. We leave it at the discretion of the Copermittee to develop such a program and feel that a citizen based monitoring program can be integrated with the existing requirements of the Tentative Order.</p> <p>The State is also available to assist interested citizens in forming their own monitoring group. http://www.waterboards.ca.gov/water_issues/programs/swamp/cwt_volunteer.shtml</p>				

Comment No.	43	Commenter No.	24	Comment Subject	SAL
Comment	<p>FHBP supports the entire MS4 permit with emphasis on the following:</p> <p>Co-permittees must be required to implement a timely, comprehensive, cost-effective storm water pollution control program to reduce the discharge of pollutants in storm water from the permitted areas so as not to exceed the MALs.</p>				
Response	<p>Comment Noted. Please note that the terminology has changed from "Municipal Action Levels" (MALs) to "Stormwater Action Levels" (SALs).</p>				
Comment No.	44	Commenter No.	24	Comment Subject	LID
Comment	<p>FHBP supports the entire MS4 permit with emphasis on the following:</p> <p>Use of Low-Impact Development (LID) site design BMPs at new development, redevelopment and retrofit must be implemented.</p>				
Response	<p>Comment noted.</p>				
Comment No.	45	Commenter No.	24	Comment Subject	General
Comment	<p>FHBP supports the entire MS4 permit with emphasis on the following:</p> <p>Enforcement of local urban runoff related ordinances, permits, and plans must be an essential component of every urban runoff management program and specifically required in the federal storm water regulations and this Order.</p>				
Response	<p>Comment noted.</p>				
Comment No.	46	Commenter No.	24	Comment Subject	Retrofitting
Comment	<p>FHBP supports the entire MS4 permit with emphasis on the following:</p> <p>Retrofitting existing development with storm water treatment controls including LID, is mandatory to address storm water discharges from existing development that may cause or contribute to a condition of pollution or a violation of water quality standards. Cooperation with private landowners is mandatory to effectively identify, implement and maintain retrofit projects for the preservation, restoration, and enhancement of water quality.</p>				
Response	<p>Comment noted.</p>				
Comment No.	47	Commenter No.	24	Comment Subject	General
Comment	<p>FHBP supports the entire MS4 permit with emphasis on the following:</p> <p>Runoff treatment and/or mitigation must occur prior to the discharge of urban runoff into receiving waters.</p>				
Response	<p>Comment noted.</p>				
Comment No.	48	Commenter No.	24	Comment Subject	SUSMP
Comment	<p>FHBP supports the entire MS4 permit with emphasis on the following:</p> <p>Due to Orange County's significant, uncontrolled development, early pollutant control actions and further pollutant impact assessments by the Co-permittees are mandatory.</p>				
Response	<p>Comment noted.</p>				
Comment No.	49	Commenter No.	24	Comment Subject	ASBS
Comment	<p>FHBP supports the entire MS4 permit with emphasis on the following:</p> <p>Discharges of Waste to State Water Quality Protected Areas (SWQPAs) or Areas of Special Biological Significance (ASBS) must be prohibited except where allowable under a State approved Ocean Plan Exception or Special Condition.</p>				
Response	<p>This Section of the Order was removed prior to the July 2009 Hearing. It was removed to prevent redundancy, as the State regulations governing ASBSs under the California Ocean Plan already provide sufficient protection from MS4 discharges.</p>				

Comment No.	50	Commenter No.	24	Comment Subject	SUSMP
Comment	FHBP supports the entire MS4 permit with emphasis on the following: Discharges from each approved development project must be subject to the most stringent of management measures.				
Response	The standard for management measures is specified by the Clean Water Act. It specifies that controls are required to reduce the discharge of storm water pollutants to the maximum extent practicable and to effectively prohibit non-stormwater discharges.				

Comment No.	51	Commenter No.	24	Comment Subject	LID
Comment	FHBP supports the entire MS4 permit with emphasis on the following: It is mandatory that each Co-permittee must require each Priority Development Project to implement LID BMPs which will collectively minimize directly connected impervious areas, limit loss of existing infiltration capacity, and protect areas that provide important water quality benefits necessary to maintain riparian and aquatic biota, and/or are particularly susceptible to erosion and sediment loss. With this in mind, it would be virtually impossible for the County of Orange or the Army Corps of Engineers to even remotely consider a project such as the SUPER Project.				
Response	Comment noted.				

Comment No.	52	Commenter No.	24	Comment Subject	Hydromod
Comment	FHBP supports the entire MS4 permit with emphasis on the following: Each Co-permittee must revise its SSMP/WQMP to implement a watershed specific Hydromodification Management Plan (HMP) to include specific criteria for minimizing and mitigating hydrologic modification at all development and redevelopment projects. Again, this would require the County of Orange and Army Corps of Engineers to discard any notion of a project that contains any characteristics similar to the SUPER Project. The Army Corps has been tasked with an ecosystem restoration of Aliso Creek. The Corps' implied support of the MS4 Permit will assist in this effort which would include disconnecting impervious areas by reducing the percentage of Effective Impervious Area (EIA) to less than five percent of total project area; also disconnect impervious area from receiving waters using on-site or off-site storm water reuse, evapotranspiration, and/or infiltration for small precipitation events, based on limitations imposed by soil conditions, groundwater contamination potential and considerations for the use of amendments to improve soil conditions.				
Response	The hydromodification requirements have been modified to be more consistent with the requirements in the San Diego County MS4 permit. Through discussions with the Copermitees and the interested parties, a metric using Effective Impervious Area (EIA) was not included in the Tentative Order's requirements. In lieu of the EIA metric, the draft Tentative Order now requires Low Impact Development BMPs to retain and/or biofilter the volume of runoff produced from the 24-hour 85th percentile storm.				

Comment No.	53	Commenter No.	24	Comment Subject	Construction
Comment	FHBP supports the entire MS4 permit with emphasis on the following: Each Co-permittee must annually notify the Regional Board, prior to the commencement of the wet season, of all construction sites with potential violations such as the SUPER Project or any other construction project in the Aliso Creek watershed.				
Response	Comment noted.				

Comment No.	54	Commenter No.	24	Comment Subject	Retrofitting
Comment	FHBP supports the entire MS4 permit with emphasis on the following: Each Co-permittee must implement a retrofitting program which meets the requirements of this section, solves chronic flooding problems, reduces impacts from hydromodification, incorporates LID, supports stream restoration, systematically reduces downstream channel erosion, reduces the discharges of storm water pollutants from the MS4 to the MEP, and prevents discharges from the MS4 from causing or contributing to a violation of water quality standards.				
Response	Comment noted.				

Comment No.	55	Commenter No.	24	Comment Subject	WURMP
Comment	<p>FHBP supports the entire MS4 permit with emphasis on the following:</p> <p>The Watershed Permittees must develop, implement, and update annually, a Watershed Water Quality Work Plan that ranks each watershed's highest priority issues. The Watershed Water Quality Work plan shall identify planned watershed assessment, BMP evaluation, BMP selection, and BMP implementation efforts for each watershed planning area for the full 5-year Permit cycle. The goal of the work plan is to demonstrate a responsive and adaptive approach for the judicious and effective use of available resources to attack the highest priority problems on a watershed basis. This element should have special emphasis and be brought to the attention of the Army Corps of Engineers in light of their Aliso Creek Mainstem Ecosystem Restoration Project.</p>				
Response	Comment noted.				

Comment No.	56	Commenter No.	24	Comment Subject	General
Comment	<p>Restoration of a healthy ocean must be achieved. We cannot protect the ocean by poisoning it with our wastewater and urban runoff. In addition, our County wilderness parks are set aside for recreation, wildlife habitat, open space, and protection of sensitive ecosystems and individual species of plants and animals. Our riparian wetland streambeds are the most productive ecosystems within the coastal sage-scrub and oak woodland zones of the chaparral ecosystems, and must be protected.</p> <p>Natural, non-invasive solutions are technologically available as soon as citizens, resource agencies and elected representatives, working together, are ready to act.</p> <p>FHBP applauds Congresswoman Loretta Sanchez and her senior advisor, Dolores Gonzalez-Hayes for their proactive stance in bringing the environmental community, County of Orange Watersheds and Army Corps of Engineers together. It is imperative that these two agencies move forward with a plan that will eliminate concrete from Aliso Creek (existing and future) while adopting the policies of the new MS4 Permit, which will dramatically minimize the runoff and current flow rates that are creating pollution and destroying the creek's natural resources.</p> <p>The proposal to build 26 step-dams (grade-control structures built 10' deep into the soil spanning the entire flow area) in the lower Aliso Creek should be eliminated as an alternative in this feasibility study. This "engineering wonder" would turn our park into a flood control channel device and do nothing to diminish the doubling of storm water flows and dry weather urban runoff that is polluting the ocean and eroding the banks.</p> <p>Alternatives that should be considered in the watershed and surrounding cities are as follows: large-scale cistern strategies that capture runoff for reuse; modernizing the Laguna Niguel sewage treatment plant by OCSD, including recycling of gray water and groundwater recharge, powering the facility with captured methane gas, and reducing the toxic sewage that is dumped 1.2 miles off Aliso Beach. As well, Low-Impact Development (LID) strategies must be applied to areas of the watershed where applicable including rain gardens and bioretention; rooftop gardens; sidewalk storage; vegetated swales, buffers, and tree preservation; rain barrels; permeable pavers; soil amendments; impervious surface reduction and disconnection; and pollution prevention programs instituted for residential properties.</p>				
Response	Comment noted. Interested parties with comments such as these should pay particular attention to opportunities to weigh-in on the environmental review process, for projects affecting Aliso Creek, conducted pursuant to the California Environmental Quality Act (CEQA).				

Comment No.	57	Commenter No.	25	Comment Subject	Finding
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Comment Below is a "cut & paste" from the new permit. I was under the impression that I needed to petition the Board to achieve parity (Same Beneficial Uses and Water Quality Objectives) due to this anadromous ES/ESU via BPO Amendments during the Triennial Review Process.

Does the new permit fulfill/accomplish my parity goal to protect this aquatic? In this case, I wouldn't need to waste either Staff or Board time.

In other words, can this NPDES accomplish by "fiat" what I thought I needed to formally petition as BPO amendments (plural)?

In the first sentence below, this NPDES doesn't APPEAR to cite Water Quality & Beneficial Use objectives on a watershed-by-watershed basis but rather generically. As there is no reference to EXISTING BPO, I'm unsure if this ambiguity might subsequently be challenged by ACW copermittees or lead agency The County of Orange.

I would ask Staff to note that the Central Coast (Region 3) BPO are more in alignment with the ABSOLUTE MINIMAL Dissolved Oxygen (DO) requirements for O. mykiss, that is 7.0 mg/l, not the 6.0 mg/l required in R9-2009-0021. Aquatic biologists and fishery experts seem unanimous that 8.0 mg/l assures healthy spawning conditions in urbanized streams like ACW that experience tremendous solar gain (elevated temperatures).

Will I be allowed to petition the Board at the R9-2009-0021 Hearing to slightly increase that BPO regarding DO for this reissued permit?

E. STATUTE AND REGULATORY CONSIDERATIONS
 2. The Water Quality Control Plan for the San Diego Basin (Basin Plan), identifies the following beneficial uses for surface waters in Orange County: Municipal and Domestic Supply (MUN), Agricultural Supply (AGR), Industrial Process Supply (PROC), Industrial Service Supply (IND), Ground Water Recharge (GWR), Contact Water Recreation (REC1) Non-contact Water Recreation (REC2), Warm Freshwater Habitat (WARM), Cold Freshwater Habitat (COLD), Wildlife Habitat (WILD), Rare, Threatened, or Endangered Species (RARE), Freshwater Replenishment (FRSH), Hydropower Generation (POW), and Preservation of Biological Habitats of Special Significance (BIOL). The following additional beneficial uses are identified for coastal waters of Orange County: Navigation (NAV), Commercial and Sport Fishing (COMM), Estuarine Habitat (EST), Marine Habitat (MAR), Aquaculture (AQUA), Migration of Aquatic Organisms (MIGR), Spawning, Reproduction, and/or Early Development (SPWN), and Shellfish Harvesting (SHELL).

Response The Tentative Order does not establish the same Beneficial Uses and Water Quality Objectives that the commenter seeks. Those designations are established by the Basin Plan in the triennial review process. We encourage the commenter to participate in the Basin Plan triennial review. Finding E.2 of the Tentative Order states in general all the Beneficial Uses identified for all of the surface waters within Orange County and is not limited to the Aliso Creek Watershed.

Comment No.	58	Commenter No.	26	Comment Subject	General
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Comment First, the City Council wishes to compliment the Regional Board and its staff for your efforts to reduce urban runoff and enhance water quality. Our City is fully committed to aggressively pursue all reasonable efforts to improve the quality of the water in our creeks and the ocean.

Response Comment noted.

Comment No.	59	Commenter No.	26	Comment Subject	FETD
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Comment The Council believes that your Board should adopt a permit which authorizes projects which provide for the diversion of nuisance water during dry weather into treatment facilities, whether they be existing sewer treatment plants or specialized programs to cleanse water in a creek. When filtration is employed to reduce bacteria and other pollutants, it should be allowed either at the source, i.e. before the pollutants enter a waterway, or at the end of the line before a creek empties into the ocean since our beaches afford a significant water contact recreational venue for thousands of Southern California residents.

Response The approval process for diversion systems in a creek would be through a Clean Water Act section 401 certification, Waste Discharge Requirements and/or individual NPDES permits. The Tentative Order is not the appropriate mechanism to regulate such facilities. Treatment systems at the end of the line before a creek empties into the ocean do not protect and enhance water quality in the creek upstream from the treatment facility. In fact, such systems could encourage degradation of the upstream portions of the creek because dischargers are aware that treatment exists at the mouth of the creek. In addition, such systems at the end of the creek have historically had implementation problems due to excessive flows, sediment loads, and design issues.

Comment No.	60	Commenter No.	26	Comment Subject	Economic
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Comment In supporting efforts to improve water quality in our creeks and ocean, the Council is also concerned about the cost of some of the proposed measures. Our small community is expecting a \$2 million "borrowing" of our property tax revenues by the State this year. At the same time, we are experiencing significant decreases in revenues from the sales tax and transient occupancy tax. We believe that virtually all governmental agencies in California are experiencing similar austerity. Therefore, the Board should carefully examine provisions of the proposed order to ensure that the proposed measures are both effective in reducing pollutants and reasonable in expense.

Response Several changes have been made to the Tentative Order to seek a cost neutral permit when compared to the previous permit. Most significantly, the Tentative Order eliminates multiple monitoring requirements and allows the Copermitees to substitute participation in regional Monitoring programs. These actions are expected to be more cost efficient and prevent redundancy. Regional Board staff considered submitted economic information in developing elements of the Tentative Order. The Regional Board, however, is not required to conduct a cost-benefit analysis.

Comment No.	61	Commenter No.	27	Comment Subject	NEL
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Comment Dry weather flows may originate from a number of sources including groundwater ingress, which is a natural source of water. Dry weather flow does not originate from consistent activities or locations, or at consistent flow rates. Assigning the word "effluent" infers that this is a relatively consistent, predictable and controllable flow originating from a single industrial process (such as a wastewater treatment plant). As such, it is relatively easy to control and treat. This is not the case with dry weather flows.

Response Effluent refers to the discharge of pollutants from a point source into waters of United States. The discharge of runoff from a MS4 is considered to be a discharge of pollutants from a point source into waters of the United States as defined in the Clean Water Act.

Comment No.	62	Commenter No.	27	Comment Subject	NEL
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Comment Assigning the term "effluent" to dry weather flow will trigger mandatory minimum penalties under the Clean Water Act. This is inappropriate for the above-referenced reasons, and will likely result in the relevant municipal separate storm sewer system (MS4) operator(s) being in immediate and consistent violation of the Clean Water Act. The term effluent should be replaced by the word "flow."

Response Please see response to Comment no. 61.

This comment has been previously addressed; please also see Comment no. 82 in the July 1, 2009, Response to Comments IV.

Comment No.	63	Commenter No.	27	Comment Subject	Urban Runoff
Comment	At present the stormwater programs apply to MS4 systems which tend to be located in urbanized areas. Removing the term "urban" infers that these requirements apply to all runoff. This is an expansion of the requirements under the Clean Water Act and would logically apply to all runoff within a jurisdiction whether or not the jurisdiction has control over the sources of runoff (agricultural sources, or undeveloped areas, for example) or the conveyance (natural drainage). Has any economic analysis been conducted to assess the impact of this change? We consider this an unfunded mandate that exceeds the requirements of an MS4 permit, as it appears to be applied to areas which do not necessarily drain to an MS4. The word "urban" should be reinstated when discussing runoff.				
Response	<p>Removal of the term "urban" is not an expansion of the requirements under the Clean Water Act and is actually more consistent with the Clean Water Act and the codified Federal Regulations. The term "urban runoff" does not appear in the Clean Water Act MS4 regulations nor the Code of Federal Regulations. The applicable regulations require a NPDES permit for all MS4 discharges in Orange County regardless if the MS4 is in an urban or rural area. Please see the discussion in the Tentative Order's fact sheet.</p> <p>The comment regarding unfunded mandates has been extensively considered in all previous response to comments. The comment does not raise any new issues from the previous comments. The State's water quality protection requirements within the Tentative Order are authorized by Federal Law, and are not unfunded mandates.</p> <p>The Fact Sheet and Response to comments Nos. 155 and 165 in the July 1, 2009, Response to Comments IV; Comment No. 5 in the July 6, 2007, Response to Comments I; Comment Nos. 1 and 9 in the December 12, 2007, Response to Comments II; Comment No. 1, 2, and 3 in the February 13, 2008 Response to Comments III; all provide discussions of these issues. No changes were made in response to this comment.</p>				

Comment No.	64	Commenter No.	27	Comment Subject	MEP
Comment	Introduction of Numeric Limits to define Maximum Extent Practicable (MEP). This is inconsistent with the concept of the iterative process where you have a chance to adapt BMPs based on observation, instead of reaching a numeric limit which is more commonly associated with Total Maximum Daily Loads (TMDLs). This is also inconsistent with the 2006 Blue Ribbon Panels recommendation that numeric limits are inappropriate for municipal permits. The NELs and the MALs should be removed from the permit.				
Response	<p>Please see response to Comments nos. 25, 33 and 39 in the July 1, 2009, Response to Comments IV, as this concern was addressed previously.</p> <p>Please also see the Regional Board Counsel Memorandum dated November 05, 2009.</p>				

Comment No.	65	Commenter No.	27	Comment Subject	SUSMP
Comment	Based on the regional model review for San Diego County updating the SUSMP annually is not feasible. It would be a more effective use of resources to update the SUSMP less frequently. Revise to incorporate findings from effectiveness studies once every permit cycle.				
Response	The Copermittees must update the BMPs in their local SSMP during the third year of implementation of the Tentative Order. The BMPs update is not required annually as the commenter implies. The Tentative Order does require the Copermittees to annually incorporate findings from local treatment BMP effectiveness studies (e.g., ones conducted by, or on-behalf of, public agencies in Orange County). This is not intended to be an annual comprehensive update of BMPs but rather an incorporation of existing data. As such, it is feasible for the Copermittees to incorporate these findings into their local SSMPs.				

Comment No.	66	Commenter No.	27	Comment Subject	Existing Development
Comment	<p>Based on our experience, not all food facilities warrant annual inspection (coffee shops, sale of largely prepackaged foods, such as ice cream parlors etc). It would not be an effective use of resources if the permittee cannot differentiate between facilities that genuinely have potential for exposures and those that do not.</p> <p>This should be revised to require that food facilities be prioritized based on potential for exposures and that the annual inspection requirement be only applied to those deemed to have the highest threat of exposure of pollutants to urban runoff. The permittees should be allowed to develop their own method to determine how the facilities should be prioritized, but this should be based on: observations from previous inspections; record of complaints and violations associated with the specific facility; potential sources of pollutants (sale of prepackaged products versus facilities with rendering bins, food preparation waste, outside eating areas, etc).</p>				
Response	<p>The Copermittees have already been inspecting restaurants annually as part of the County Health Department inspections. As such this change is not considered significant because it allows the Copermittees to continue with their existing programs. Restaurants have been found to present many threats to water quality and standard educational efforts are not effective because restaurants are subject to frequent management and personnel changes. For these reasons, the Tentative Order requires restaurants to be inspected annually.</p>				

Comment No.	67	Commenter No.	27	Comment Subject	Retrofitting
Comment	<p>Requirement to retrofit existing development (page 65). It is not clear what mechanism(s) will be available to accomplish this requirement, nor how it would be funded. Further clarification is needed on how this can be legally accomplished and how it would be funded.</p> <p>It would be a better use of resources for jurisdictions to develop measures during the review-of any discretionary project to ensure that retrofitting stormwater BMPs are considered. Preparing a comprehensive report on the City-wide potential for retrofit, when it is unlikely that there would be any legal opportunity, much less financial resources, to extensively implement it appears to be wasteful. The goal could be better attained by using the available permitting process to achieve retrofits where feasible.</p>				
Response	<p>Retrofitting existing development is a widespread practice across the United States. Although a Copermittee may not have the legal authority to explicitly require a private landowner to retrofit their property, the Copermittee has various other means to communicate and cooperate with the private property owner. The Tentative Order lists several mechanisms available to the Copermittee in cooperating with the private landowner such as demonstration projects, retrofits on public lands or easements, education and outreach, subsidies, retrofit projects as mitigation or ordinance compliance, public and private partnerships, and in lieu fee reductions for existing MS4 discharges. The Tentative Order requires the ranking and prioritization of retrofitting projects based in part on feasibility and cost effectiveness, thereby avoiding duplicative and wasteful efforts. This prioritization maximizes benefits by implementing retrofitting projects that will be most effective and affordable. No further changes have been made to this requirement.</p>				

Comment No.	68	Commenter No.	27	Comment Subject	Monitoring
Comment	<p>Expansion of monitoring requirements to include wet and year round dry sampling of MS4. Expansion of constituents to be analyzed. Introduction of new programs (sediment toxicity study and aquatic habitat monitoring)(Attachment E).</p> <p>Sediment toxicity may originate from historic sources which the permittee never had control over. Also current activities not under the control of the permittee will also impact aquatic habitats and sediment. It is inappropriate to use an MS4 permit as a catch-all for all monitoring that is conducted in a watershed. Monitoring should be focused on the impact from the MS4 and constituents of concern associated with the MS4.</p> <p>Presumably these studies are in addition to monitoring associated with TMDLs, therefore resulting in duplication of effort and costs.</p>				
Response	<p>The Regional Board has attempted to alleviate the costs from additional monitoring by introducing more flexibility into the requirements for Storm Water Action Levels and Dry Weather Non-storm Water Effluent monitoring. In addition, required Bioassessment sampling has been reduced and language has been added to allow for participation in Regionalized monitoring programs.</p> <p>The Regional Board agrees that some sediment toxicity, primarily in areas of historic industrial or agricultural activity, may be due to historic sources. For example, Dana Point harbor sediment sampling has detected DDE, indicating historic DDT use in the area. However, the Regional Board has included a required sediment toxicity study in urban streams for a number of reasons. First, as referenced in the fact sheet, recent studies and monitoring in the San Diego Region have shown that pesticides that are not "historic" impact urban stream receiving waters. Second, current bioassessment protocols include a measurement of water toxicity, but not sediment toxicity. Bioassessment conducted by the Copermittees under Order R9-2002-01 has shown consistently poor to very poor IBI scores with no strong relationship to water chemistry or physical habitat. Third, multiple waters within the San Diego Region have a current or proposed 303(d) listing for toxicity. It is expected this special study will complement, not duplicate, any TMDL efforts by the Copermittees to address these listings. Lastly, Copermittees have identified specific categories of non-storm water discharges as a source and conveyance of pollutants, including pesticides, to waters of the United States.</p> <p>Please remember that, the MS4 owner/operator is responsible for discharges into their MS4 system. Please see Comment no. 44 in the July 1, 2009, Response to Comments IV.</p>				

Comment No.	69	Commenter No.	27	Comment Subject	General
Comment	<p>Overall we are concerned at the additional layer of reporting required in the permit (annual workplans in addition to annual reports and management plans). This further diverts precious resources from direct improvements to water quality to the preparation of compliance documents that overlap. We strongly recommend that the RWQCB reconsider its need for such extensive documentation (which would be in addition to any TMDL reporting).</p>				
Response	<p>We are not aware of any additional layer of reporting requirements. A watershed workplan has taken the place of the WRMP requirements. The annual reports and management plans are preexisting requirements. As stated in section K. Reporting, the Copermittees may propose alternative reporting criteria and schedules for the Executive Officer's acceptance.</p>				

Comment No.	70	Commenter No.	28	Comment Subject	FETD
Comment	<p>I am writing on my own behalf to ensure that the action taken by the Laguna Beach City Council on June 2, 2009 is clearly represented. The following motion (taken from the Recap provided by the City Clerk) was passed in regard to item 13. COMMENTS ON NATIONAL POLLUTANT DISCHARGE ELEIMINATION SYSTEM PERMIT.</p> <p>"Moved by Mayor Pro Tem Pearson, seconded by Councilmember Rollinger and carried unanimously to send a letter to the San Diego Regional Water Quality Control Board over the Mayor's signature, incorporating the language in the first paragraph of the Memorandum written by the Environmental Committee and encouraging the allowance of dry weather diversion and filtration both at the source and at the end of the line. The letter is to include a statement that Laguna Beach is concerned, as are other cities, regarding costs related to enforcement monitoring."</p>				
Response	<p>Please see response to comment no. 59.</p> <p>Several changes have been made to the Tentative Order to seek a cost neutral permit when compared to the previous permit. Most significantly, the Tentative Order eliminates multiple monitoring requirements and allows the Copermittees to substitute participation in regional Monitoring programs. These actions are expected to be more cost efficient and prevent redundancy. To the extent economic information was submitted, the Regional Board staff considered economic considerations in developing elements of the Tentative Order but the Regional Board is not required to conduct a cost-benefit analysis.</p>				

Comment No.	71	Commenter No.	28	Comment Subject	General
Comment	<p>The following is the language in the first paragraph of the Memorandum written by the Environmental Committee:</p> <p>"The City Council of the City of Laguna Beach applauds SDRWQCB in its efforts to reduce runoff and improve water quality. We are especially concerned with the watershed of Aliso Creek where excess runoff has severely incised the waterways of the Aliso and Wood Canyons Wilderness Park. The waters of lower Aliso Creek, of its estuary and of the Pacific Ocean near the mouth of the creek have long shown high levels of a wide range of pollutants. We strongly support your efforts to reduce both storm water discharge and dry-season discharge into the creek as well as your efforts to increase the quality of the water entering the creek."</p> <p>As the City's elected City Clerk for nearly thirty years prior to my election as a Member of the City Council, it is important to me that the actions taken by the City Council be clearly transmitted. Thank you for your efforts on our behalf.</p>				
Response	<p>Comment noted.</p>				

Comment No.	72	Commenter No.	29	Comment Subject	Overirrigation
Comment	<p>First, we would like to express our support for one aspect of the March 13, 2009 Tentative Draft Permit which was not covered by our May 14 letter. We recognize that section B, regarding Non-Stormwater Discharges removes "landscape irrigation, irrigation water, and lawn watering" from the listed categories of non-prohibited nonstormwater discharges. We note that the draft Fact Sheet identifies discharges from these categories to be substantial sources of pollutants. We agree that it is valid for the Regional Board to remove these sources from the list of non-prohibited non-stormwater discharges.</p>				
Response	<p>Comment noted.</p>				

Comment No.	73	Commenter No.	29	Comment Subject	LID
Comment	<p>We are encouraged by the revisions made to the draft permit's Low Impact Development (LID) provisions in the June 8 update. We have been supportive of the Santa Ana Regional Board's Orange County MS4 permit, which was adopted on May 24, 2009. The LID provisions included in the June 8 update are generally consistent with the Santa Ana Regional Board's permit. We also appreciate that the June 8 update addresses the comments pertaining to LID in our May 14 letter.</p>				
Response	<p>Comment noted.</p>				

Comment No.	74	Commenter No.	29	Comment Subject	SUSMP
Comment	Section F .1.d requires the submittal of an updated model SUSMP within two years of permit adoption. We note that in other permits, including the May 24, 2009 Santa Ana Regional Board permit for Orange County, similar plans must be submitted within one year of permit issuance.				
Response	The Tentative Order requires the SSMP to be submitted within two years at the request of the Copermitees. They specifically requested that this requirement not be consistent with the Santa Ana Regional Board permit for Orange County. This change was made in response to comment No. 102 in the July 1, 2009, Response to Comments IV. By allowing two years to develop SSMP, this allows the update of the SSMP and the development of the HMP to coincide.				
Comment No.	75	Commenter No.	29	Comment Subject	LID
Comment	Section F .1.d.4.c.ii - The updated LID language includes the term "biofiltration." Although this term is commonly used, as a general matter, its exact meaning is unclear. For example, in some circumstances, distinctions have not been made between infiltration and biofiltration. Conceptually, we believe that a well designed and operated biofiltration system can be consistent with LID principles by reducing flow volumes and protecting water quality. However, without a clear definition of biofiltration, there is the potential for the use of approaches that are contrary to LID. This section of the draft permit takes a step in the right direction by providing a total volume requirement for an acceptable biofilter. We would be interested in conferring further with you to improve the permit's definition of biofiltration.				
Response	The latest Tentative Order includes a definition of biofiltration in Attachment C.				
Comment No.	76	Commenter No.	29	Comment Subject	TMDL
Comment	Lastly, we'd like to refer to our May 14 comment letter's mention of the permit's provisions regarding the incorporation of Total Maximum Daily Loads (TMDLs). We continue to believe that the draft permit's TMDL provisions should be clarified, and would be glad to consult with you on this issue.				
Response	Please see response to comment no. 305 from the July 1, 2009, Response to Comments IV.				
Comment No.	77	Commenter No.	30	Comment Subject	General
Comment	NAIOP SoCal has reviewed the comments submitted by the County of Orange in their May 15, 2009 document. We will not repeat what they have set forth, but will incorporate them by reference as though fully set forth herein. We agree with the issues they raised and do feel that further discussions would be very beneficial in developing a final permit that addresses everyone's goal; cleaner water.				
Response	Comment noted.				
Comment No.	78	Commenter No.	30	Comment Subject	SAL
Comment	NAIOP SoCal will highlight a few of the areas of concern. First, the draft permit attempts to establish Municipal Action Levels (MALs). NAIOP does not believe MALS are justified or warranted, as well as not being technically supportable. In fact, the Blue Ribbon Panel Report does not support the use of numeric effluent criteria on stormwater discharges, and should be deleted.				
Response	The issue raised by this comment is not new. Please see responses to Comment nos. 25 and 33 in the July 1, 2009, Response to Comments IV.				

Comment No.	79	Commenter No.	30	Comment Subject	TMDL
Comment	The draft permit also attempts to establish Total Maximum Daily Loads (TMDLs) for 303(d) impaired waters. Yet, there have been no TMDLs approved by the Federal or State governmental agencies. What is set forth in the draft permit appears to be unworkable and impracticable. Any interest in pursuing TMDLs should be done by working on one impaired body and its associated watershed at a time.				
Response	<p>On June 11, 2008, the San Diego Water Board adopted Resolution No. R9-2008-0027 amending the Basin Plan to incorporate Total Maximum Daily Loads (TMDLs) for indicator bacteria Baby Beach in Dana Point Harbor and Shelter Island Shoreline Park in San Diego Bay.</p> <p>On June 16, 2009 the State Water Resources Control Board adopted Resolution No. 2009-0053 to approve an amendment to the Water Quality Control Plan for the San Diego Region (Basin Plan) to incorporate Total Maximum Daily Loads for Indicator Bacteria in Baby Beach in Dana Point Harbor and Shelter Island Shoreline Park in San Diego Bay.</p> <p>The State's Office of Administrative Law (OAL) approved the TMDLs on September 15, 2009. The effective date of the TMDLs is the date of OAL approval.</p> <p>The United States Environmental Protection Agency (USEPA) approved the TMDLs on October 26, 2009.</p>				

Comment No.	80	Commenter No.	30	Comment Subject	SUSMP
Comment	Next is the limit on impervious area on a project site to 5% of the total area. This really is not reasonable or practical. Setting development restrictions that cannot be practically achieved is not an approach that leads to effective means of addressing the runoff issue. The 5% limit needs to be deleted.				
Response	Through discussions with the Copermittees and the interested parties, a metric using Effective Impervious Area (EIA) was not included in the Tentative Order's requirements. In lieu of the EIA metric, the draft Tentative Order requires Low Impact Development BMPs to retain and/or biofilter the volume of runoff produced from the 24-hour 85th percentile storm.				

Comment No.	81	Commenter No.	30	Comment Subject	SUSMP
Comment	We also want to emphasize the concept of a County-wide Model WQMP that is consistent for the entire County and one that does not include different standards for new development and redevelopment for North and South County areas.				
Response	The requirements of the Tentative Order do not prevent or obstruct the implementation of a consistent County-wide WQMP. The standards for new development and redevelopment in the Tentative Order and in the Santa Ana Regional Board's North Orange County MS4 permit are not mutually exclusive. A County-wide WQMP meeting the requirements of the Tentative Order would also meet the requirements of the North Orange County permit, and would be beneficial to the watersheds of both portions of Orange County.				

Comment No.	82	Commenter No.	30	Comment Subject	SUSMP
Comment	Sections XII.B.4A and B of the North County Permit provides several options for the treatment control BMP sizing calculations, whereas the South County Permit provides only one option. We request that the language in Section F.1.d.6 of the South County Permit be updated to reflect all of these options, which is consistent with Exhibit 7.11 of the OC DAMP (Page 7.11-47).				
Response	The Tentative Order limits the selections of methods used to determine the appropriate volume of storm water runoff to be treated. This limitation ensures that priority development project proponents utilize the most accurate information to determine the volume or flow of runoff that must be treated. Using detailed local rainfall data, the County of Orange has developed the 85th Percentile Precipitation Isopluvial Map, which exhibits the size of the 85th percentile storm event throughout Orange County. Since this map uses detailed local rainfall data, it is more accurate for calculating the 85th percentile storm event than other methods which were included in Order No. R9-2002-0001. The other methods found in Order No. R9-2002-0001 were included as options to be used in the event that detailed accurate rainfall data did not exist for various locations within Orange County. The development of the 85th Percentile Precipitation Isopluvial Map makes these other less accurate methods superfluous. Therefore, these other methods for calculating the 85th percentile storm event have been removed from the current Order. This limitation also simplifies compliance and oversight for the project developer, municipality, and Regional Board.				

Comment No.	83	Commenter No.	30	Comment Subject	SUSMP
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Comment Section XII.C.5 of the North County Permit discusses many of the issues that limit the applicability of LID principles in certain situations (e.g., unfavorable soil conditions, existing contamination issues, etc.). The option for the permittees to incorporate the LID principles into larger sustainability programs that balance the benefits of LID against other laudable sustainability objectives should be included in the South Orange County Permit.

Response Implementation of LID is a sustainability objective with the dual purpose of pollutant capture and hydromodification control. As such, it is difficult to substitute the benefits of LID with other laudable sustainability objectives that may not be measurable or water quality based. In addition, we must be careful where the ends do not justify the means. A site that meets other laudable sustainable objectives would still presumably be discharging the same pollutant load unless LID measures were implemented on site. We cannot support a program that would allow a project not to implement LID while still discharging the same pollutant load regardless of other laudable sustainability objectives. Therefore, the Tentative Order includes section F.1.d.(7)(g) allowing the Copermittee's to implement a pollutant credit system at their discretion provided that such a program exhibits that it does not allow a net impact from pollutant loadings over and above the impact caused by projects meeting LID requirements.

Comment No.	84	Commenter No.	30	Comment Subject	Overirrigation
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Comment As also discussed in previous comment letters provided by the County of Orange, we are concerned with the elimination of irrigation runoff required by the South County Permit. Our experience has taught us that irrigation runoff can be feasibly minimized, however complete elimination of irrigation runoff is unlikely to be 100% achievable. We recommend the language of Section XII.B.3.a that requires irrigation runoff to be minimized to the maximum extent practicable rather than eliminated.

Response The comment regarding the prohibition on overirrigation practices was addressed in the previous response to comments. The comment does not raise any new issues from the previous comments.

Please see the discussion in the Fact Sheet for finding C.15; and the July 1, 2009, Response to Comments IV, Response Nos. 28, 52, 76, and 159. No changes have been made in response to this comment.

The exemptions for irrigation runoff from prohibition have been removed as required per 40 CFR 122.26, which requires such illicit discharges be addressed where such discharges are identified as sources of pollutants. Furthermore, irrigation runoff is a non-storm water discharge that is required to be effectively prohibited by the Clean Water Act and is not subject to the maximum extent practicable standard. The Regional Board expects the Copermittees to treat irrigation runoff, through ordinance and inspection, like any other prohibited non-storm water discharge. The Copermittees current non-storm water prohibitions, that do not include prohibiting over irrigation runoff, are also not 100 percent effective. The Regional Board realizes that the large number and diffuse geography of storm drain inlets makes a 100 percent prohibition difficult to enforce. Nevertheless, the Copermittees currently have non-storm water prohibitions within their ordinances and it is expected that they make a good faith effort in enforcing those ordinances. The language suggested from Section XII.B.3.a appears to be contrary to federal regulations. Non-stormwater discharges are prohibited according to the Clean Water Act. 40 CFR 122.26 requires "a program including inspections, to implement and enforce an ordinance, orders or similar means to prevent illicit discharges to the municipal separate storm sewer system; this program description shall address all types of illicit discharges, however the following category of non-storm water discharges or flows [including overirrigation] shall be addressed where such discharges identified by the municipality as sources of pollutants to waters of the United States."

Comment No.	85	Commenter No.	30	Comment Subject	Hydromod
Comment	The interim hydromodification requirements of the South County Permit section F.1.h.6 are extensive and include the 1-year through the 10-year storm and potential for continuous modeling requirements along with an EIA requirement. The hydromodification requirement of the North County Permit (as set forth in Section XII.D) is limited to the 2-year storm and has clear provisions for determining compliance and for determining the applicability of the hydromodification requirement. Based on our consultation with several storm water and water quality engineers, the design and approval process for implementing a system that control multiple storms is exponentially more difficult than the design approval process for a single storm event. This increased complexity in design, however, does not translate to a radically altered design in the constructed condition. We feel the complexity does not greatly add to achieving the regional water quality objectives and recommend that the Regional Board replace the hydromodification language from the North County Permit with the South County Permit language entirely.				
Response	<p>The interim hydromodification requirements have been rewritten and no longer contain references to the EIA. Additionally, the requirements call for use of a continuous simulation hydrologic model to implement flow control BMPs for flow rates that fall within 10 percent of the 2-year, and up to the 10 year, storm event. Flows leaving a project site that do not fall within this range do not need to be controlled under the interim requirements.</p> <p>The Regional Board finds that mitigating runoff above the 2-year storm is necessary to prevent erosion and impacts to downstream receiving waters. Studies have shown that storms greater than the 2-year storm do most of the erosive work (SCVURPPP, 2005). The requirement for continuous modeling is necessary to help dischargers decipher both the applicability of hydrologic controls and whether or not compliance will be achieved with proposed BMPs. The Regional Board recognizes that Copermitees will need to learn how to perform continuous modeling and the design approval process associated with these hydromodification requirements. This process, however, is not without precedent. Copermitees in both the Bay area and San Diego area have successfully implemented requirements to perform continuous modeling for purposes of hydromodification management, and have been able to do so in evaluating effects from a range of storms (not a single storm event). The Regional Board disagrees that mitigating effects from a range of storms does not add to achieving regional water quality objectives because, as previously stated, storms greater in intensity than the 2-year storm perform the majority of the work that causes downstream erosion.</p>				

Comment No.	86	Commenter No.	30	Comment Subject	SUSMP
Comment	In general, the changes that NAIOP requests will not negatively impact water quality in the region and the recommended changes are consistent with the overall approach taken for water quality protection in the region. In fact, we strongly feel that a consistent Model WQMP for the entire County will increase the probability that the design measures in the Permits will be implemented in a more consistent manner when all cities have the same requirements. The overall differences with respect to new development/redevelopment in the adopted Permit for North Orange County and the draft permit for South Orange County are minimal enough that the objectives for both Permits can be achieved by a County-wide Model WQMP that reflects the specific design and numerical requirements set forth in the northern Orange County Permit.				
Response	The requirements of the Tentative Order do not prevent or obstruct the implementation of a consistent County-wide WQMP. The standards for new development and redevelopment in the Tentative Order and in the Santa Ana Regional Board's North Orange County MS4 permit are not mutually exclusive. A County-wide WQMP meeting the requirements of the Tentative Order would also meet the requirements of the North Orange County permit, and would be beneficial to the watersheds of both portions of Orange County.				

Comment No.	87	Commenter No.	31	Comment Subject	SUSMP
Comment	Thank you for providing Rancho Mission Viejo (RMV) with the opportunity to review and comment on the referenced Revised Tentative Order ("Order"). We have received and reviewed the revised language concerning Low Impact Development recently distributed by the Regional Board. We are supportive of the addition of the Alternative Performance Criteria for Watershed-Based Projects (Section F.1.c. (8)).				
Response	Comment noted.				

Comment No.	88	Commenter No.	32	Comment Subject	LID
Comment	NRDC believes that good policy and law require a standard both to retain onsite the design storm whenever possible and to provide offsite mitigation for any of the design storm volume not retained onsite. The most recent draft language issued by the Regional Board would require onsite retention but allow "biofiltration" to qualify toward meeting the design storm volume obligation when onsite retention is technically infeasible. Tentative Order ¶ F.1.d.(4)(c). For reasons previously elaborated in our comments and discussed briefly below, we do not support crediting water treated through biofiltration BMPs toward the onsite, 85th percentile storm retention obligation that otherwise applies to projects under Tentative Order ¶ F.1.d.(4)(c)(i). When biofiltration practices are used (we do not oppose their use when onsite retention of the design storm is technically infeasible), this should trigger the requirement to provide offsite mitigation or in-lieu funds.				
Response	<p>The Regional Board maintains that bio-filtration is part of a comprehensive LID program. Effective bio-filtration provides pollutant removal and energy dissipation. Biological removal of pollutants can even be an improvement over simply keeping pollutants on-site until rainfall over the design-storm criteria washes pollutants into receiving waters. Removal of pollutants and prevention of downstream hydromodification ensures any discharge to be low impact. The USEPA's Green Infrastructure website includes filtration as a Low Impact Development technique; http://cfpub.epa.gov/npdes/greeninfrastructure/information.cfm#glossary.</p> <p>In addition, the U.S. Department of Housing and Urban Development's report titled "The Practice of Low Impact Development," (July 2003, H-21314CA) incorporates filtration techniques. The County of San Diego's LID manual also utilizes bio-filtration as an acceptable LID practice. In the future as the science and knowledge of storm water treatment evolves, filtration may not be a suitable LID practice to meet the maximum extent practicable standard.</p> <p>For this permit iteration, LID BMPs that capture the design storm for reuse, infiltration or evapotranspiration are preferred over bio-filtration techniques. The draft permit provides design-criteria for "LID bio-filtration BMPs" in section F.1.4.d.ii and requires demonstration that retention LID BMPs are technically infeasible prior to implementing bio-filtration BMPs.</p>				

Comment No.	89	Commenter No.	32	Comment Subject	LID
Comment	To dispel misconceptions about onsite retention-based standards, such standards do not equate to a "no discharge" requirement because the design storm is relatively small and many precipitation events will exceed it. Implementing a full retention-based standard with appropriate alternative compliance provisions would mean, however, that Orange County would reap the benefit of a superior pollution discharge standard even if onsite retention were infeasible. This would be a critical step forward, particularly because the water retained, whether onsite or offsite through alternative compliance, would be infiltrated or otherwise reused. Such an approach mirrors similar approaches now being implemented or considered in locations as diverse as Washington, D.C., Philadelphia, West Virginia, and—through new requirements for federal buildings—everywhere in the United States.				
Response	Comment noted.				

Comment No.	90	Commenter No.	32	Comment Subject	LID
Comment	Critically in this connection, as discussed in our last letter, on May 7, 2009, the Los Angeles Regional Water Quality Control Board adopted NPDES No. CAS00402, a new MS4 permit for Ventura County and the incorporated cities therein. The adopted Ventura County MS4 permit requires onsite infiltration, harvesting and reuse, or evapotranspiration of the 85th percentile design storm, with no runoff. The critical difference between the Ventura County MS4 permit and the draft Tentative Order's LID performance standard is that, in Ventura County, biofiltration cannot count toward a site's LID volumetric obligations—the Tentative Order, as currently drafted, would allow a site that demonstrated technical infeasibility to discharge potentially all of its stormwater to the storm sewer system without undertaking any offsite mitigation. If the biofiltration BMPs installed are not 100% effective at removing pollutants (and they almost undoubtedly would not be 100% effective), the site will discharge more pollution than a site that meets the onsite retention standard. For this reason, offsite mitigation should be required in such situations.				
Response	Please see the response to comment No. 88. In addition, the biofiltration requirements are consistent with the Santa Regional Board's MS4 permit for North Orange County, R8-2009-0030.				

Comment No.	91	Commenter No.	32	Comment Subject	LID
Comment	A strict requirement (with appropriate alternative compliance options) for onsite infiltration, reuse, and evapotranspiration not only implements the MEP requirement (and others) contained in the Clean Water Act, it is also inarguably wise policy in drought stricken California. Governor Schwarzenegger recently declared a state of emergency in California due to severe drought. The major Southern California water supplier will cut water deliveries across the region this summer by ten percent, the first such cut since the drought of the early 1990s. Notably, the Governor's Proclamation orders public water agencies essentially to "find" more water through a variety of activities, including "...efforts to protect water quality or water supply." As such, a standard that requires retention of the design storm onsite is directly responsive to the Governor. The Tentative Order would potentially allow large quantities of biofiltered water to flow into receiving waters through storm sewers, providing no water supply benefit at all.				
Response	Please see the response to comment No. 88.				

Comment No.	92	Commenter No.	32	Comment Subject	LID
Comment	Thus, we strongly urge the Board to make a small but very important change to the Tentative Order by requiring that projects using biofiltration BMPs mitigate—through the LID substitution program—the quantity of stormwater that is not retained onsite. This will comport with the emerging stormwater management trend around the country and help ensure that the Permit meets the MEP standard.				
Response	Please see the response to comment No. 88.				

Comment No.	93	Commenter No.	32	Comment Subject	LID
Comment	We appreciate that the Regional Board has attempted to circumscribe the use of biofiltration BMPs by requiring that they be designed appropriately. However, as Orange County Coastkeeper Executive Director Garry Brown testified regarding the same issue in North Orange County, experience shows that this is easier said than actually implemented. As such, allowing biofiltration may serve as an "out" that will minimize environmental performance. In contrast to objectively clear requirements to "infiltrate, harvest and reuse, or evapotranspire," "biofilter" is a subjective term open to interpretation and abuse.				
Response	The latest Tentative Order includes a definition of biofiltration to avoid misuse and misinterpretation. Please see the response to comment No. 88.				

Comment No.	94	Commenter No.	32	Comment Subject	LID
Comment	Indeed, while we oppose the allowance for biofiltration as part of the main LID performance standard, we believe that if this language remains over our objections, clarifying language should close the loopholes that we have identified. There is consensus among the environmental NGOs and industry stakeholders, including the BIA and CICWQ, that biofiltration LID BMPs can be abused and therefore must be built and maintained to meet strong and clear requirements. CICWQ, for example, stated in its February 13, 2009 letter to the Santa Ana Regional Board: "we recommend that hard feasibility criteria should be specified in the model WQMP/DAMP upon its renewal — such that developers should not be able to bypass implementation of appropriate LID BMPs."				
Response	The Tentative Order has included some basic design criteria for biofiltration to avoid abuse. The LID biofiltration BMPs must be designed for an appropriate surface loading rate to prevent erosion, scour and channeling within the BMP. Due to the flow through design of biofiltration BMPs, the total volume of the BMP, including pore spaces and prefilter detention volume is allowed to be no less than 0.75 times the design storm volume.				

Comment No.	95	Commenter No.	32	Comment Subject	LID
Comment	<p>Therefore, if the Board does not delete references to biofiltration in the Tentative Order's LID provisions, it should, at minimum, make the following clarifications:</p> <p>Section F.1.d.(4)(c)(ii) should be elaborated and state as follows: "LID bio-filtration BMPs shall be designed to accommodate the design flow at a surface loading rate no greater than 5 inches per hour and shall have a total volume, including pore spaces and prefilter detention volume, no less than the runoff volume generated by the design storm depth times 0.75. Maximum ponding depth shall be 12 inches; minimum drainage time shall be 12 hours."</p> <p>"Runoff from impervious areas also may be dispersed to pervious landscaped areas in a ratio not to exceed 2 parts impervious area to one part pervious landscaped area. Pervious landscaped areas must be designed to pond and infiltrate runoff produced by the design storm depth. Maximum ponding depth shall be 2 inches and minimum topsoil-turf thickness 3 inches."</p>				
Response	<p>Comment noted. The latest Tentative Order includes similar language to meet the intent of the commenter. LID biofiltration BMPs must be designed for an appropriate surface loading rate to prevent erosion, scour and channeling within the BMP. Due to the flow through design of biofiltration BMPs, the total volume of the BMP, including pore spaces and prefilter detention volume is allowed to be no less than 0.75 times the design storm volume.</p>				

Comment No.	96	Commenter No.	32	Comment Subject	LID
Comment	<p>Currently, the Tentative Order includes provisions that establish apparently two separate alternative compliance options for regulated projects. The first—"Alternative Performance Criteria for Watershed-Based Projects"—allows the implementation of nebulously defined "planning principles" through regional LID BMPs. Tentative Order ¶ F.1.c.(8). The Tentative Order does state that these regional LID BMPs should be sized to retain or biofilter the 85th percentile storm, or else conventional treatment controls and participation in the "LID substitution program" are required. Id. This provision does not establish a hierarchy of LID practices, however, and would allow qualifying projects to use biofiltration without demonstrating the technical infeasibility of retention-based BMPs. This opens the door to inferior pollution removal and is notably less stringent than the standard LID BMP requirements of Section F.1.d.(4), which prioritize retention based BMPs. We therefore urge the Regional Board to establish the same hierarchy of LID BMPs as in Section F.1.d.(4) and to require, as suggested above, participation in the LID substitution program whenever the project does not retain the full design storm volume. Further, the provision should clearly state that any projects utilizing this alternative compliance option must ensure at least equivalent environmental performance (compared to Section F.1.d.(4)'s requirements) in terms of pollutant removal and volume reduction.</p>				
Response	<p>Comment noted. The requirement for technical infeasibility has been included in the section on regional LID BMPs. Also, Section F.1.c.(8) has been moved to section F.1.d.(11) as it is more appropriate in that section.</p>				

Comment No.	97	Commenter No.	32	Comment Subject	LID
Comment	<p>The second alternative compliance option—the LID substitution program—also does not clearly require equivalent performance for the in-lieu payment component. While Section F.1.d.(8)(a) does state that the "LID substitution program must clearly exhibit that it will not allow PDPs to result in a net impact from pollutant loadings over and above the impact caused by projects meeting LID requirements," Section F.1.d.(8)(f) describes the in-lieu payment component of the program and sets forth four requirements that do not include ensuring equivalent water quality benefits. Since there are two options for the LID substitution program (offsite mitigation and in-lieu payment) and the offsite mitigation provision is linked to pollutant load reduction, the absence of any reference to pollutant load reduction in the in-lieu payment provision is conspicuous and potentially subject to misinterpretation. For this reason, the in-lieu payment provision should be revised to include a fifth criterion that requires in-lieu payment programs to ensure that the funds contributed by priority development projects are correlated to offsetting the impact of their onsite non-compliance and ensuring equivalent environmental performance. Without such clarification, the LID substitution program will include a potential loophole that would allow permittees and projects not to fully mitigate their impacts as otherwise required by the Permit.</p>				
Response	<p>Comment noted. Section F.1.d.(7)(a) requires that prior to implementation, the LID waiver program must clearly exhibit that it will not allow PDPs to result in a net impact (after consideration of any mitigation and in-lieu payments) from pollutant loadings over and above the impact caused by projects meeting LID requirements. In addition, section F.1.d.(7)(h)(iv) requires that in-lieu payments must be proportional to the additional pollutant load discharged by not fully implementing LID.</p>				

Comment No.	98	Commenter No.	33	Comment Subject	LID
Comment	There is much that the Proposed Order sets out to do which is laudable, and indeed, potentially beneficial for Camp Pendleton. Stormwater runoff can be a major source of pollutant loading - frustrating attainment of downstream beneficial uses and at times necessitating the implementation of expensive treatment as a prerequisite to use for municipal supply. Camp Pendleton, and the Department of Navy generally, support the concept of LID to decrease stormwater pollution and prevent net increases in stormwater runoff. See enclosed Department of Navy Low Impact Development Policy for Storm Water Management (November 2007). The implementation of LID-as prescribed in the Proposed Order for new development, combined with the proposed prohibition of dry-weather runoff from developed areas such as Rancho Mission Viejo-may increase the water quality (if not quantity) of flows (and baseflow) on Cristianitos and Talega Creeks into the San Mateo water production aquifers. Unfortunately, the potential benefits of LID as envisioned in the Proposed Order may also contribute to an attendant loss of flows that support Camp Pendleton's water supply.				

Response Comment noted. The commenter's suggested language has been included in the Tentative Order to address this concern.

Comment No.	99	Commenter No.	33	Comment Subject	LID
Comment	<p>Camp Pendleton relies almost entirely upon local water sources-the vast majority of which are derived from wet weather surface water flows originating outside of the Base-to meet its national defense mission. The Office of Water Resources is concerned that the Proposed Order, as currently drafted, may indirectly harm Camp Pendleton's water supply by mandating a version of low impact development that has the potential to greatly diminish the volumes of water that reach (and recharge) Camp Pendleton's aquifers. In particular the Office of Water Resources is concerned about diminution of flows to the San Mateo aquifers in the northern portion of the Base. Such diminution of aquifer recharge may result from implementation of the Proposed Order's requirement of 85% stormwater recapture in existing municipal separate storm sewer system (MS4) drainages in the vicinity of Talega and Christianitos Creeks. Talega and Christianitos Creeks are tributaries of San Mateo Creek and the San Mateo groundwater aquifers which provide camp water supply to the northern portion of Camp Pendleton.</p> <p>Additionally, the stormwater recapture requirements identified for existing development in the Proposed Order could have significant implications if they are adopted as Regional Board policy and subsequently implemented in MS4 reissuances for stormwater discharges in the Santa Margarita River watershed. The Santa Margarita, and the groundwater aquifers it recharges, is the sole source of water for the entire southern portion of the Base (Camp Pendleton's primary cantonment area). The proposed Order's requirement to remove and treat 85% of storm flows during many storm events, raises legitimate concerns about Camp Pendleton's future ability to retain its water independence. However, since the Santa Margarita River watershed is not proposed for inclusion within the Proposed Order, the Office of Water Resources simply notes that the precedent associated with inclusion of large scale retrofit requirements to remove 85% of stormwater flows in existing developments, could be problematic for Camp Pendleton's sole source of water supply in the southern portion of the Base.</p>				

Response Comment noted. The commenter's suggested language has been included in the Tentative Order to address this concern.

Comment No.	100	Commenter No.	33	Comment Subject	LID
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Comment Implementation of the Proposed Order-which appears to require "retrofit" of existing drainages in the Christianitos, Talega and San Mateo watersheds (as well as imposing significant flow reduction requirements on "new" developments)---could result in a significant decrease in the amount of flows entering Christianitos, Talega and San Mateo Creeks. A confounding factor is whether, and to what extent, stormwater that is locally infiltrated, filtered or treated in accordance with the requirements of the Proposed Order, see Section F.1.d.(6)(a)(i), will in fact join groundwater and eventually flow down-gradient to San Mateo Creek. The Office of Water Resources is attempting to quantify the magnitude of such anticipated losses through hydrologic study. However, what is apparent is that if the Proposed Order operates as it appears to be designed, more surface water flow will be retained at the point of generation and used onsite, actively for irrigation or passively through root uptake/evapotranspiration. This greater magnitude of on-site use has the potential to adversely impact the water production capabilities of downstream riparians, overlies and appropriators.

Compounding our concerns regarding the Proposed Order's volumetric and flow restrictions is the fact that the Co-Permittees, once they receive stormflow into their MS4s, may find it difficult or impossible to return captured stormwater to the same stream system from which it was derived. As previously alluded, the Proposed Order appears to mandate that infiltrated, filtered or treated stormwater meet all basin plan standards at the point where such water is "discharged," and a discharge would appear to occur whenever such water leaves the MS4 conveyance system. See Proposed Order Sections C.2; E.g, 13. While the requirement to meet water quality standards at all times seems reasonable on its face, implementation could present difficulties that exacerbate harm to downstream water rights.

Response Comment noted. The commenter's suggested language has been included in the Tentative Order to address this concern.

Comment No.	101	Commenter No.	33	Comment Subject	LID
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Comment Additionally, if the Co-Permittees are required to meet basin plan standards prior to infiltrating the stormwater (or otherwise discharging to land), they may be unable to comply with the Proposed Order without constructing and implementing some form of treatment prior to discharge. Implementation of technology of this magnitude and footprint could be very expensive and would presumably require removal of stormwater from its watershed of origin in many instances so that CoPermittees could achieve sufficient economies of scale to make construction of necessary treatment facilities cost effective. Such stormwater may be lost to its watershed of origin. Moreover, if a Co-Permittee (or developer) spends many millions of dollars to construct and maintain a micro-filtration facility, they are likely to want to put such captured water to beneficial use for their own purposes after treatment (in order to recover outlays of capital needed to build the treatment facilities in the first instance). Finally, even assuming that "treated" stormwater flows are indeed infiltrated into groundwater aquifers within their watershed of origin, such aquifers may be many miles above downstream receiving waters and otherwise hydrologically disconnected from the streams and creeks that previously conveyed water to downstream water rights holders.

Response Comment noted. The commenter's suggested language has been included in the Tentative Order to address this concern.

Comment No.	102	Commenter No.	33	Comment Subject	LID
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Comment The problem described above is equally acute if the water is to be discharged to a surface water. Currently there is no known technology capable of reliably treating total nitrogen below 1 ppm, yet that is the default basin plan standard for total nitrogen in the San Mateo Basin and in other watersheds throughout Southern Orange County. If Basin Plan standards for nutrients are strictly applied at the point of discharge, as Section C.2 implies they must be, then even implementation of membrane technologies to "treat" or "filter" stormwater would be ineffective. A Co-Permittee could not release water from the MS4 system to receiving surface waters without violating the terms of the Proposed Order in many circumstances, leaving groundwater infiltration (which is problematic for the reasons stated above) as the only viable disposal alternative.

Response Comment noted. The commenter's suggested language has been included in the Tentative Order to address this concern.

Comment No.	103	Commenter No.	33	Comment Subject	LID
Comment	Camp Pendleton is home to 17 threatened or endangered species that rely directly (or indirectly) on the maintenance of flows in Camp Pendleton's creeks, rivers, lagoons and riparian areas. Potential impoundment of stormwater flows via the Proposed Order has the potential to also impact the maintenance of habitat that these riparian species rely upon for their survival.				
Response	Comment noted. The commenter's suggested language has been included in the Tentative Order to address this concern.				
Comment No.	104	Commenter No.	33	Comment Subject	Legal
Comment	In Section E of the Proposed Order (pages 22-24), language along the following lines should be inserted clarifying the Regional Board's intention to protect existing downstream water right holders from injury associated with stormwater recapture: a. "Nothing herein shall authorize a Co-Permittee or other discharger regulated under the terms of this order to divert, store or otherwise impound water if such action is reasonably anticipated to harm downstream water right holders in the exercise of their water rights."				
Response	The Regional Board has previously made the suggested change to the Tentative Order.				
Comment No.	105	Commenter No.	33	Comment Subject	General
Comment	Provide clarification in the Proposed Order that infiltration of water at the point of generation is not a "discharge" that requires strict compliance with basin plan standards. This would obviate the need for removal of water from the watershed of origin for off-site treatment (and probably appropriation) in a different watershed.				
Response	The clarification has been made that strict compliance with "surface" water quality standards is required.				
Comment No.	106	Commenter No.	33	Comment Subject	General
Comment	In Section F.3.d.6(d): Revise guidance for substitute regional mitigation projects for existing development to authorize: "Localized rainfall storage and reuse to the extent such projects are fully protective of downstream water rights."				
Response	The requested change has been made to the Tentative Order.				
Comment No.	107	Commenter No.	34	Comment Subject	General
Comment	Negotiations on the Draft Permit have been ongoing between the Regional Board and the Orange County Permittees since 2007. To date, the Riverside County Permittees and other Riverside County stakeholders have not been provided the opportunity to participate in the process in an equivalent manner as the Orange County Permittees and stakeholders. Nevertheless, the use of this Draft Permit as the model for the Riverside County Permit can create the false presumption that the requirements and programs contained therein have been thoroughly reviewed and commented upon by the Riverside County Permittees and Riverside County stakeholders, which is not the case. As the permit that results from this process will be specific to Orange County, the Riverside County Permittees have appropriately played a passive and mostly observational role in the development of this Permit. Although the Riverside County Permittees have provided comments on the Draft Permit, the extent and intent of their comments has been limited to addressing broad policy issues that the Riverside County Permittees are concerned are inappropriate and may set precedent for the renewed Riverside County Permit. There has been no effort on the part of the Riverside County Permittees to fully review or comment on the details of this Permit and, furthermore, the Riverside County Permittees have not been involved nor invited to the "Permittee" meetings in which the details of this Draft Permit have been discussed. Therefore, the Riverside County Permittees expect to be afforded, at minimum, an equivalent process for involvement in their permit renewal as has been provided to the Orange County Permittees and stakeholders for this Draft Permit.				
Response	Please note that the Tentative Order is for renewal of the NPDES permit for Copermittees within Southern Orange County. As such, Copermittee participation has been limited to those Copermittees under purview of R9-2002-001. While it is likely that the Tentative Order will be utilized as the model for renewal of R9-2004-001 (MS4 Permit for Riverside Co. in the Santa Margarita Hydrologic Unit), this does not imply that the public process and Copermittee/stakeholder participation for renewal of R9-2004-001 shall be limited in scope. Please note that the Regional Board does not anticipate that the duration of time needed to renew R9-2002-001 will mirror the time needed for renewal of R9-2004-001. R9-2002-001 was significantly delayed as the Regional Board lacked a quorum to hear the original draft Tentative Order.				

Comment No.	108	Commenter No.	34	Comment Subject	General
Comment	<p>Through previous permits, the Riverside County Permittees have developed watershed specific programs that are structured differently than those in Orange County. These programs have been in development and subsequent refinement for several years, and these programs have been molded into effective and efficient programs for the Upper Santa Margarita Watershed. As discussed in the 4th year annual report, these programs have been shown to be effective and are protective of receiving water quality, especially in light of the 300% growth and urbanization that has occurred within the Permit area. Forcing permit requirements upon the Riverside County Permittees that are structured based upon Orange County's existing permit and which have been negotiated between Regional Board staff and Orange County stakeholders could result in an unjustified overhaul and unnecessary re-invention of Riverside County's programs that will undermine the credibility of the Permittees' program, and will negatively affect their ability to protect water quality.</p> <p>The cookie cutter approach to permitting could negate progress the Permittees have made to date on developing Low Impact Development (LID) tools (including the District's LID BMP Testing and Demonstration Facility and pending LID Design Manual), hydromodification management tools (being developed in conjunction with the Southern California Coastal Watershed Research Program), Permittee efforts to develop and promote proper management of Pyrethroid Pesticides (including several presentations and meeting with leading scientists and Department of Pesticide Regulation managers) and other projects that we have undertaken for the last five years to manage water quality issues specific to the Santa Margarita Region of Riverside County. MS4 Permits should be written to take advantage of programs that Permittees are proactively undertaking and reflect the priorities that the Riverside County Permittees have identified for their watershed. By imposing permit requirements that obviate these existing efforts, the Regional Board is de incentivizing MS4 Permittees from being proactive.</p>				
Response	<p>Comments regarding program inclusion for the renewal of R9-2004-001 (MS4 Permit for Riverside Co. in the Santa Margarita Hydrologic Unit) will be addressed during that NPDES permit renewal process. It is expected that existing LID, hydromodification efforts and management measures will work in concert with proposed requirements, as many requirements are built upon the current Order (R9-2004-001). For example, R9-2004-001 requires Copermittees to initiate hydromodification efforts, and monitoring currently required lead to the identification of pyrethroid pesticides as a potential concern. The Regional Board will continue to build upon advances and improvements, gleaned from all three MS4 permits under their jurisdiction, when revising the next MS4 permit up for reissuance.</p>				

Comment No.	109	Commenter No.	34	Comment Subject	General
Comment	<p>Permits should reflect and accommodate the recommendations set forth by the Permittees in the Report of Waste Discharge (ROWD).</p> <p>For over 18 years, the Riverside County Permittees have been actively involved in statewide efforts to further develop and support the stormwater community and develop, review, test and implement appropriate Best Management Practice (BMP) technologies and programs. As part of the ROWD the Permittees thoroughly reviewed their existing compliance programs and committed to well thought-out programmatic revisions that will ensure that they continue to protect receiving water quality to the Maximum Extent Practicable (MEP) and implement measurable goals. Many of the recommended programs are actually proactive in that they provide similar end results as programs that are now being discussed for the draft South Orange County Permit.</p> <p>Although the recommended revisions result in an additional burden upon already stretched municipal budgets, the recommended programs have been formulated in a manner that ensure that their programs meet the MEP standard while remaining cost effective, transparent and integrate smoothly into the Riverside County Permittees' existing programs. It is important to recognize that the recommended programs described in the Riverside County Permittees' ROWD present an approach that will be more appropriate and effective within Riverside County and warrant serious consideration.</p>				
Response	<p>Comments regarding program inclusion for the renewal of R9-2004-001 will be addressed during that NPDES permit renewal process.</p> <p>Please note the MEP standard applies to storm water discharges and that non-storm water discharges are to be effectively prohibited (Please see Regional Board Counsel Memorandum dated November 05, 2009).</p>				

Comment No.	110	Commenter No.	34	Comment Subject	General
Comment	<p>Permits should focus resources on the actual water quality issues within each watershed.</p> <p>Inappropriately imposing requirements from other permit areas curtails the Permittees ability to develop and implement programs that address their specific water quality issues in a manner that is efficient and effective. Further, attempting to comply with requirements that are developed for areas with different climatic, land use and hydrologic conditions may actually decrease the effectiveness of the Permittees' overall program by diverting funding away from where it can provide the greatest benefit to water quality. The physical and socio-economic characteristics of the Santa Margarita Region of Riverside County are substantively different from Orange County and, as such, the water quality issues, and the most effective solutions to address those issues, may be vastly different than what is appropriate and effective in Orange County. Using Orange County's requirements as a model for the Riverside County Permit falsely presumes that Orange County's programs will be equally effective and efficient at addressing the water quality issues in Riverside County. On the contrary, such programs may actually be less effective than simply building upon the Riverside County Permittees' existing and already proven programs.</p>				
Response	<p>Comments regarding program inclusion for the renewal of R9-2004-001 will be addressed during that NPDES permit renewal process.</p> <p>NPDES permits are issued to protect water quality standards for those waters receiving the discharge. As such, different receiving waters may require different efforts due to 303(d) listings, TMDLs, Beneficial Uses, differing water quality criteria, and other factors that require consideration during the NPDES permitting process.</p>				

Comment No.	111	Commenter No.	34	Comment Subject	General
Comment	<p>Permit requirements should be reflective of the resources available within the permit area.</p> <p>MS4 Permit requirements are written to establish a framework by which MS4 Permittees can be measured for compliance with the MEP standard. The MEP is not and cannot be the same for all permit areas, as what is "practicable" is affected by many factors, including socio-economic factors, which are quite different between the Orange County and Riverside County Permit areas. South Orange County is a built-out, highly urbanized coastal community whereas the Santa Margarita Region of Riverside County is still essentially an urbanizing rural region in a semi-arid climate with less than 300,000 residents. These differences affect the ability of the Riverside County Permittees to secure the resources to comply with expanded permit requirements and define what is "practicable" for Riverside County. Therefore the scale, focus, and implementation of compliance programs will be necessarily different and should reflect the unique characteristics of the watershed and the communities located within it. The following information provides a limited example of some of the stark differences between the two Permit areas.</p> <p>Additionally, the sobering economic forecasts described in the 2009 ROWD have continued to not only be realized but actually exceeded in its negative impacts as Riverside County is one of the hardest hit areas in the country with a 13% unemployment rate and the 4th highest number of foreclosures in the nation. Further, City Councils and the County Board of Supervisors do not have the luxury to impose assessments nor allocate funds and resources irrespective of the general needs and will of the public. These factors further diminish the likelihood that additional assessments for enhanced compliance requirements would be voter approved in the current economic climate.</p> <p>Imposing the negotiated Orange County Permit requirements upon Riverside County would create an insurmountable burden that would likely result in unavoidable noncompliance due to their inability to secure the significant resources that would be required to not only reinvent their existing programs as described above, but to incorporate additional programmatic and reporting programs that are often excessive and do not in any way benefit water quality.</p>				
Response	<p>Comments regarding program inclusion for the renewal of R9-2004-001 will be addressed during that NPDES permit renewal process. Please also see response to Comment nos. 109 and 110.</p>				

Comment No.	112	Commenter No.	34	Comment Subject	NEL
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Comment Tentative updates to the Draft Permit released on May 5th describe the actions that must be taken in the event that monitoring data determines that a Numeric Effluent Limit (NEL) has been exceeded. Notwithstanding the comments provided in our previous comment letter submitted on May 15, 2009, the process that is required when an NEL is exceeded requires that the Permittees make one of three specific findings in response to the exceedance; 1) the discharge is demonstrably natural in origin, 2) the discharge results from an illicit connection and the discharge can be identified and eliminated, or 3) the discharge is determined to be a discharge that is conditionally exempt. The problem is that these options are based on the faulty assumption that a single and specific source of an exceedance can always be identified.

In at least some cases, transitory Illegal Connection/Illicit Discharge (IC/ID) events involving dissolved pollutants only detectable via lab analysis may trigger NEL provisions. However, lab results can take multiple days to process; by the time the Permittee becomes aware of the exceedance, the discharge may have ceased. In such a case, the Permittee would have not been able to make any of the allowable findings. Further, the area served by MS4s is not entirely under the control of the Permittees (compared to an industrial operator who is actually in direct control of his business) and MS4 discharges can originate from multiple diffuse sources. Detecting the source of an exceedance in such cases is complicated by many factors, including:

- a) The time it takes pollutants to migrate downstream within the MS4. By the time the exceedance is detected and a source investigation is initiated the discharge may no longer be occurring.
- b) The combination of many diffuse sources which would be difficult or impossible to individually pinpoint and quantify.
- c) The source could be natural such as arsenic, iron or selenium in rising groundwater, but making a demonstrable conclusion is not feasible given limited data sets.
- d) The exceedance may be for a constituent that can be attributed to many different types of sources and factors, (e.g., pH and TSS). As such, finding the true source can be likened to finding a needle in a haystack.

The required responses to exceedances of an NEL need to be realistic and recognized that it may not always be possible to determine with absolute certainty the source of the exceedance. Accordingly MS4 Permits should not hold Permittees responsible for inability to determine the source of an exceedance.

Response In regards to responsibility for discharges into the MS4 system, please see Comment no. 39 in the July 1, 2009, Response to Comments IV.

The Regional Board expects that the Copermittees respond to suspected illicit discharges and/or connections in compliance with Section C.1 and F.4 of the Order. Non-storm water discharges, no matter how diffuse in source, difficult to pinpoint or intermittent in nature, are a prohibited discharge unless specifically exempted. The Regional Board contends that the required responses to non-storm water discharges are realistic and required under federal regulations. The Copermittee must conduct further investigation into all non-storm water discharges unless it is known with certainty that the discharge either is exempted from prohibition or covered by another permit, as non-storm water discharges are to be effectively prohibited. This requirement to investigate the source of the discharge, regardless of chemical composition, is already part of the existing permit.

Please also see response to Comment #394.

Comment No.	113	Commenter No.	34	Comment Subject	SUSMP
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Comment Several provisions of the Draft Permit require the calculation of Pollutant Loads generated by sites and to determine the pollutant load reductions that occur through the implementation of BMPs. There is not a sufficient and defensible body of knowledge within the storm water community to support and justify inclusion of such requirements. These requirements need to be removed or restructured to include requirements that can be complied with utilizing the available and applicable body of knowledge.

Response Federal regulations at 40 CFR 122.26(d)(2)(iv)(A) requires, "a description of structural and source control measures to reduce pollutants from runoff ..., accompanied with an estimate of the expected reduction of pollutant loads ...". The Copermittees must calculate pollutant loads based on the available studies and knowledge. CASQA and CalTrans both have guidance on BMP pollutant removal effectiveness.

Comment No.	114	Commenter No.	34	Comment Subject	Hydromod
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Comment The Draft Permit requires implementation of three distinct hydromodification programs, all to be implemented potentially within the first three years of the Permit cycle. Each program is based on different sets of requirements and will likely result in three distinct programs where each program will only be implemented for approximately one year before the Permit will require the next program to be implemented. From an administrative point of view these requirements would have unreasonable impacts on the municipal staff, the development community and even the Regional Board staff. The repeated requirements to develop and re-develop programs are not reasonable and will only serve to create confusion and waste scarce resources. It is not practicable, nor is it good public policy to develop a program, train municipal staff and the development community on the program, and then implement the program all while developing a completely different successor program that will be implemented a year later. Alternatively and in light of the virtual cessation of development activity in the region, it would make more sense to require continuation of existing new development controls with possible minor enhancements until the completion of the Southern California Coastal Watershed Research Project (SCCWRP) hydromodification study, which all of Southern California has already committed to implement upon its completion.

Response Tentative Order No. R9-2009-0002 will not require the implementation of three distinct hydromodification programs, as the commenter suggests. Rather, provision F.1.h. describes the elements that must be included in a Hydromodification Management Plan (HMP) that will be developed by the Copermittees. While the HMP is being developed, the Copermittees are to immediately implement interim hydromodification criteria. This is to ensure that hydromodification controls are implemented to protect receiving waters from impacts from increased erosive force from PDPs that are approved before the permanent HMP is complete. The Copermittees are given 2 years to develop an HMP that contain specific requirements that are suitable for the Orange County area (not including time for review and approval from the Regional Board, and incorporation of the HMP into local ordinances). Interim criteria are necessary in order to protect downstream creeks and beneficial uses while the HMP is under development.

Because the interim criteria are already stated in the Order, there is no requirement to "develop and re-develop" programs. The requirement is to develop an HMP once. The commenter suggests that a preferred method is "continuation of existing new development controls." The Regional Board disagrees with this suggestion as the limited controls in place currently have done little to protect and restore the beneficial uses of downstream receiving waters, which is why a regional HMP is necessary.

The Regional Board agrees that the hydromodification study currently being done by SCCWRP will be useful in developing the HMP. The SCCWRP study is nearing completion and therefore the Copermittees will be able to access the information in developing their HMP.

Comment No.	115	Commenter No.	34	Comment Subject	General
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Comment In closing, we would like to thank you for the continued opportunity to comment on the Draft Permit and appreciate your consideration regarding the important concerns described herein. The Riverside County Permittees reiterate their request made in the ROWD submitted in January 2009 that the next Riverside County MS4 Permit be structured and based on our existing Permit and that any expansion of compliance requirements be limited and support our efforts to improve the effectiveness of existing compliance programs in addressing specific water quality impairments. We appreciate your consideration of our comments and look forward to meeting with Regional Board staff in the development of a MS4 Permit specific to Riverside County.

Response Comment noted. Comments regarding program inclusion for the renewal of R9-2004-001 will be addressed during that NPDES permit renewal process.

Comment No.	116	Commenter No.	35	Comment Subject	LID
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Comment The language in the Tentative Order, while specifying a volume capture approach to sizing LID BMPs, introduces a narrow definition of LID through restrictive application of BMPs to only those that infiltrate, harvest and use rainwater, and/or evapotranspire all of the captured water (See Section F.1.d.(4)(c)). In other words, permit language now requires that projects would be limited to zero discharge of a design storm volume with no cross-boundary runoff whatsoever allowed.

Unless the Tentative Order is better clarified, the draft provisions seemingly rule out the use of LID BMPs for filtration – and instead require that no storm water (except in the largest rains) can ever leave a developed or redeveloped parcel unless an infeasibility analysis is performed. If this is intended, it is a radical measure that should not be undertaken. It would violate millennia (literally) of civil law concerning the unconstrained flow of rain water (called “diffuse surface water”). Specifically, the law in California – which itself is derived from the laws of the Roman Empire – favors what is called the “natural flow doctrine,” which states that diffuse surface flows should be permitted to flow to their natural water course. See *Gdowski v. Louie*, 84 Cal.App.4th 1395, 1402 (2000) (“California has always followed the civil law rule. That principle meant ‘the owner of an upper ... estate is entitled to discharge surface water from his land as the water naturally flows. As a corollary to this, the upper owner is liable for any damage he causes to adjacent property in an unnatural manner.... In essence each property owner’s duty is to leave the natural flow of water undisturbed.’” – emphasis added by the court, quoting *Keys v. Romley*, 64 Cal.2d 396, 405-06 (1966)).

Response The purpose of the ruling in *Gdowski vs. Louie* was to protect downstream property holders from harm. In that regard, the Tentative Order includes provisions to protect the downstream water rights holders from harm. For example, section E.1 of the Tentative Order states “Nothing herein shall authorize a CoPermittee or other discharger regulated under the terms of this order to divert, store or otherwise impound water if such action is reasonable anticipated to harm downstream water right holders in the exercise of their water rights.” The Tentative Order does not rule out the use of LID BMPs for biofiltration. Biofiltration BMPs may be used without mitigation if infiltration, capture, and evapotranspiration BMPs are technically infeasible.

Comment No.	117	Commenter No.	35	Comment Subject	LID
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Comment Mandating the complete on-site retention of any sizable storm volume (i.e. runoff that never crosses any property boundary as surface flows) is not a reasonable approach. The Tentative Order seemingly seeks to implement LID in a way that is contrary to the EPA definition of LID by restricting BMPs to those that only achieve zero discharge—not allowing any BMPs that appropriately “filter” runoff, such as bioretention cells or other vegetated LID BMPs. Total, 100-percent on-site retention remains impractical and unwise in most circumstances, and is not a goal that can be achieved for most projects within reasonable costs, despite best efforts. Moreover, such a mandate abandons the goal to mimic predevelopment conditions to the extent practicable, as EPA encourages.

Response The Tentative Order’s requirements for implementing LID are similar to those requirements found in the Santa Ana Regional Board’s MS4 permit for North Orange County. The Tentative Order allows the use of biofiltration where total capture is technically infeasible. Implementation of LID is expected to help a project site more easily meet the hydromodification requirements.

Comment No.	118	Commenter No.	35	Comment Subject	LID
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Comment We provide, in Attachment 1, a comprehensive analysis done by Geosyntec Consultants of the feasibility of implementing rainfall and stormwater harvesting systems and the utility of these systems in achieving pollutant load reductions from stormwater runoff as compared to use of all types of LID BMP features. This document shows that attempts at harvesting alone may result in poor water quality treatment performance relative to a well designed system of LID BMPs that includes all types of BMPs, not just those that capture and retain stormwater. This document also identifies the current institutional barriers--code requirements--that will need to be adjusted long before total rainwater capture systems can be considered feasible in any practical sense.

Response Thank-you for providing the Geosyntec Consultants' analysis. The Regional Board understands that complete capture is not always technically feasible at all project sites. Therefore, for those sites where LID is technically infeasible, the Tentative Order provides alternative compliance options.

We do not draw the same conclusions as the commenter from our review of the analysis. The analysis does not look at the other two options for LID capture; infiltration and evapotranspiration. Therefore, the analysis presumes that all rainfall captured must be reused, without infiltration or evapotranspiration.

The analysis of rainfall and storm water harvesting appears to be conducted on a flow basis and did not consider pollutant loading. A well-documented phenomenon in storm water runoff is the "first flush." The first flush is the most polluted portion of runoff during the initial portion of a rain event following an extended dry period. During that dry period, pollutants accumulate on the surfaces and the first rain washes away the pollutants, depositing them in receiving waters. In back to back storms as looked at in the analysis, the first storm would probably carry a significant pollutant load due to the first flush. That pollutant load in the first flush would be captured by the LID BMPs. The successive storm event would not produce the same level of pollutant load as the first event due to less time being available for pollutants to accumulate. So, although the second storm event may not be fully captured by LID BMPs, the second storm would still produce runoff with a lesser pollutant load than found in the first rain event.

Comment No.	119	Commenter No.	35	Comment Subject	LID
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Comment To CICWQ, the retention BMPs of infiltration, harvesting, and evapotranspiration ("ET") may be described as preferred LID BMPs, but they should not be universally mandated to the exclusion of all other options. As the EPA definition of LID indicates, biofiltration, bioretention, filter strips, and other BMPs based on using vegetation to promote stormwater treatment via filtration are fundamental to LID implementation. These BMPs may be specified as secondary options (although they best mimic pre-development conditions), but project proponents should have considerable discretion to use these BMPs, and should not be required to perform a feasibility analysis to do so.

Response The Tentative Order has included biofiltration as a compliance option where LID retention BMPs are technically infeasible. Retention BMPs have a greater assurance of pollutant removal and thus are preferred. Due to their greater efficiency at pollutant removal, project sites should strive to implement these BMPs where feasible. The requirement for a technical feasibility analysis is appropriate to ensure that project sites are striving to implement retention BMPs to protect water quality.

Comment No.	120	Commenter No.	35	Comment Subject	SAL
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Comment The Tentative Order establishes Municipal Action Levels (MALs) for selected pollutants (pH; TSS; chemical oxygen demand; total Kjeldahl nitrogen; nitrate & nitrite; total phosphorous; and total cadmium, chromium, copper, lead, nickel, zinc, and mercury). In comparison, the Ventura County Tentative Order MALs are set for only those pollutants that were identified as pollutants of concern by the Ventura Program. Such an approach avoids using public resources unwisely and inefficiently by not requiring actions to address pollutants that are not resulting in local water quality concerns. The revised Ventura County Tentative Order includes MALs only for the following pollutants of concern: TSS; nitrate & nitrite; and total copper, lead, and zinc. If MALs are to be included in the South Orange County Tentative Order, they should be revised to include only those pollutants that are of particular concern in southern Orange County.

Response Please note that the terminology has changed from "Municipal Action Levels" (MALs) to "Stormwater Action Levels" (SALs).

Please note SALs have been revised and now include only the following constituents: Turbidity, Nutrients, Cadmium, Copper, Lead, Nickel and Zinc. Each of the above pollutants has been identified as a pollutant of concern through CWA Section 303(d) listing and/or monitoring conducted under Order R9-2002-01.

Comment No.	121	Commenter No.	35	Comment Subject	SUSMP
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Comment Section F.1.d(6)(g) – Treatment Control Requirements

The Revised Tentative Order states:

“Not be constructed within a waters of the U.S. or waters of the State.” The sentence should be modified to be consistent with the statement on page 14 of the Order regarding federal authorization as follows: “Without federal authorization (e.g. pursuant to Clean Water Act Section 404), not be constructed within a waters of the U.S. or waters of the State.”

Response Please see Comment no. 69 in the July 1, 2009, Response to Comments IV. This comment was also addressed in the 2007 Response to Comments.

Comment No.	122	Commenter No.	35	Comment Subject	Hydromod
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Comment The hydromodification control waivers contained in this subsection should expressly include waivers for projects that do not increase the potential for hydromodification impacts over the existing site conditions, or that discharge to a receiving water that is not susceptible to hydromodification impacts. Suggested edits are as follows:

(c) On-site hydromodification control waivers: Copermittees may develop a strategy for waiving hydromodification requirements for on-site controls (not site design BMPs) in situations where assessments of downstream channel conditions and proposed discharge hydrology clearly indicate that adverse hydromodification effects to present and future beneficial uses are unlikely. The waivers must be based on the following determinations:

(i) Lack of discharge-caused hydrology changes: Waivers may be implemented where the total impervious cover on a site is increased by less than 5% in new developments and decreased by at least 10% in redevelopments within the site’s watershed at planned build-out is less than 5%. This numeric criteria may be revised to be consistent with findings from reports from the Storm Water Monitoring Coalition and Southern California Coastal Waters Research Program. Alternatively, directly connected impervious area or effective impervious cover may be used as an indicator, provided that numeric criteria for the indicators are used and are based on hydromodification studies conducted in southern California. Waivers may also be implemented for the following projects that do not increase the potential for hydromodification impacts over the existing site conditions:

(A) Projects within a natural watershed where a geomorphically-based watershed study has been prepared that establishes that the potential for hydromodification impacts is not present.

(B) Significant redevelopment projects that do not increase impervious area or decrease the infiltration capacity of pervious areas compared to the pre-project conditions.

(C) Projects that discharge directly or via a storm drain to a substantially hardened channel, sump, a lake, area under tidal influence, or other receiving water that is not susceptible to hydromodification impacts.

Response Projects are exempt from hydromodification management requirements if they do not increase the potential for impacts over the site’s pre-development, naturally occurring condition, or that discharge to a receiving water that is not susceptible to hydromodification impacts. Section F.1.h(c) requires hydrologic control measures at PDPs where hydromodification effects are expected, but does not require controls where hydromodification effects are not expected. Therefore, there is no need to incorporate the changes suggested by the commenter.

In terms of assessing whether or not a project would have impacts over existing site conditions, the commenter must be aware that the performance standard is that of the pre-development, naturally occurring condition. This is the only way to ensure that the natural flow regime of the watershed is restored in order to protect Water Quality Standards. Section F.1.h(3) already allows the Copermittees to exempt projects that discharge to a channel that is concrete lined all the way to the ocean, enclosed bay, reservoir or lake. The Regional Board agrees that such a receiving water is not susceptible to further hydromodification impacts (although the lining of the channel is already a negative impact on beneficial uses). In terms of assessing the amount of impervious cover that results from building of a project, the text of section F.1.h has removed references to this performance standard.

Comment No.	123	Commenter No.	35	Comment Subject	Hydromod
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Comment Section F.1.h (3)(c)(ii)(b) – Hydromodification Control Waivers, degraded stream channel condition

The waiver for discharges into degraded stream channels has been removed in the Revised Tentative Order. As stated in the Supplemental Fact Sheet

“If requirements for currently degraded channels are removed, there will be a diminished opportunity for future restoration of Beneficial Uses of that receiving water due to the lack of hydromodification controls.”

In areas tributary to channels that have been engineered as part of a Flood Control Master Plan that incorporated channel modifications and drop structures that control channel morphology and areas tributary to streams that are geomorphically unstable and have degraded to the point that controls on Priority Projects alone would not be effective in addressing impacts, projects should be allowed to contribute to in-stream or retrofit measures in lieu of onsite hydromodification controls.

Response The waiver for discharges into concrete lined channels has not been removed. If a stream has been channelized and hardened all the way from the PDP to the ocean, enclosed bay, reservoir, or lake, then the Copermitees have the discretion to waive the hydromodification management requirements for that PDP (section F.1.h.(3)(b)). The quoted text in the fact sheet has been removed to avoid confusion regarding restoration of concrete lined channels. The Tentative Order does not require the Copermitees to restore hardened channels to their natural state.

In certain cases, projects should be allowed to contribute to in-stream or retrofit measures in addition to (not in lieu of) onsite hydromodification controls (section F.1.h.(2)). For example, if there are measures taken to restore or rehabilitate a stream, then smaller hydrologic control measures might be needed at the project site than if no in-stream measures were taken. The Regional Board encourages efforts to restore the beneficial uses of creeks by returning them to their natural state.

Comment No.	124	Commenter No.	35	Comment Subject	Hydromod
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Comment Section F.1.h(6) – Interim Hydromodification Requirements

The Tentative Order includes an “Effective Impervious Area” (EIA) threshold requirement for Priority Projects as an interim hydromodification control requirement. The use of EIA as a regulatory metric for LID implementation is the subject of considerable debate and concern within the stormwater management and science community, as well as among urban planners and practicing landscape architects. Specific aspects of this concern include whether an EIA criterion should be used and, if used, if its application on a site-by-site basis is appropriate given its potential impact on urban redevelopment, smart growth, and sprawl. The use of an EIA requirement needs to be fully vetted to ensure that redevelopment of brownfields and infill development are not discouraged, but rather are encouraged, by the permit.

Although managing EIA is an important tool to achieving the goal of beneficial use protection, it should not be a goal in itself as it does not reflect the goals of the Clean Water Act. The origin of this measure is that it illustrated a threshold beyond which impacts could be identified in watersheds where treatment and hydromodification controls, including source controls, were generally not implemented. The adverse effects of impervious areas can be mitigated by a variety of tools including directing runoff to pervious surfaces, incorporating pervious material, or by controls located at the project scale, sub-watershed scale, or watershed scale. The issue is achieving beneficial use protection, not tool selection.

The volumetric control standards provided in section F.1.h(6)(a)(iii) are sufficient for interim hydromodification control. The inclusion of the EIA metric in F.1.h(6)(a)(i) is unnecessary and unwarranted.

Response Please see the response to Comment No. 7.

Comment No.	125	Commenter No.	35	Comment Subject	SUSMP
Comment	<p>The definition of Development Projects should clarify that for purposes of the Revised Tentative Order a land subdivision made for financing or legal purposes (i.e. without soil disturbing activities) is not considered a "Development Project." Modify the language as follows:</p> <p>"Development Projects – New development or redevelopment with land disturbing activities: structural development, including construction and installation of a building or structure, the creation of impervious surfaces, public agency projects, and land subdivision (except for financing or legal purposes)"</p>				
Response	<p>The definition is clear that development projects must include land disturbing activities. Land subdivision that does not include land disturbance would not be considered a development project. Land subdivision was included to prevent piecemealing of larger projects in an attempt to evade the requirements of the Tentative Order. No change is necessary in response to the comment.</p>				

Comment No.	126	Commenter No.	35	Comment Subject	Hydromod
Comment	<p>The definition of "Effective Impervious Area" does not accurately reflect the studies in which the term was derived. The definition should be edited as follows:</p> <p>"Effective Impervious Area (EIA) – that portion of the impervious area or pervious area incapable of retaining design storm flow that is hydrologically hydraulically connected via sheet flow or a discrete hardened conveyance to a drainage system or a receiving water body."</p> <p>Suggested edits to the definition of "Erosion Potential" are as follows:</p> <p>Erosion Potential (EP) - is determined as follows – A ratio calculated to estimate the likelihood of stream instability due to watershed land use changes. Ep is determined as follows: The total effective work done on the channel boundary is derived and used as a metric to predict the likelihood of channel adjustment given watershed and stream hydrologic and geomorphic variables. The A sediment transport or work index (W) under urbanized conditions is compared to the work index that under pre-urban conditions and expressed as a ratio (EP). The effective work index (W) is computed using applicable sediment transport or effective work equations, as appropriate to the channel materials and morphology. These equations quantify as the magnitude of excess shear stress that exceeds a exceeding the critical value for streambed mobility or bank material erosion, integrated over time, and represents thereby represent an estimate of the total work done on the channel boundary.</p> <p>The effective work index for presumed stable stream channels under pre-urban conditions is compared to stable and unstable channels under current proposed urbanized conditions to evaluate the adequacy of proposed hydromodification BMPs. The comparison, expressed as a ratio, is defined as the Erosion Potential (Ep)¹ (MacRae 1992, 1996).</p>				
Response	<p>References to both the Effective Impervious Area and Erosion Potential have been removed from the Tentative Order.</p>				

Comment No.	127	Commenter No.	36	Comment Subject	General
Comment	<p>Over the past several months, SDRWQCB Staff, South Orange County Copermittees and other stakeholders have been meeting to discuss potential revisions to the March 2009 draft of Tentative Order No. R9-2009-0002. The City of Laguna Niguel has appreciated these opportunities to share perspectives and work toward resolution of certain issues.</p> <p>In the course of these workshop meetings, SDRWQCB Staff solicited comments and then distributed several sets of "draft updates" to various sections of the text for discussion. The Staff also committed to issuing a complete redlined track-edited draft incorporating proposed text adjustments to all interested parties by June 19. Unfortunately, June 19 was also the specified deadline for submittal of written comments for purposes of the July 1 hearing.</p> <p>While we appreciate the need for SDRWQCB Staff to have adequate time to prepare their response to comments, the June 19 deadline provides no opportunity for the Copermittees and other stakeholders to provide written comments on the complete final draft permit that will be presented to the Board. We cannot effectively comment today on something we were not to see until today (and have not yet seen as of this writing on 3:30 p.m., Friday, June 19).</p> <p>Consequently, we would like to request that the written comment period not be closed at the end of the July 1 hearing, but instead be held open for another 10 days after the hearing - especially if additional errata are presented on July 1. Closing the comment period on July 10 would still allow the Staff a full month to respond prior to the scheduled adoption hearing on August 12.</p> <p>Thank you for your consideration of this request.</p>				
Response	<p>Regional Board staff have responded to all written comments received from the close of the March 2009 draft Tentative Order public comment period to the close of the current Tentative Order (August 2009) comment period. The latest version of the Tentative Order is essentially the June 19, 2009 red-line strikeout version. Thus, the Copermittees have had ample time to review and comment on the entirety of the Tentative Order. It must be noted that the substantial changes (NELs, SALs, removal of exemption to prohibition for over-irrigation, LID and Hydromodification requirements) were extensively discussed well in advance of the July 2009 Hearing.</p>				

Comment No.	128	Commenter No.	37	Comment Subject	SAL
Comment	<p>At the July 2, 2009 public hearing, one of your board members requested clarification regarding the proposed Municipal Action Level (MAL) for nickel and the assertion made in the presentation by Richard Boon, County of Orange, that it was more stringent than the Basin Plan objective (See Attachment 1 - Presentation Slide). Mr. Boon was not present at this time to clarify the data and, in his absence, your staff opined incorrectly that Mr. Boon had used a Maximum Contaminant Level (MCL) rather than a Basin Plan objective and that the MAL was not more stringent than the Basin Plan.</p> <p>The comparison of the proposed MAL for nickel (26ug/l) with the Basin Plan objective for nickel was first presented in our comment letter of May 15 on the March 13, 2009, version of the Tentative Order. For the nickel objective, the Basin Plan incorporates the California Toxics Rule (CTR) by reference. CTR establishes both acute and chronic objectives. Since the MAL appeared to be an instantaneous value, the comparison was made to the California Toxic Rule acute criterion. The published value (see Attachment 1 - p . 37772 Federal Register/ Vol. 65, No. 97/Thursday, May 18, 2000/Rules and Regulations) for this criterion, which assumes 100mg/l as CaCO3 hardness, is 470ug/l. The MAL is therefore significantly more stringent than this Basin Plan objective.</p> <p>Constituent Nickel</p> <p>CTR Criterion - Maximum Concentration 470 ug/l</p> <p>Proposed MAL 26 ug/l</p> <p>It is requested that this clarification be provided to your Board members to eliminate any confusion on the response to the question.</p>				
Response	<p>Please note that the terminology has changed from "Municipal Action Levels" (MALs) to "Stormwater Action Levels" (SALs).</p> <p>The Regional Board appreciates the clarification regarding the presentation made by Mr. Boon.</p> <p>Please note that Regional Board staff, prior to the July 01, 2009 presentation by the County of Orange, clarified to the County that SALs were updated to include a measure of receiving water hardness to establish metals criteria in order to determine if a SAL was exceeded. Incorporation of a site and time specific hardness measure to determine the SAL for metals is a more accurate application of CTR, and thus the Basin Plan, than assuming a hardness value of 100 mg/L. This has already been incorporated in the August 09, 2009 Tentative Order.</p>				

Comment No.	129	Commenter No.	38	Comment Subject	General
Comment	<p>The Water Authority supports comments provided to the Regional Water Quality Control Board by USMC Camp Pendleton, dated June 19, 2009, on the Orange County Municipal Storm Water Permit Reissuance Order No. R9-2009-0002. Although Camp Pendleton is a member of the Water Authority, they remain almost fully self-sufficient by virtue of their reliance on local groundwater supplies from both the San Mateo and Santa Margarita groundwater basins. These local supplies are critical for Camp Pendleton's long-term sustainability and help maintain the overall sustainability of the San Diego Region.</p>				
Response	<p>Comment noted. It is expected that advances made in cleaning up storm water and non-storm water surface flows should improve water quality to the benefit of ground water supplies.</p>				

Comment No.	130	Commenter No.	38	Comment Subject	LID
Comment	<p>The Water Authority supports the use of low impact development (LID) approaches to storm water management to the extent that the LID improves water quality and does not reduce water available to our member agencies that may use local groundwater basins. Stormwater capture also has the poteritial to augment local water supplies if it is properly managed by capturing peak flows that would otherwise be lost to the ocean. Focusing efforts on those stormwater activities that would increase local supplies would have multiple benefits and would be supported by the Water Authority.</p>				
Response	<p>Comment noted.</p>				

Comment No.	131	Commenter No.	38	Comment Subject	Retrofitting
Comment	<p>We are concerned with the approach proposed in the proposed Permit that would require LID retrofits of existing properties in South Orange County. State Board policy encourages the use of LID and hydromodification to reduce hydrograph peaking and maintain water quality. In the past, the focus has been on using LID in new development in a manner that would maintain current flows. Retrofit of existing properties has the potential to alter the downstream flows in San Mateo Creek reducing the availability of water that is currently captured, recharged, and extracted in local water supply wells. This could potentially raise serious water rights issues. For each basin where LID is contemplated, the impact of such an action on the local water supply should be evaluated. Implementation of LID, as proposed in the Permit, should not be contemplated until a comprehensive evaluation and modeling of the groundwater basin is completed that would assess the overall impacts on water supply as a result of compliance with the Permit requirements.</p> <p>We support the Camp Pendleton's recommendations that are designed to protect their local water supply and water rights.</p>				
Response	<p>The Regional Board understands this concern and has previously included Camp Pendleton's recommended language into the Tentative Order.</p>				

Comment No.	132	Commenter No.	39	Comment Subject	FETD
Comment	<p>On Page 8 of the new NPDES (Development Planning) below a #6 should be added: Diversions Impair Ocean Outfall Discharges</p> <p>b. Controlling urban runoff pollution by using a combination of onsite source control and site design BMPs augmented with treatment control BMPs before the runoff enters the MS4 is important for the following reasons: (1) Many end-of-pipe BMPs (such as diversion to the sanitary sewer) are typically ineffective during significant storm events. Whereas, onsite source control BMPs can be applied during all runoff conditions; (2) End-of-pipe BMPs are often incapable of capturing and treating the wide range of pollutants which can be generated on a sub-watershed scale; (3) End-of-pipe BMPs are more effective when used as polishing BMPs, rather than the sole BMP to be implemented; (4) End-of-pipe BMPs do not protect the quality or beneficial uses of receiving waters between the pollutant source and the BMP; and (5) Offsite end-of-pipe BMPs do not aid in the effort to educate the public regarding sources of pollution and their prevention.</p>				
Response	<p>To the extent that such diversions impair ocean outfall discharges, such matters should be taken up with that ocean outfall discharger's individual NPDES permit. We understand that these types of diversions decrease the capacity of treatment works. Again, these issues are best handled through the individual treatment works NPDES permit. In-creek diversion systems are not regulated by the Tentative Order and are more appropriately regulated through Clean Water Act Section 401 Water Quality Certifications, Waste Discharge Requirements and/or individual NPDES permits.</p>				

Comment No.	133	Commenter No.	39	Comment Subject	FETD
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Comment It has become obvious that there has been NO attempt by the Board to halt these diversion activities. Worse, the Board has the power to deny or prohibit the local JPA, South Orange County Wastewater Authority (SOCWA) via its NPDES Ocean Outfall Pipe Discharges (off Dana Point and Aliso Creek Beaches) such diverted surface flows. The Board's silence is tacit approval.

The CLB sends almost .4 mgd, is legally allowed by SOCWA to send 50,000 gd per diversion. This equals potentially 1 mgd, and CWN!C has been able to confirm that the Coastal Treatment Plant (CTP) only processes about 3.5 mgd total of wastewater.

Co-mingled with the Aliso Creek Ocean Outfall Pipe (ACOOOP) is the recently approved .66 mgd diversion of briny waste from the Irvine Ranch Water District of the former MCAS El Toro contaminated aquifer cleanup. This has been projected to require as much as 20 years or more for remediation, and IRWD has admitted at Rehab Hearings that minor, "acceptable" traces of TCE and perchlorate are in the wastewater.

Adding insult to injury will be the .3 mgd of briny waste from the proposed South Coast Water District diversion of Aliso Creek, presently pending due to Cal Water Rights procurement.

The County of Orange, in its strategies, has included an Urban Runoff Treatment Plant with a capacity of approximately 6.5 mgd that will reduce bacteria and TDS in the Aliso Creek Estuary. Briny waste going into the ACOOP is projected to be 1-2 mgd.

CWN!C has NOT been able to ascertain exact numbers of such diversions or exact quantities/volumes of briny waste from Advanced Waste Treatment infrastructure at the Regional Plant (LNRP) in Laguna Niguel, volumes of which are included in the ACOOP discharge.

At the CTP, 1 mgd = Approx. 25% of the total emptied by the facility into the ACOOP. As the NPDES for the ACOOP isn't scheduled for renewal for several years it impinges upon the Board to stop giving tacit approval to these increased volumes NOW. It should be noted that by the time bio-assessment of longterm adverse impacts at the outfalls have taken place, "dead zones" may have occurred and be irreversible. Toxic biomagnification will have already taken its toll.

As the staff well knows, and the Board should, urban runoff contaminants are NOT reduced or removed by these plants UNLESS given AWT (tertiary) cleansing targeted or specifically designed for the pollutants of concern.

Response The regulation of in-stream diversion and treatment BMPs are not covered by this Tentative Order. These types of diversion systems are more appropriately regulated through Clean Water Act Section 401 water quality certifications, Waste Discharge Requirements and/or individual NPDES permits. Comments regarding the SOCWA ocean outfall pipe are best addressed through their NPDES permit renewal. The Tentative Order does not regulate SOCWA's ocean outfall.

Comment No.	134	Commenter No.	25	Comment Subject	FETD
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Comment Board and staff need to address the blatant disparity between policy and implementation. It is ludicrous that MS4 Permittees are allowed to solicit and receive state or federal funds in contradiction to the very goals of the NPDES process. Funding violators to circumvent compliance makes no sense.

Setting lofty goals while allowing Permittees to siphon funds more appropriate for legitimate mitigations, pilot/demos, BMPs, BETs, BCTs and BATs, etc. needs to be brought to the forefront.

Response Comment noted.

Comment No.	135	Commenter No.	39	Comment Subject	FETD
Comment	<p>Chronic violators who initially agreed that diversions were temporary have now PERMANENTLY included the infrastructure to accomplish their purpose of compliance WITHOUT source reduction, WITHOUT enforcement. While they claim both are too expensive the State and other agencies continue to fund the diversions, the Permittees continue to supplement these funds for the O & M costs. Who in their right mind believes that the Permittees will EVER dismantle these diversions? They are now widely integrated, insinuated into the MS4 systems themselves and lead agency strategy thinking---The Permittees will claim Economic Unfeasibility or Technological Impossibility if asked to remove or return them to historical configurations.</p> <p>Allowing these runoff diversions to be added to the South County outfalls only moves the problem, in fact creates toxic bundles discharged into critically sensitive marine habitats. In the case of both the San Juan and Aliso, these creek mouths are acknowledged corridors for the endangered species and ESU Southern Steelhead (O. mykiss). The outfalls are becoming DOMINATED by CTRs and Prop. 65 chemicals.</p>				
Response	<p>It is more appropriate to regulate FETDs through an individual or regional permit. This does not, however, preclude these facilities from any enrollment requirements under the Statewide Industrial Storm Water permit for storm water runoff or from obtaining a CWA Section 401 Water Quality Certification. The intake and subsequent discharge from FETDs will require a separate NPDES permit and/or Waste Discharge Requirements. The Tentative Order does not provide funds for the operation and maintenance costs of such facilities. The South County outfalls are regulated under separate NPDES permits. Comments regarding toxicity, pollutants, and capacity for those outfall discharges should be addressed to their respective NPDES permit.</p>				

Comment No.	136	Commenter No.	39	Comment Subject	FETD
Comment	<p>It is time for the SDRWQCB to drag SOCWA and its members into the 21st Century by mandating a 5 year phase-in of 100% Advanced Waste Treatment (tertiary) at ALL of its facilities in South OC.</p> <p>NPDES compliance will never take place if the Board does not take a stronger oppositional position. If it will not, then perhaps we should just suspend the entire process, abandon MS4 Permits as they will never drive CWA or Porter-Cologne compliance. Permittees will continue to find ways or fiscal means to avoid source tracking, reduction and prevention.</p>				
Response	<p>This permit does not regulate the SOCWA and its members with respect to their waste water discharges. Please address your comment regarding Advanced Waste Treatment to the appropriate NPDES permit.</p>				

Comment No.	137	Commenter No.	40	Comment Subject	General
Comment	<p>I want to thank you for your help in bringing to the attention of the San Diego Regional Water Quality Control Board the need to address the issue of contaminated fire sprinkler discharge.</p> <p>The Board's recommendation to require co-permittees to mandate fire sprinkler maintenance activities as illicit discharges speaks loudly about the need to begin regulating a number of sources of pollutants that for the most part drain to ground surfaces and storm drains. We can no longer ignore these sources of pollutants, especially since we now have the capacity to clean discharge at the source or transport it to cleaning centers. Through filtering and cleaning, we can recycle and reuse waste water, an important point to be considered in our current time of water shortages and reduced water allowances.</p> <p>Your board has set an example that I believe will be difficult for the other regional boards not to follow. Again, thank you for your assistance, and I look forward to seeing the new language to be added to regional water quality law.</p>				
Response	<p>Comment noted.</p>				

Comment No.	138	Commenter No.	41	Comment Subject	General
Comment	<p>I am the Member at Large on the Casa Loma Homeowners' Association Board of Directors. In fact, my building is practically next to Oso Creek as the creek heads to the golf course. I have read R9-2009-0002 and have the following comments on it. I like the report. It seems well written and took along time and lots of research to put together. The parts in it for retrofitting properties like Casa Loma is very good. And making the water quality control enhancements in such a way as to complement and not destroy natural features that can be part of water quality control is a great plus. The natural features of the land should be preserved and this Order does that. Storm water should be treated at its source to the greatest extent possible before heading to the storm drain system, and this Order calls for that. Also, we are working with two water districts to have a union supply line for recycled water go by our complex so we can use recycled water for the landscape; and I saw a small part in the report looking to see if storm water runoff could not be integrated with recycled water to the fullest extent possible which is another good thing. The way it is in the Order, the Pollutant Credit System seems good. And I am happy that the Order recommends against pouring more concrete onto stream and river banks but calls for restoration to natural conditions to the greatest extent possible. There is a part of the Oso Creek Trail on the Pacific Hills side between the Marguerite Parkway and La Paz Road trail entrances where old sections of curb, old brick chimnies, and old pieces of tennis courts with the paint still on them have been dumped along the creek bank. Those things really stand out from the natural features. There are also two large storm drain openings that empty into Oso Creek on either side of the La Paz Road overpass bridge and sometimes there are plastic bottles, tin cans, plastic wrapping at the mouths of these storm drains and plastic cups and bottles floating down in the creek that probably came in through the storm drains because they are not too far from the drains. Finally, if I was giving a grade to this report, I would give it between an A and A plus. It should be implemented.</p>				
Response	<p>Comment noted.</p>				

Comment No.	139	Commenter No.	42	Comment Subject	Existing Development
Comment	<p>I contact the City of Anaheim, received the same direction to contact the County, and received the attached BMP developed as a result of the adoption of the new NPDES MS4 Permit. It appears that my concerns shared in testimony and comments are valid. I have requested the Permit be prescriptive so that BMP's would be consistent with the spirit and intent of the Permit writers. The BMP has lumped all Mobile Businesses together and I believe that there are special practices associated with Wash & Detailing a car that are not addressed.</p> <p>My primary focus of concern is and has been pollution, not the waste water. Focus on pollution, you solve any and all issues with waste water. This BMP mentions pollution in the beginning, but all other language and Practice recommendations focus on the waste water. This water can be controlled and prohibited from entering the Storm Drain. However, the BMPs do not address the pollution left behind which are picked up in Storm Water Runoff as Non Point Source Pollution.</p>				
Response	<p>The Tentative Order prohibits non-storm water discharges from mobile car washing and detailing services. In addition, the Tentative Order requires that storm water discharges are minimized to the maximum extent practicable. Where BMPs are considered to meet the MEP standard, they should be required by the Copermitttees in compliance with the Tentative Order.</p>				

Comment No.	140	Commenter No.	42	Comment Subject	Existing Development
Comment	<p>Region 9 South Orange County</p> <p>You are finalizing your permit</p> <p>Do you see why I come to every meeting to champion a more prescriptive approach and specifying the standards you expect? You set standards on LID at the 85th percentile, so I know it is possible.</p> <p>With no action, even though you have the word pollution specifically inserted into the relevant section on Mobile businesses . There is valid concern that the County will not alter the BMP's.</p> <p>There is sufficient evidence that the Cities will take their direction from the Primary Permittee, the County of Orange.</p> <p>What can we, you or I do?</p> <p>Can you please help me to get a meeting with the County of Orange?</p>				
Response	<p>The Tentative Order prohibits non-storm water discharges from mobile car washing and detailing services. In addition, the Tentative Order requires that storm water discharges are minimized to the maximum extent practicable. Where BMPs are considered to meet the MEP standard, they should be required by the Copermitees in compliance with the Tentative Order. The Tentative Order requires the Copermitees to incorporate a mechanism for public participation in the updating, development, and implementation of the Jurisdictional Runoff Management Program. Failure to do so would be a violation of the Permit.</p>				

Comment No.	141	Commenter No.	43	Comment Subject	LID
Comment	<p>As we pointed out in our previous letters, Region 9 is seeking clear, measurable, and enforceable LID requirements in MS4 permits. The LID requirements of the latest draft are quite similar to the requirements in the North Orange County MS4 permit , adopted in May 2009, with Region 9's support, by the Santa Ana Regional Board (SARB). We believe the SDRB's draft permit would be consistent with our objectives for LID implementation with a few minor revisions discussed below:</p> <p>1) Page 8 (Finding D.2.c) - We recommend either removing the word "filtration" replacing it with "retention." This would be consistent with the draft permit's Part F.1.d.(4)(d) which requires LID BMPs to be sized and designed to ensure onsite retention of the design stonn event. We believe this would also better mirror the intent of mimicking natural hydrology via infiltration, harvesting and reuse, or evapotranspiration of stormwater, as opposed to the use of filtration systems which result in stormwater, flows into the MS4 via underdrains.</p>				
Response	<p>The Regional Board maintains that bio-filtration is part of a comprehensive LID program. Effective bio-filtration provides pollutant removal and energy dissipation. Biological removal of pollutants can even be an improvement over simply keeping pollutants on-site until rainfall over the design-storm criteria washes pollutants into receiving waters. Removal of pollutants and prevention of downstream hydromodification ensures any discharge to be low impact. The USEPA's Green Infrastructure website includes filtration as a Low Impact Development technique; http://cfpub.epa.gov/npdes/greeninfrastructure/information.cfm#glossary. In addition, the U.S. Department of Housing and Urban Development's report titled "The Practice of Low Impact Development," (July 2003, H-21314CA) incorporates filtration techniques. The County of San Diego's LID manual also utilizes bio-filtration as an acceptable LID practice.</p> <p>In the future as the science and knowledge of storm water treatment evolves, filtration may not be a suitable LID practice to meet the maximum extent practicable standard. For this permit iteration, LID BMPs that capture the design storm for reuse, infiltration or evapotranspiration are preferred over bio-filtration techniques. The draft permit provides design-criteria for "LID bio-filtration BMPs" in section F.1.4.d.ii and requires demonstration that retention LID BMPs are technically infeasible prior to implementing bio-filtration BMPs. Finding D.2.C will be modified to replace "filtration" with "bio-filtration."</p>				

Comment No.	142	Commenter No.	43	Comment Subject	LID
Comment	2) Page 31 (Part F .1.c.8) - The inclusion of "LID biofiltration" in this section pertaining to large development projects is inconsistent with both section F.1.d.(4)(d) of the draft permit (described above) and with the SARB MS4 permit for Orange County (Part XII.C.2), where "bio-treatment" is only considered to meet that permit's LID provisions if infiltration, harvesting and reuse, or evapotranspiration are not feasible. This section should be revised to clarify that retention BMPs are preferred, and that the use of biofiltration will comply with this provision only if retention BMPs are not feasible.				
Response	Thank you for the comment. The Regional Board did not intend to have a lesser standard applied to regional BMP implementation. The Tentative Order has been corrected.				
Comment No.	143	Commenter No.	43	Comment Subject	LID
Comment	3) Page 31 (Part F .1.c.8) - At the first mention of the feasibility of onsite retention or "LID biofiltration" there should be a reference to the requirement that feasibility criteria will be proposed by the co-permittees and approved by the Executive Officer (EO). Based on the mention of a "technical feasibility analysis" in section F .1.d. 7., it's our understanding that if the intent of the permit that this analysis must be submitted for the approval of the EO as part of the standard stormwater mitigation plans (SSMPs) and will be subject to public review and comment. The permit should be clarified to explicitly state the expectations for the timing of the submittal of this analysis and the review and approval process. These expectations should be included initially in this section, which is the first instance in the permit where this analysis would apply.				
Response	Section F.1.c.8 has been moved, as it is more appropriately placed as section F.1.d.11.				
Comment No.	144	Commenter No.	43	Comment Subject	LID
Comment	4) Page 34 (Part F.1.d.4.(a)(iv)) - We recommend deletion of the words "filter" and "detain" since they are not consistent with the intent of onsite retention as noted above.				
Response	The word "detain" has been removed and replaced with the word "retain" since retain means to hold on to indefinitely.				
Comment No.	145	Commenter No.	43	Comment Subject	LID
Comment	5) Page 36 (Part F.1.d.4.(d)(ii)) - Given the mention of technical infeasibility in this section) it should be noted here that the conclusions of feasibility will be made based on the approved feasibility analysis.				
Response	The Regional Board agrees with the intent of this provision. The Tentative Order has been clarified.				
Comment No.	146	Commenter No.	43	Comment Subject	LID
Comment	6) Page 36 (Part F.1.d.4.(d)(iii)) - We recommend the word "may" be changed to "must" to ensure conventional treatment is required when LID is determined to be infeasible.				
Response	Thank you for the comment. The Tentative Order has been changed.				
Comment No.	147	Commenter No.	43	Comment Subject	LID
Comment	7) Page 39 (part F.1.d.7) - As noted above, mention of the technical feasibility analysis should clarify expectations for the submittal of this analysis along with the fact that there will be an opportunity for public review 'and comments' and ultimate approval by the EO.				
Response	The first paragraph of this section, F.1.d.7, requires the Copermittees to submit the LID Waiver Program as part of the SSMP. The first paragraph of Section F.1.d requires submission of the updated SSMP within two years of permit adoption and stipulates that the SSMP will be subject to public review and comment. No change has been made in response to this comment. Submission of the updated SSMP within two years is adequate because that will coincide with the submittal of the Hydromodification Management Plan (HMP) and the SSMP should be integrated with the HMP.				

Comment No.	148	Commenter No.	43	Comment Subject	TMDL
Comment	As you know, the Baby Beach TMDL has not yet been approved by the State Office of Administrative Law (OAL) or EPA. Accordingly, Finding E.II is not currently accurate in stating that the permit includes wasteload allocations (WLAs) from fully approved TMDLs. However, we anticipate the Baby Beach TMDL will be approved by OAL and EPA prior to permit adoption) and we suggest you proceed under this assumption.				
Response	The Office of Administrative Law approved the Baby Beach TMDL on September 15, 2009. The United States Environmental Protection Agency approved the Baby Beach TMDL on October 26, 2009.				
Comment No.	149	Commenter No.	43	Comment Subject	TMDL
Comment	1) Page 79 (Part I) - The reference to Finding E.12 appears to be an error, and should be corrected.				
Response	Directive I has been corrected to reference Finding E.10.				
Comment No.	150	Commenter No.	43	Comment Subject	TMDL
Comment	2) Page 79 (Part I. 1. a) - Although Finding E.II identifies the particular copermitees which are affected by the TMDL requirements, it would be helpful for additional clarification to include the names of these co-permittees in Part I.I.a of the permit as well.				
Response	The Regional Board believes it is sufficient to name the Copermitees responsible for TMDL implementation only in Finding E.11. No change has been made in response to this comment.				
Comment No.	151	Commenter No.	43	Comment Subject	TMDL
Comment	3) Page 79 (Part I.1.b) - The permit should contain clear expectations for monitoring to ensure achievement of TMDL WLAs. Given that the referenced TMDL does not include a clear monitoring plan, the permit should require submittal of a monitoring plan and specify the date by which this plan must be submitted.				
Response	Attachment E of the Tentative Order has been modified to require submission of a Mornitoring Plan within 12 months of permit adoption.				
Comment No.	152	Commenter No.	43	Comment Subject	TMDL
Comment	4) Page 79 (Part I.I.c.) • Since the date for compliance with the dry weather WLA is five years after permit adoption, it appears erroneous to require both the wet weather and dry weather WLAs to be met by 2019, ten years after permit adoption. It should be noted that dry weather WLAs must be met by the end of 2014.				
Response	Directive I.1.c of the Tentative Order has been corrected to reflect 2014 as the date dry weather Waste Load Allocations must be met.				
Comment No.	153	Commenter No.	43	Comment Subject	NEL
Comment	In our previous letter of May 14, 2009, we supported the inclusion of numeric effluent limiits for non-stormwater discharges, and we continue to do so. Establishing these limits is consistent with section 402(P)(3)(B)(ii) of the Clean Water Act, which states that permits for municipal stormwater must effectively prohibit non-stomwater discharges into the storm sewers:				
Response	Comment noted.				
Comment No.	154	Commenter No.	43	Comment Subject	NEL
Comment	1) Page 22 (part C.4) - We recommend clarification regarding the "representative percentage" of the major outfalls/stations which will be monitored. The permit should provide expectations for the magnitude of required monitoring pursuant to this section.				
Response	The Regional Board appreciates the comment regarding the monitoring. Regional Board staff have retained flexibility within the monitoring language to allow for the Copermitees to adjust their existing non-storm water monitoring efforts to match the new requirements in order to prevent any increases in monitoring costs. The Copermitee's Monitoring Program must be submitted to the Regional Board, at which time the Regional Board will provide careful scrutiny of submitted plans to ensure sufficient sampling occurs to assess compliance with the NELs. This approach received support from Board members at the July 01, 2009 public hearing. Thus, no change has been made to the Tentative Order.				

Comment No.	155	Commenter No.	43	Comment Subject	NEL
Comment	2) Page 23 (Table 4.a.2) - It appears that the numeric values in the columns for the saltwater AMELs and MDELs should be reversed, i.e., the MDELs should be the larger numbers.				
Response	The Regional Board appreciates the comment and the typographical error has been changed.				
Comment No.	156	Commenter No.	43	Comment Subject	SAL
Comment	We fully support the inclusion of stormwater action levels (SALs) in the permit. These requirements help to clarify MEP. We recommend the fact sheet include additional information describing how the particular values for the SALs were derived.				
Response	Finding D.1.h. of the Tentative Order has been updated to explain the derivation of the SALs. The data utilized can be found in Attachment F of the Tentative Order.				
Comment No.	157	Commenter No.	43	Comment Subject	SAL
Comment	1.) Page 25 (Part D.2.) - Again the permit requires Sampling of a "representative percent of the outfalls." Both here and in Part C.4, the permit should provide some degree of specificity so that the permittees and the public have an idea of the expectations for the number of outfalls to be monitored.				
Response	The Regional Board has included flexible language in the monitoring requirements in order to alleviate increased costs associated with the SAL monitoring in the permit. This language allows the Copermitees to propose monitoring for both Sections for review and approval. Please also see response to Comment no. 154.				
Comment No.	158	Commenter No.	43	Comment Subject	Retrofitting
Comment	We fully support the proposed requirements in the permit for retrofitting existing development with additional controls such as LID. The benefits of adding LID measures in particular in new developments have been documented in numerous reports of which the Board is well aware. Such benefits would also accrue from adding LID to existing developments. In addition to the support provided by the fact sheet, we would note that such requirements are encouraged by the State's 2005 report entitled "NPDES Stormwater Cost Survey" which also investigated alternative approaches to stormwater control.				
Response	Comment noted.				
Comment No.	159	Commenter No.	43	Comment Subject	Hydromod
Comment	We are pleased to see the draft permit continues to include requirements related to hydromodification, and that clear, measurable requirements are included to address the issue. We believe the requirements are fully supported in the fact sheet and are consistent with the requirements of other recent MS4 permits in California.				
Response	Comment noted.				

Comment No.	160	Commenter No.	44	Comment Subject	LID
Comment	<p>Section F.1.d.(4) - Reduce pollutants to the MEP or implement LID to the MEP? The Section F.1.d.(4).(d).(iii) requirement to participate in the LID waiver program effectively replaces the Clean Water Act directive to reduce the discharge of pollutants of concern to the maximum extent practicable (MEP) with a fundamentally new and more stringent standard of implementing a very narrow subset of LID BMPs to the maximum extent practicable. The two requirements are not interchangeable.</p> <p>Section F.1.d.(4) requires on site retention where feasible. Where retention is demonstrated to be infeasible, biofiltration is required. Where that is infeasible, "conventional treatment control BMPs in accordance with Section F.1.d.(6) must be used, and the project must participate in the LID waiver program.</p> <p>However, Section F.1.d.(6).(d).(ii) states that BMPs must, at a minimum, "be correctly sized and designed so as to remove storm water pollutants to the MEP". So, essentially the permit stipulates that if it is infeasible to meet the LID requirements, a site must still meet the MEP standard, and in addition must participate in the LID substitution program. In this context it is clear that the LID requirements and the triggering of the LID substitution program are additional requirements above and beyond the requirement to meet the MEP standard.</p> <p>It would be more consistent with the MEP standard to include an MEP waiver program in the permit instead of an LID waiver program. If for some reason a project is unwilling to implement the most effective controls that are also feasible, then it is perfectly reasonable to require participation in a waiver program to ensure that at least on a watershed basis impacts of development are mitigated.</p>				

Response	<p>The Clean Water Act requires that pollutants in storm water discharges are reduced to the maximum extent practicable (MEP). Current runoff management, knowledge, practices and technology consider the use of LID BMPs as meeting the storm water MEP standard. Therefore, the storm water treatment controls must also be designed to meet this same level of pollutant reduction to be considered MEP.</p> <p>The Regional Board realizes the difficulty in design and implementation of treatment controls to be able to reduce pollutants to the same standard as LID retention BMPs. Therefore, the Tentative Order allows project proponents to design conventional treatment controls at least up to the design storm as long as mitigation or in-lieu fees, which compensate for the pollutant load that would otherwise be retained by LID BMPs, are also implemented. A project proponent may choose to design their treatment controls to treat storm flows greater than the design storm that, in effect, would provide an equal pollutant removal as LID retention BMPs. In that case, mitigation would not be needed.</p>				
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Comment No.	161	Commenter No.	44	Comment Subject	LID
Comment	<p>Section F.1.d – Allow regional retention facilities where on-site retention is feasible, but not desirable. Section F.1.d of this permit requires that priority development projects retain the design storm on-site where feasible. We strongly support this requirement, with the caveat that off-site retention should be allowed where local retention is feasible but not desirable. For example, where there are confining layers at some depth below the surface, it may be possible to infiltrate on site, but excess groundwater inputs may create problematic seeps downstream or could otherwise disrupt the local hydrologic balance. It may also be more feasible to manage retention facilities, groundwater tables and water harvest systems regionally. A project should be allowed to discharge runoff to a regional retention BMP in accordance with a regional management plan without needing to first show that on-site retention is infeasible.</p>				
Response	<p>The Tentative Order allows regional mitigation projects through the LID BMP Waiver program. The regional mitigation projects must clearly exhibit that it will not allow a net impact from pollutant loading over and above the impact cause by projects meeting LID requirements.</p>				

Comment No.	162	Commenter No.	44	Comment Subject	LID
Comment	<p data-bbox="194 94 852 126">Section F.1.d.(4).(d).(ii) - Replace "Biofilter" with "Filter".</p> <p data-bbox="194 157 1559 220">To resolve the conflict between implementing LID to the MEP and reducing pollutant discharge to the MEP, the term "biofiltration" in Section F.1.d.(4).(d).(ii) should be replaced with "filtration".</p> <p data-bbox="194 241 1526 367">We also strongly support the use of filtering BMPs where either local or regional retention BMPs are infeasible. However, the draft tentative order attempts to limit the range of allowable filtration BMPs by requiring "biofiltration" with storage for at least 75% of the volume of the design storm. These limitations are not justified by any clear performance benefit and may actually be counterproductive.</p> <p data-bbox="194 388 1559 609">The "bio" modifier and the term "biofilter" are unexplained. Taken literally, "biofilter" may exclude filters using inert filter media without a significant organic component, such as sand. However, nearly all filters, including sand filters will develop a biologically active microbial community of within and especially at the surface of the filter media that will improve pollutant removal and transformation. Presumably filters incorporating organic media, but not plants would qualify as "biofilters". Unfortunately, the term "bio" is often narrowly interpreted as meaning "incorporating plants". This interpretation would be especially unfortunate in this case since it would limit the range of filters allowed and would also ensure that BMPs add to irrigation water demand.</p>				
Response	<p data-bbox="194 630 1226 661">A definition of biofiltration has been included in Attachment C to clarify the interpretation.</p>				

Comment No.	163	Commenter No.	44	Comment Subject	LID
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Comment Section F.1.d.(4).(d).(ii) – Replace the 75% design storm storage requirement with a requirement that filters must be moderately to highly effective for anticipated pollutants of concern on site.

The 75% volume requirement in this section is poorly worded and unnecessary. It currently states that the “detention volume is allowed to be no less than 0.75 times the design storm volume.” Taken literally, this would require a BMP to store 75% of the total design storm volume even where a portion of the design storm is retained on-site by other BMPs. I doubt that this is the intent. At a minimum, this section must be revised to require that the biofiltration BMP be designed to retain 75% of the portion of the design storm that is not retained on site.

Preferably the requirement would be removed altogether since it conflicts with an earlier observation in the same sentence that biofiltration facilities are designed as flow through BMPs. It is more appropriate to design filters based on a flow rate, rather than a volume. The 75% volume requirement will make these systems unnecessarily large and expensive. No performance based justification is given for this extra cost which will be substantial.

For example, one impervious acre will produce 2,700 cubic feet of runoff from a 0.75” storm. Assuming a ponding depth of 6” and a soil depth of 18” with a generous void ratio of 30%, a landscape based “biofilter” must occupy at least 4.5% of the contributing impervious site area. This area simply will not be available downstream of impervious areas on many redevelopment sites. In such cases, a similarly effective subsurface, nonvegetated media filter would still be technically feasible since it could be installed under a paved surface.

The existing 75% design storm storage standard should be replaced by a requirement that any filter implemented must have the ability to treat pollutants of concern expected to be generated on site with at least medium effectiveness as demonstrated in full scale field monitoring. With these changes, a technically feasible and effective solution will exist for all sites regardless of their development density, soil properties or other constraints.

Currently, any discussion of the required performance capabilities of a “biofiltration” device is missing from this section. The result of this oversight will be development of designs that seek primarily to meet the “bio” and volume storage requirements instead of the MEP based performance requirements in section F.1.d.(6). These two sets of criteria are potentially conflicting. Requiring conformity with design details instead of the MEP performance standards stifles innovation and may actually prevent the maximum extent practicable standard from being met. For example, a site discharging to a water body with a bacteria TMDL, may be required to install a powered filtration and disinfection system if on-site retention is infeasible. As written, the permit would also require that they participate in the LID waiver program even though the quality of discharge may be far superior to that of a “biofilter”.

Response Biofilters are designed as flow through BMPs, therefore it is allowed for the prefilter detention volume to be 0.75 times the design storm volume. We do not agree that this requirement will make the biofilters unnecessarily large. The design storm volume can be distributed throughout a site. Also, the implementation of LID site design practices such as disconnecting downspouts and installing pervious pavement/pavers will lessen any site's design storm volume for treatment. The LID waiver program is a pollutant load based system. If a project site can demonstrate that they will meet or exceed the pollutant load reduction expected from implementing LID retention BMPs, then no mitigation would be required. The overall filtration design of the biofiltration unit must be for the whole design storm. The 75 percent allowance is for the prefilter detention volume.

Comment Media Filter Design and Performance Verification

Media filters are available in a wide variety of designs including some that have been proven to be effective for common stormwater pollutants and can be installed below grade in self contained structures. Performance of any media filter is impacted by many factors including hydraulic loading rate, media gradation and chemical properties, bed thickness and orientation, influent pollutant load and concentration, and longevity. Whether a filter has a vegetated component or not is just one additional design factor and may not be a critical factor at all.

At CONTECH we have been researching stormwater filter performance for over 15 years and offer a vegetated version, the UrbanGreen BioFilter® (Attachment 1) and several nonvegetated versions including the Stormwater Management StormFilter® (Attachment 2). Throughout the United States, more than 80,000 StormFilter cartridges have been installed, often in combination with infiltration or detention systems, or other stormwater management practices. In California there are over 25,000 StormFilter cartridges in operation. During the past permit term more than 130 separate StormFilter system installations have been completed in Orange County alone. This system is typically used on the densest and most challenging sites where infiltration and landscape based BMPs are not feasible. The flexibility to use this BMP and similarly effective controls such as sand filters without triggering waiver programs must be maintained for those projects where they are in fact the most effective controls that are technically feasible.

In laboratory tests verified by the Washington Department of Ecology, the StormFilter consistently removed sediment particles 5-10 microns in diameter and larger at full treatment capacity. In the field, the StormFilter has consistently shown the ability to reduce effluent TSS concentrations to less than 20 mg/L when influent concentrations are less than 100 mg/L and to remove greater than 80% of the TSS load at higher concentrations. A variety of StormFilter media options are also available to target specific pollutants such as sediment, phosphorous, heavy metals and oil and grease. The hydraulic loading rate of each cartridge can also be set to achieve various performance objectives. For your reference, a StormFilter performance summary is included with this letter (Attachment 2).

As of June 2009, the Stormwater Management StormFilter is the only proprietary filtering technology that has been field-tested and approved for stand alone use in the following peer reviewed nationally recognized programs:

Washington State Department of Ecology
 The Technology Assessment Protocol - Ecology (TAPE)
 The StormFilter is approved as stand-alone facility in meeting the Washington State Department of Ecology basic treatment standards.
http://www.ecy.wa.gov/programs/wq/stormwater/newtech/use_designations/StormFilterGULD12307.pdf

Protocol for Stormwater Best Management Practice Demonstrations
 Technology Assessment Reciprocity Partnership (TARP)
 StormFilter field monitoring data has been verified by New Jersey Corporation for Advanced Technologies (NJ CAT). The StormFilter is certified to remove 80% of typical stormwater sediment by the New Jersey Department of Environmental Protection.
http://www.nj.gov/dep/stormwater/docs/treatment_final_cert_stormfilter.pdf

ETV Protocol– Stormwater Source Area Treatment Technologies
 US EPA - Environmental Technology Verification Program
 The StormFilter was tested at three separate sites following the ETV protocol.
<http://www.epa.gov/nrmrl/std/etv/vt-wqp.html>

Investigation of Structural Control Measures for New Development
 Sacramento Stormwater Quality Partnership
 The StormFilter is conditionally approved pending final review of testing information from 33 storms.
<http://www.sacramentostormwater.org/SSQP/development/proprietary.asp>

Response Comment noted. To the extent that conventional storm water treatment controls are able to provide the same pollutant reduction as LID retention BMPs, then that project site would not have to do mitigation or in-lieu fees as part of the LID waiver program. The conventional storm water treatment controls may be designed for greater than the design storm to provide the same pollutant load reduction as LID retention BMPs.

Comment No.	165	Commenter No.	44	Comment Subject	LID
Comment	We strongly urge you to revise Section F.1.d.(4).(d).(ii) by replacing the term "biofilter" with "filter" and replacing the 75% design storm volume storage requirement with filter a performance standard. Without these changes, the only technically feasible treatment controls on some sites with poor soils and without adequate landscape area available for biofiltration may trigger participation in the LID substitution even while still requiring the MEP standard to be met on site.				
Response	Please see the responses to Comment Nos. 162 and 163.				
Comment No.	166	Commenter No.	45	Comment Subject	Construction
Comment	Make findings consistent with JRMP. Provide separate sections for Construction vs. Existing Development.				
Response	Thank-you for the comment, but we feel this change to the Findings is not warranted and unnecessary.				
Comment No.	167	Commenter No.	45	Comment Subject	Finding
Comment	Definition of "urban stream" contradicts 40 CFR 122. Provide clearer definition as to what an "urban stream" is.				
Response	Similar comments regarding urban streams being part of the MS4 have been considered in previous response to comments. Please see the Fact Sheet; December 12, 2007, Response to Comments II, Response No. 13; and July 6, 2007, Response to Comments I, Response No. 3. In summary, an MS4 is defined in the federal regulations as a conveyance or system of conveyances owned or operated by a Copermittee, and designed or used for collecting or conveying runoff. Therefore, the Regional Board considers natural drainages that are used by the Copermittees as conveyances of runoff, as both part of the MS4 and as receiving waters. No changes have been made in response to this comment.				
Comment No.	168	Commenter No.	45	Comment Subject	MEP
Comment	Discharge category found to be a source of pollutants requires implementation of appropriate control measures to prevent the discharge of pollutants to the MS4. Should state: Implement appropriate control measures to reduce the discharge of pollutants to the MEP.				
Response	Please see response to Comment no. 1. Please also see see Comments no. 28 in the July 1, 2009 in Response to Comments IV. Please also see the Regional Board Counsel Memorandum dated November 05, 2009 regarding non-storm water discharge regulation.				
Comment No.	169	Commenter No.	45	Comment Subject	General
Comment	Discharges into MS4 require authorization from owner and operator of the MS4 system, specifically for uncontaminated pumped ground water, foundation drains, and water from crawl space pumps. Support change, and recommend that dischargers are required to obtain authorization prior to the commencement of the discharge.				
Response	Comment noted. Please note this is a requirement for enrollees under the referenced NPDES permit (R9-2008-0002).				

Comment No.	170	Commenter No.	45	Comment Subject	General
Comment	States that building fire suppression system maintenance discharges contain waste and must be prohibited. Not clear what waste the discharges contain and the basis for prohibiting it.				
Response	The Regional Board has received public comments (e.g. Comment no. 137) concerned with non-storm water discharges associated with building fire suppression system maintenance and testing. The Regional Board has found that such activities do not qualify as fire fighting flows as the activities are strictly maintenance in purpose. The current Order (R9-2002-001) and draft Tentative Order contain non-storm water discharge exemptions for discharges associated with water line flushing. While building fire suppression systems lines may be filled with potable water, the systems are not utilized until: a) a fire occurs and triggers the system, or b) the system undergoes required maintenance. The Regional Board has found that water within the lines may contain metals that that may be a significant source of pollutants upon discharge. Furthermore, many of these discharges occur to MS4s, which discharge to receiving waters 303(d) listed for toxicity or identified as requiring listing under the Draft 2008 CWA 303(d) Report. As such, these non-storm water discharges are no longer exempted from prohibition.				
Comment No.	171	Commenter No.	45	Comment Subject	General
Comment	Must identify and control any non-prohibited discharge that creates water quality problems. Should define what is meant by control the discharge.				
Response	The Regional Board appreciates the comment and has provided clarification to Section B.4.				
Comment No.	172	Commenter No.	45	Comment Subject	NEL
Comment	Attachment E, page 12, uses the phrase "Dry weather non-storm water effluent limitations" as opposed to this section's title. Inconsistent. If this is the same, please change.				
Response	The Regional Board appreciates the comment and the change has been made.				
Comment No.	173	Commenter No.	45	Comment Subject	NEL
Comment	The footer on this page does not correspond to the section title. Change footer from "Directive D: Storm Water Action Levels" to "Directive C: Non-Storm Water NEL"				
Response	The Regional Board appreciates the comment and the change has been made.				
Comment No.	174	Commenter No.	45	Comment Subject	NEL
Comment	Requires review and acceptance of a determination that a effluent limitations discharge is from a natural source. Strike "acceptance" from section.				
Response	The comment provides no explanation for striking the word from the Section. Thus, the requested change has not been made. The evidence submitted by the Copermittee to support their source determination must be of acceptable scientific rigor to the Regional Board.				
Comment No.	175	Commenter No.	45	Comment Subject	NEL
Comment	This requires the Copermittee to determine whether a discharge type should be exempt. This is the responsibility of the Regional Board.				
Response	This is the responsibility of both the Regional Board and discharger. Either the Regional Board or the discharger may identify categories that should not be exempt. Please see the Regional Board Counsel Memorandum dated November 05, 2009 for discussion of non-storm water discharge regulation. Please also see response to Comment no. 52 in the July 1, 2009, Response to Comments IV.				

Comment No.	176	Commenter No.	45	Comment Subject	NEL
Comment	<p>This is a completely new program, above and beyond any requirement of the CWA.</p> <p>This is inconsistent with the CWA. Make program consistent with 40 CFR 122.</p>				
Response	<p>This program is consistent with CWA requirements. Please see the Regional Board Counsel Memorandum dated November 05, 2009 for discussion of regulation of non-storm water discharges.</p> <p>Please also see USEPA Comment no. 153.</p>				

Comment No.	177	Commenter No.	45	Comment Subject	NEL
Comment	<p>"This Permit does not regulate natural sources and conveyances of constituents listed in Table 4"</p> <p>This sentence is confusing. If it doesn't regulate "constituents listed in Table 4." What does it regulate and why is there a Table 4?</p>				
Response	<p>The Tentative Order regulates the discharge of pollutants from a point source (the MS4). Table 4 is applicable for non-storm water discharges from the MS4 into receiving waters. An exceedance of an NEL caused by a natural source being naturally conveyed would not trigger further action from the Regional Board.</p>				

Comment No.	178	Commenter No.	45	Comment Subject	NEL
Comment	<p>This Permit does not regulate natural sources and conveyances of constituents listed in Table 4.</p> <p>Should state clearly which Table(s) 4 (4.a.1, 4.a.2, 4.b. and/or 4.c).</p>				
Response	<p>This statement in the Tentative Order applies to all Tables under Table 4 (a-c).</p>				

Comment No.	179	Commenter No.	45	Comment Subject	NEL
Comment	<p>States that for natural sources the copermitttee must demonstrate discharge is not anthropogenic.</p> <p>Are there guidelines available to make this determination?</p>				
Response	<p>The Regional Board expects this determination to be made through Section F.4.e., which requires investigation and inspection in response to suspected illicit discharges and or connections. This is already required under the current Order. Determinations of origin are likely to be made on a case-by-case basis once the supporting evidence is submitted.</p>				

Comment No.	180	Commenter No.	45	Comment Subject	NEL
Comment	<p>Copermitttees must develop monitoring plans to sample a representative percentage of major outfalls and identified stations within each hydrologic subarea.</p> <p>Make consistent with 40CFR.</p>				
Response	<p>The NPDES regulations do not specify the exact location to be used for monitoring, and the permittee is ultimately responsible for providing a safe and accessible sampling point that is representative of the discharge (40 CFR 122.41(j)). The Regional Board has prescribed the monitoring in an effort to be consistent with the current monitoring done by the Copermitttees under the existing Order. The Regional Board finds it difficult to respond to the comment without a more specific reference to 40 CFR.</p>				

Comment No.	181	Commenter No.	45	Comment Subject	NEL
Comment	<p>The NELs as defined are receiving water standards. This would apply receiving water standards to the water within the MS4. Some of the NELs are not appropriately applied. (Fecal Coliform 400 for AMEL, this is a single sample standard not an average standard).</p> <p>There needs to be a way to account for receiving water quality.</p>				
Response	<p>The establishment of water quality-based effluent limitations must consider the discharge under critical conditions, including for flow (see 40 CFR 122.44(d)). As such, no mixing zone is allowed for discharges under the Tentative Order. For further information please see the Tentative Order Fact Sheet.</p> <p>Water within the MS4 is not required to meet receiving water standards. Under the Tentative Order, the discharge of non-storm water from the MS4 must meet numeric effluent limitations to protect waters receiving the discharge.</p> <p>In regards to the referenced Fecal Coloform Standard, the clarification has been made to the Tentative Order. The standard has been included in the AMEL because it is based on a 30-day period.</p>				

Comment No.	182	Commenter No.	45	Comment Subject	NEL
Comment	<p>Non-storm water discharges from MS4 to inland surface waters.</p> <p>What about when an MS4 flow discharges to dry sediment surface waters and not to actual water?</p>				
Response	<p>The described situation would be considered critical conditions for flow. The consideration of critical flow conditions is required under 40 CFR 122.44(d). A discussion regarding flow is also found in the Fact Sheet:</p> <p>"The San Diego Region has predominately intermittent and ephemeral rivers and streams (Inland Surface Waters) which vary in flow volume and duration at spatial and temporal scales. Therefore, it is assumed that any non-storm water discharge from the MS4 into the receiving water is likely to be of a quantity and duration that does not allow for dilution or mixing. For ephemeral systems, non-storm water discharges from the MS4 are likely to be the only surface flows present within the receiving water during the dry season."</p>				

Comment No.	183	Commenter No.	45	Comment Subject	NEL
Comment	<p>Need to define WARM & COLD water for DO effluent limitations.</p> <p>Should use > < with specific temperatures.</p>				
Response	<p>A change has been made to Table 4.a to clarify the WARM and COLD Beneficial Use designation. Please note that the DO limitations are not temperature dependent, as WARM and COLD are Beneficial Uses assigned by the Basin Plan to particular receiving waters.</p> <p>While the suggested use of >< for DO is the table is appreciated, this change has not been made as the language used in the table is directly from the Basin Plan for the San Diego Region.</p>				

Comment No.	184	Commenter No.	45	Comment Subject	NEL
Comment	<p>Fecal coliform AMELs are inappropriate for multiple reasons.</p> <p>Imposes AB411 standards for Rec 1 waters on non-storm water, non-recreational flows. If it must be applied then B should move to Instantaneous Maximum column.</p>				
Response	<p>A clarification has been made regarding fecal coliform and AMELs (please see response to Comment no. 181).</p> <p>The Tentative Order includes non-storm water numeric effluent limitations that are protective of receiving waters, including those downstream of the discharge. Please note that receiving waters under the Tentative Order are designated as having an existing or potential REC-1 Beneficial Use.</p> <p>Furthermore, it is inappropriate to consider waste assimilation as a Beneficial Uses of receiving waters. Please also see Comment no. 69 in the July 1, 2009, Response to Comments IV.</p>				

Comment No.	185	Commenter No.	45	Comment Subject	NEL
Comment	<p>Enterococcus inappropriately set to Ocean Plan Designated beach area standards.</p> <p>This is non-storm water, non-recreational flow. Why is it being held to beach standards when 5+ years of paired sampling data do not indicate strong links between even higher levels of bacteria than being allowed, and detected AB411 exceedances.</p>				
Response	Please see response to Comment no. 184.				
Comment No.	186	Commenter No.	45	Comment Subject	NEL
Comment	<p>MDEL limits.</p> <p>Where are MDELs defined in 40 CFR?</p>				
Response	Please see 40 CFR 122.2 and 122.45. A definition consistent with 40 CFR 122.2 and existing State and Regional Board NPDES permits and resolutions has been added to Attachment C for further clarification.				
Comment No.	187	Commenter No.	45	Comment Subject	NEL
Comment	<p>Table 4.a.1 does not list an instantaneous maximum for Fecal Coliform.</p> <p>Should list a maximum if less than 5 samples collected in 30-day period.</p>				
Response	Please see response to Comment no. 181.				
Comment No.	188	Commenter No.	45	Comment Subject	NEL
Comment	<p>Tables 4.a.1, 4.b, and 4.c subject storm drain flows to the very stringent AB-411 Rec-1 Criteria standards.</p> <p>The maximums should be adjusted to attainable limits.</p>				
Response	Please see response to Comment no. 184.				
Comment No.	189	Commenter No.	45	Comment Subject	NEL
Comment	<p>Turbidity.</p> <p>What is the justification for turbidity limitations in Region 9 being so much lower than other regions in the state?</p>				
Response	<p>The water quality criteria for Turbidity is determined in the Basin Plan for the San Diego Region. The criteria in the Basin Plan has been set to protect the Beneficial Uses of waters within the San Diego Region. The Basin Plan Objectives were appropriately used in the development of water quality-based effluent limitations for non-storm water discharges. Please note that issues pertaining to Basin Plan Objectives are to be addressed under the Triennial review process. More information may be found at: http://www.waterboards.ca.gov/sandiego/water_issues/programs/basin_plan/tri_review.shtml</p>				
Comment No.	190	Commenter No.	45	Comment Subject	NEL
Comment	<p>Freshwater criteria are based on site-specific water quality data (receiving water hardness).</p> <p>Should be changed to effluent water hardness.</p>				
Response	The Regional Board disagrees as this is required under State Water Board Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California.				
Comment No.	191	Commenter No.	45	Comment Subject	NEL
Comment	<p>pH.</p> <p>6.5 - 8.5 for freshwater 6-9 for saline waters - based on?</p>				
Response	As cited in Tables 4.a and 4.b, pH is based upon Basin Plan Objectives and Ocean Plan Criteria found within the Basin Plan for the San Diego Region and California Ocean Plan.				

Comment No.	192	Commenter No.	45	Comment Subject	NEL
Comment	<p>Fecal coliform AMELs are inappropriate.</p> <p>Imposes AB411 standards for Rec 1 waters on non-storm water, non-recreational flows. If it must be applied then B should move to Instantaneous Maximum column.</p>				
Response	Please see responses to Comments nos. 181 and 184.				
Comment No.	193	Commenter No.	45	Comment Subject	SAL
Comment	<p>This requires "implementation of all necessary storm water controls and measures to reduce .. ." when there is no evidence of a receiving water exceedance. The assessment point is "end-of-pipe" and SALs do not have any justification for applicability.</p> <p>This seems to require an action when there is no evidence of a receiving water violation.</p>				
Response	SALs are applicable as a tool to be used by the Copermittee(s) to determine the level of effectiveness of BMPs utilized within the drainage area discharging at the SAL outfall. This is part of the iterative process to reduce the discharge of pollutants in storm water from the MS4 to the MEP standard.				
Comment No.	194	Commenter No.	45	Comment Subject	SAL
Comment	<p>Metals SALs are in direct contradiction with statement on "table Levels 4.a.2: Priority Pollutants", page 23.</p> <p>Contradiction between NEL section and SAL in terms of metals values.</p>				
Response	Storm Water Action Levels (SALs) are for discharges of storm water from the MS4. Section C is for non-storm water discharges. The SALs were computed utilizing USEPA nationwide MS4 discharge data (Arid West Region), and SALs for metals have been set as the 90th percentile for this dataset. Additionally, the SALs for metals incorporate synoptic water hardness measurements. Please see Attachment E Section II.B.1.b.				
Comment No.	195	Commenter No.	45	Comment Subject	SAL
Comment	<p>" ... assessment points for determination of SAL compliance are all major outfalls " Seems to contradict the following sentence " ... monitoring plans to sample a representative percent of the outfalls "</p> <p>Sentences seem to contradict each other.</p>				
Response	Section D of the Order has been clarified in response to the comment. The word "all" has been removed, as the Copermittees are to sample a representative percent of major outfalls within each hydrologic subarea, not all major outfalls.				
Comment No.	196	Commenter No.	45	Comment Subject	SAL
Comment	<p>" ... to have outfall storm water discharges meet all applicable water quality standards."</p> <p>This applies receiving water standards to the storm drain.</p>				
Response	This is not a requirement of the Order, but a goal as discharges that meet applicable water quality standards are protective of the Beneficial Uses of the receiving waters.				
Comment No.	197	Commenter No.	45	Comment Subject	SUSMP
Comment	<p>"centralized infiltration devices" -This term needs to be clearly defined otherwise there will be confusion on when these infiltration devices" restrictions apply.</p> <p>Provide clear definition as to what "centralized infiltration" are</p>				
Response	Please see the July 6, 2007, Response to Comments I, Response No. 24. A centralized infiltration refers to applications such as large infiltration trenches and infiltration basins that collect water from various locations for the purpose of infiltration and does not refer to small infiltration systems dispersed throughout a development. The language proposed in Section D.1.c.6 is consistent with the language used in Section F.1.b.2.h of Order No. R9-2002-0001 (the current Permit). The Copermittees may collectively or individually develop alternative restrictions on the use of treatment control BMPs which are designed to primarily function as centralized infiltration devices.				

Comment No.	198	Commenter No.	45	Comment Subject	SUSMP
Comment	In practice, this results in treatment control and hydromodification facilities being installed in single family residences, which is not a good practice in terms of assuring adequate maintenance of permanent BMPs.				
	Exclude single family residences from this category if the provided adequate site design and source control.				
Response	Environmentally Sensitive Areas are inherently sensitive habitats containing unique, rare, threatened, or endangered species, or are not achieving their designated beneficial uses. Runoff is known to contain a wide range of pollutants and has demonstrated toxicity to plants and animals. Therefore, it is necessary to apply additional storm water controls for developments within, adjacent to, or directly discharging to ESAs. This need for additional storm water controls is addressed within each component of the Order. Although maintenance of BMPs at single family residences discharging to ESAs may be perceived as being difficult, the ESAs require this added protection. The implementation of LID BMPs and site design should lessen the maintenance requirements and difficulty.				
Comment No.	199	Commenter No.	45	Comment Subject	SUSMP
Comment	It is not clear what is intended to be included this category. A steep hillside development with known erosion soil conditions would need to address erosion. Treatment control and hydromodification requirements are not justified.				
	Remove this from the Priority Development Project Categories, and define elsewhere in Section F.1 how these projects would need to include measures that protect slopes from erosion.				
Response	This requirement is identical to that in the current Permit (Order No. R9-2002-0001), the San Diego MS4 Permit (Order R9-2007-0001), and the Santa Ana Permit (Order R8-2009-0030). These provisions are based on the Los Angeles Regional Board's SUSMP upheld by the precedential State Board Order WQ-2000-11. The State Board's order found that hillside residences can be a significant source of pollutants and/or runoff following development and it is appropriate that the design standards apply so that BMPs for these categories of development result in the infiltration or treatment of a significant amount of the runoff.				
Comment No.	200	Commenter No.	45	Comment Subject	SUSMP
Comment	Retention of the 85th percentile storm event does not mimic the natural hydrology. The amount of runoff under natural conditions is dependent on soil type and other factors.				
	Retention requirements should be revised with intent of matching hydrology under natural conditions.				
Response	Retention of the 85th percentile storm event provides for a high level of pollutant removal to protect water quality. This design storm does not necessarily result in zero discharge. The design storm is between 0.7 to 0.8 inches of rainfall for most of the developed area of Orange County. Larger storms will produce runoff to receiving waters. Also, retention of the design storm will begin to compensate for decades of previous, unchecked development creating impervious surfaces that have resulted in the increased runoff volumes and flow rates discharged to receiving waters.				
Comment No.	201	Commenter No.	45	Comment Subject	SUSMP
Comment	It may be unrealistic for municipalities to implement the various processes required under this section within the amount of time allowed.				
	Provide a feasible time schedule for municipalities to put such a program in place.				
Response	The commenter provides no basis or information for the change, nor specificity regarding the requested change. Thus, no change has been made.				

Comment No.	202	Commenter No.	45	Comment Subject	Construction
Comment	<p>It is neither wise nor necessary to mandate use of a particular technology for managing sediment from construction sites. The Construction General Permit has adequate and more appropriate measures for ensuring sediment discharges will not create a pollution problem.</p> <p>Remove the requirement that Copermitees mandate use of AST. Allow Copermitees to rely on the Risk based approach that was developed for the Construction General. Permit, which does not mandate a particular technology.</p>				
Response	<p>The Tentative Order does not mandate the use of a particular technology for managing sediment from construction sites. The Tentative Order defines Active Sediment Treatment variously as using mechanical or chemical means to flocculate and remove suspended sediment from runoff at construction sites prior to discharge. Examples of coagulants include chitosan, modified starches, alum, electro-coagulation, carbonic acid, ferric chloride, and polyacrylamides. Examples of sedimentation devices include settling basins, ponds, baker tanks, weir tanks, tube settlers, and centrifuges. Examples of polishing filter types include sand, engineered media, membrane and hydrocarbon. For certain construction sites, with specific soil types that are difficult to settle, ATS is likely the only method to meet the 20 NTU water quality objective specified in the Basin Plan. The ATS requirements in the Tentative Order are identical to the ATS requirements in the San Diego MS4 Permit adopted on January 24, 2007. As such, the authors of the Construction General Permit were aware of these existing requirements concerning ATS.</p>				
Comment No.	203	Commenter No.	45	Comment Subject	Construction
Comment	<p>This section requires inspection of construction sites of 1 acre or more at least monthly.</p> <p>Propose language that is definitive and require construction site inspections monthly for sites of 1 acre or more.</p>				
Response	<p>The Tentative Order requires the Copermitees to inspect at least monthly, all sites with one acre or more of soil disturbance.</p>				
Comment No.	204	Commenter No.	45	Comment Subject	Existing Development
Comment	<p>Requirement for use of an automated database system (e.g., GIS) to maintain an updated watershed-based inventory of municipal areas and activities is too restrictive.</p> <p>The use of an automated database system, such as Geographical Information System is highly recommended when applicable, but not required.</p>				
Response	<p>The previous Order (R9-2002-01) did not require the use of GIS, but included language stating it was highly recommended. In this next permit term the use of GIS has been determined to be required (Please also see Comment no. 277 in the July 1, 2009, Response to Comments IV) . It is important to note that section K allows the Copermitees to propose alternative reporting criteria and schedules for the Executive Officer's acceptance. Thus, if a particular Copermitee has difficulty in meeting the time requirement, they may elect to request the reporting be extended. Thus, no changes have been made.</p>				
Comment No.	205	Commenter No.	45	Comment Subject	Existing Development
Comment	<p>Reduction of pesticides, herbicides, and fertilizers into the storm Pesticides, Herbicides water to the MS4 and receiving waters.</p> <p>Support inclusion of "storm water" and "and receiving waters" in the opening paragraph.</p>				
Response	<p>Comment noted.</p>				
Comment No.	206	Commenter No.	45	Comment Subject	Existing Development
Comment	<p>Inspecting and cleaning all MS4 facilities between May 1 and September 30 is infeasible for those Copermitees that have tens of thousands of structures.</p> <p>Inspection and removal of accumulated waste at least once a year between May 1 and September 30 of each year for all MS4 facilities that receive or collect high volumes of trash and debris.</p>				
Response	<p>The Tentative Order provides in section F.3.a.(6)(iii) that "Following two years of inspections, any MS4 facility that requires inspection and cleaning less than annually may be inspected as needed, but not less than every other year;" Thereby, this requirement will give the Copermitees the ability to prioritize their MS4 maintenance activities following a sufficient data collection period.</p>				

Comment No.	207	Commenter No.	45	Comment Subject	Existing Development
Comment	<p>Sections (a) and (b) are redundant.</p> <p>Delete Section (b) as the implementation of the provisions in Sanitary Sewer to Section (a) would maximize pollutant reductions by providing greater flexibility to Copermittees to manage their programs.</p>				
Response	<p>This comment has already been addressed. Please see the July 1, 2009, Response to Comments, Response No. 251.</p>				

Comment No.	208	Commenter No.	45	Comment Subject	Existing Development
Comment	<p>The separation of food facilities from other industrial and commercial facilities and requiring a completely separate inspection program is problematic.</p> <p>We currently inspect 25% of inventory. New requirements would reduce general industrial and commercial inspections by 5%, but increases food facility inspections to 100%. For the City this would result in an inspection requirement of 40% of our inventory.</p>				
Response	<p>Copermittees have been inspecting restaurants annually as part of the County Health Department inspections. Reports from the Aliso Creek watershed Copermittees demonstrate that as-needed inspections for restaurants means at least annually. Restaurants have been found to present many threats to water quality and standard educational efforts are not effective because restuarants are subject to frequent manangement changes. For these reasons, the Order requires restaurants to be inspected annually.</p>				

Comment No.	209	Commenter No.	45	Comment Subject	Existing Development
Comment	<p>"Each food facility must be inspected annually for compliance with the Copermittee's water quality ordinances and this Order."</p> <p>This could be legally not possible. Does the City have the jurisdiction to enforce provision in the Order if there is not municipal code for the regulation in question?</p>				
Response	<p>Section E.1. requires that "Each Copermittee must establish, maintain, and enforce adequate legal authority to control pollutant discharges into and from its MS4 through ordinance, statute, permit, contract or similar means. ...This legal authority must, at a minimum, authorize the Copermittee to: ... Carry out all inspections, surveillance, and monitoring necessary to determine compliance and noncompliance with local ordinances and permits and with this Order, including the prohibition on illicit discharges to the MS4." A failure to establish such legal authority would be considered a violation of the Permit.</p>				

Comment No.	210	Commenter No.	45	Comment Subject	Retrofitting
Comment	<p>The draft language requires an evaluation of potential retrofit sites in establishing a prioritized list of activities and states that "highly feasible projects expected to benefit water quality should be given a high priority" to implement BMPs. However, Copermittees should possess the discretion to evaluate where to direct limited storm water program resources in the larger context of all efforts/activities. While the current language provides the possibility for this program wide consideration, it should be explicitly stated that the Copermittees retain such discretion. For example, the highest rated retrofit project may result in only a medium priority rating when compared to education campaigns, enforcement, street sweeping, or other controls identified in the work plan.</p> <p>Proposed Language: (3) Each Copermittee must consider the results of the evaluation in prioritizing potential retrofit projects with other activities in work plans for the following year. Where feasible, the retrofit projects should be designed in accordance with the SSMP requirements within sections F .1.d.(3) through F.1.d.(8). In addition, the Copermittee shall encourage retrofit projects to implement where feasible the Hydromodification requirements in Section F .1.h.</p>				
Response	<p>The prioritization of retrofitting opportunities does not bar the implementation of other worthy high priority activities. The Copermittees prioritization and implementation of retrofitting can be integrated into other identified high priority activities. For example, education can include homeowner education on installing rain barrels or rain gardens. Enforcement actions can result in offering retrofitting as mitigation in lieu of penalties. High priority street sweeping areas can be retrofitted with trash guards on storm drains or lot -sized LID BMPs that prevent pollutant transport to the streets. In summary, the requested flexibility is already present in the Tentative Order.</p>				

Comment No.	211	Commenter No.	45	Comment Subject	Retrofitting
Comment	<p>Section F.3.d.(3) states that retrofit projects should be designed to SSMP requirements. However, other requirements, such as TMDL or ASBS requirements, may be critically important to designing to retrofit projects. Because these requirements are spatially and temporally variable, the draft Permit should be revised to state that retrofit projects should consider applicable regulations and requirements, as feasible, and should not list specific criteria.</p> <p>Permit should be revised to state that retrofit projects should consider applicable regulations and requirements, as feasible, and should not list specific criteria.</p>				
Response	<p>The Tentative Order's language provides sufficient flexibility to design retrofitting projects according to applicable regulations and requirements. To our knowledge, neither TMDLs nor ASBS have design storm requirements. The SSMP design standards are to be applied to retrofitting only where feasible. The Tentative Order also states that retrofit project "should" (rather than "must") be designed in accordance with SSMP requirements. The Regional Board feels that it is important not to limit retrofitting opportunities to the design storm. Because retrofitting occurs in an already developed area, the space requirements needed to meet the design storm may not exist on a particular site. Space restrictions should not limit being able to retrofit the property to the maximum extent practicable. For example, where a site cannot design a retrofit practice to the 85th percentile storm, the site may be able to design a retrofit practice to the 50th percentile; thereby still improving storm water quality.</p>				

Comment No.	212	Commenter No.	45	Comment Subject	Monitoring
Comment	<p>Require "inspections for illegal discharges and connections must be conducted during routine maintenance of all MS4 facilities"</p> <p>This could be an added reporting burden. How are we supposed to document that an inspection for illegal discharges and connections is done? Delete "must" from sentence.</p>				
Response	<p>Federal regulations require that illicit discharges be prevented from entering the MS4. Federal regulations also require a program to detect and remove illicit discharges and improper disposal into the MS4. It is expected that staff conducting MS4 maintenance activities be trained to detect illegal discharges and connections. It is unclear how this requires additional documentation. If staff, during MS4 maintenance activities, identify a possible illegal discharge or connection it is expected that information is used in accordance with Section F.4.e (Investigation/Inspection and Follow-up).</p>				

Comment No.	213	Commenter No.	45	Comment Subject	Monitoring
Comment	<p>"The use of GIS is required" and "The GIS layers of the MS4 map must be submitted ... "</p> <p>Not a problem for us but for those jurisdictions that do not have this capability this would be a significant expense. Delete requirement for use of GIS.</p>				
Response	<p>The previous Order (R9-2002-01) did not require the use of GIS, but included language stating it was highly recommended. In this next permit term the use of GIS has been determined to be required (Please also see Comment no. 277 in the July 1, 2009, Response to Comments IV) . It is important to note that section K. allows the Copermittees to propose alternative reporting criteria and schedules for the Executive Officer's acceptance. Thus, if a particular Copermittee may have difficulty in meeting the time requirement, they may elect to request the reporting be extended. Thus, no changes have been made.</p>				

Comment No.	214	Commenter No.	45	Comment Subject	Monitoring
Comment	<p>Vague language.</p> <p>Provide a more specific description of the information to be confirmed and updated.</p>				
Response	<p>The intent of F.4.b is to require the Copermittees to update their MS4 maps in coordination with the dry weather field screening and analytical monitoring required under Section F.4.d. and Section F.4.e. It is expected that illicit discharge detection and elimination activities will confirm the accuracy of existing MS4 maps and potentially discover new or incorrect MS4 discharge points. As such, the map is simply required to be updated.</p>				

Comment No.	215	Commenter No.	45	Comment Subject	Monitoring
Comment	<p>Paragraph makes a reference to attachment E, which does not in fact contain a description of this particular program.</p> <p>Include a description of the Dry Weather Field Screening and Analytical Monitoring Program in Attachment E.</p>				
Response	<p>Comment noted. Section F.4.d of the Order references Attachment E. The description of the program is contained within Section II.C of Attachment E for Dry Weather Numeric Effluent Limitations. The Tentative Order gives the Copermittees great flexibility to propose a program that meets these requirements.</p>				

Comment No.	216	Commenter No.	45	Comment Subject	Monitoring
Comment	<p>This seems to be the dry weather program we currently have. This appears to be in addition to the "Dry Weather NEL" program. In essence this appears to be a duplicate program.</p> <p>This is inconsistent with the CWA. Make program consistent with 40 CFR 122.</p>				
Response	<p>Please see response to Comment no. 215. The description of the program is contained within II.C of Attachment E for Dry Weather Numeric Effluent Limitations. The current program under Order R9-2002-01 must continue with minor additions. Subsequently, the Copermittees must incorporate criteria for non-storm water numeric effluent limitations.</p> <p>There is no duplicative effort required and the monitoring required under the Tentative Order is consistent with section 402 of the CWA and 40 CFR 122.26, 122.44 and 122.48. The Regional Board finds it difficult to respond to the comment as there is no basis for inconsistency cited.</p>				

Comment No.	217	Commenter No.	45	Comment Subject	Monitoring
Comment	<p>Reference "Attachment E" for description of this program.</p> <p>Add description of program in Attachment E. There is currently not a description for this program.</p>				
Response	<p>Please see response to Comment nos. 215 and 216.</p>				

Comment No.	218	Commenter No.	45	Comment Subject	Monitoring
Comment	<p>... based on results of field screening ...</p> <p>Field screening is not included as a component of any monitoring programs and should be removed from this sentence.</p>				
Response	<p>The Regional Board disagrees, as field screening is the quantitative and/or qualitative monitoring of MS4 outfalls for non-storm water discharges and associated observations regarding a discharge. For example, if a field screening of an MS4 major outfall detects a high turbidity from sediment in a non-storm water discharge, Section F.4.e directs that this screening should be used for investigating and inspecting that portion of the MS4.</p>				

Comment No.	219	Commenter No.	45	Comment Subject	Monitoring
Comment	<p>References a monitoring effort that does not exist anywhere else in the permit (field screening).</p> <p>The inconsistency in the permit for the different programs and the referenced sections need to be straightened out. Add description of referenced program to Attachment E.</p>				
Response	<p>Please see response to Comment nos. 215 and 216.</p>				

Comment No.	220	Commenter No.		Comment Subject	
Comment	<p>Transcription error. Please reuse this comment ID #.</p>				
Response	<p>Transcription error. Please reuse this comment ID #.</p>				

Comment No.	221	Commenter No.	45	Comment Subject	Monitoring
Comment	<p>Contradictory paragraph. Numeric action levels must be developed, but "the criteria must consider numeric effluent limitation (see Section C)".</p> <p>The NELs from Section C or develop numeric action levels? Recommend selecting one criteria.</p>				
Response	<p>This paragraph has been clarified. Action levels are determined by the Copermittees as a point in which follow-up investigation is required. This includes levels set as effluent limitations under the Order. Effluent limitations must be used by the Copermittees as the maximum concentration at which follow up investigative action is required for those specific pollutants. However, Copermittees may wish to set action levels below effluent limitations. Furthermore, action levels are required for other pollutants which do not have effluent limitations under the Order.</p>				
Comment No.	222	Commenter No.	45	Comment Subject	Monitoring
Comment	<p>References Attachment E for program description. There is no program in Attachment E that relates to this.</p> <p>Add description of program in Attachment E.</p>				
Response	<p>Please see response to Comment nos. 215 and 216.</p>				
Comment No.	223	Commenter No.	45	Comment Subject	Monitoring
Comment	<p>Punctuation error.</p> <p>Remove apostrophe from "it's" in the last line.</p>				
Response	<p>The Regional Board appreciates the comment and the correction has been made.</p>				
Comment No.	224	Commenter No.	45	Comment Subject	WURMP
Comment	<p>The workplan is for development of a BMP strategy and implementation of BMPs to improve urban runoff water quality contributions to the receiving water. Calling it a "Water Quality" workplan is misleading because the regulated parties under this permit are not responsible for every contribution to every water body in the entire watershed.</p> <p>The requirements should focus on urban runoff contributions to the receiving waters for which the regulated parties are responsible.</p> <p>Revise the section to state: The Watershed Workplan shall describe the Permittees' development and implementation of a collective watershed strategy to assess and prioritize the water quality problems due to runoff discharging to the watershed's receiving waters, identify and/or model sources of the highest priority water quality problem(s), develop a watershed-wide BMP implementation strategy to abate highest priority water quality problems and the relative contribution from runoff discharges, and a monitoring strategy to evaluate BMP effectiveness and changing water quality prioritization in the WMA.</p>				
Response	<p>The Tentative Order is for the discharges from the Copermittees MS4s. Pollutant contributions that are not discharged from the Copermittees MS4 are not addressed by this permit or required to be addressed by the WRMP section. No changes have been made in response to this comment.</p>				
Comment No.	225	Commenter No.	45	Comment Subject	WURMP
Comment	<p>The permit required monitoring program does not support this level of analysis. If an attempt was made to use the data from the monitoring programs, misrepresentation and mischaracterization would occur because the program does NOT involve collection sufficient data to do this. The requirements should focus on urban runoff contributions to the receiving water for which the regulated parties are responsible.</p> <p>Remove this section or replace with a requirement more in line with the regulated parties' responsibility of contributions of runoff discharges to the receiving waters, such as the requirements in Order No. R9-2007-0001 for the San Diego County Copermittees.</p>				
Response	<p>The watershed characterization allows the Copermittees to consider all available data, reports, monitoring and information available. The Copermittees monitoring program should be designed and implemented to be consistent with other monitoring protocols and QA/QC procedures to allow data comparison. The Tentative Order is for the discharges from the Copermittees MS4s. Therefore, the Copermittees must analyze their discharge in relationship to other potential pollutant discharges in the receiving waters. No changes have been made in response to this comment.</p>				

Comment No.	226	Commenter No.	45	Comment Subject	WURMP
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Comment The regulated parties are responsible for urban runoff contributions to the receiving waters and are not necessarily responsible for attainment of the receiving water quality objectives, particularly if there are contributions to the degradation of receiving water quality from parties outside the purview of this permit.

Further, to require that BMPs not contributing to measured improvements in receiving water quality be removed and replaced could lead to no water quality improvement and is flawed considering the intent of the permit. If a BMP is not assessed with regard to its direct improvement to quality of runoff from the localized site but only to the receiving waters, it could be falsely interpreted that a BMP is ineffective and will be removed. BMPs may be effective in reducing pollutants in runoff, but may need the time to be replicated and installed in multiple locations to observe improvements in receiving water quality. Additionally, there may be lag time between installation of a BMP, the end of a reporting year, and the actual observed improvements in water quality. Lastly, If regulated parties were required to expend resources to remove an ineffective BMP (for high priority water quality problems) where said BMP may not be a contributing pollutant source, resources to remove the BMP may be redirected from other, more valuable, efforts to improve water quality.

Replace with: Develop a watershed BMP implementation strategy that focuses on attainment of receiving water quality objectives in the identified highest priority water quality problem(s) by improving discharge runoff water quality. The BMP implementation strategy shall include a schedule for implementation of the BMP projects to abate specific runoff discharge contributions to receiving water quality problems. BMPs not contributing to measured pollutant reductions or improvements to runoff discharge water quality must be modified or replaced with alternative BMPs. Identified watershed water quality problems may be the result of jurisdictional discharges that will need to be addressed with BMPs applied in a specific jurisdiction in order to generate a benefit to the watershed.

Response The cited requirement states that "BMPs not contributing to measured pollutant reductions or improvements to water quality ..." A measured pollutant reduction by the BMP shows a direct improvement to the quality of runoff treated by that BMP. The Copermittees assessment should provide sufficient time to maintain and troubleshoot BMPs to improve their performance. This time frame may be over several rainy seasons and reporting periods and is not prescribed by the Tentative Order. In summary, the Copermittees should not waste their resources on BMPs that are not achieving desired outcomes and the Copermittees should redirect those resources to more effective BMPs.

Comment No.	227	Commenter No.	45	Comment Subject	WURMP
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Comment Requiring modeling AND monitoring improvements to water quality will require regulated parties to expend resources inefficiently. Additionally parties are regulated because of their contribution, as MS4 dischargers, to receiving water quality impairments. The regulated parties called out in this permit are MS4 dischargers and are responsible for their relative contributions, not the entire receiving water body quality.

The use of the word "proper" for installation of BMPs is subjective and not defined by this permit. There may be many different ways to "properly" design and install a BMP, and the regulated parties may or may not choose to test different ways for each BMP to determine which works best.

Revise to state: Develop a strategy to model and/or monitor improvements in runoff discharge quality resulting from implementation of the BMPs described in the Watershed Workplan. The modeling and/or monitoring strategy shall generate the necessary data to report on the measured pollutant reduction that results from BMP implementation.

Response The monitoring and modeling requirements are required to assess the effectiveness of BMPs at improving water quality in an iterative manner. Then, the Copermittees can prioritize their resource expenditure on BMPs that are more efficient at meeting water quality objectives. We agree that this Tentative Order regulates the discharge from MS4s and that Copermittees are responsible for their relative contributions. Pollutant contributions outside of the scope of this Tentative Order are addressed through other regulatory mechanisms such as separate NPDES permits, Waste Discharge Requirements, CWA section 401 water quality certifications and the nonpoint source program. The term "proper" for describing BMP implementation is purposely left undefined in the Tentative Order. The Copermittees must determine what is the proper BMP implementation through manufacturer suggestions or BMP guidance manuals (e.g. CASQA). In some cases, "proper" BMP design and implementation may later be found to be faulty. The Tentative Order provides the Copermittee the flexibility to adjust and maintain BMPs to improve pollutant removal effectiveness. No changes have been made in response to this comment.

Comment No.	228	Commenter No.	45	Comment Subject	WURMP
Comment	<p>Add a timeframe in which the Regional Board must respond/accept the work plan prior to implementation. By not having a time certain for the Regional Board's response, this could cause unnecessary delay to the implementation of the program and prolong the currently unacceptable conditions of water quality.</p> <p>Add a specific timeframe in which the Regional Board must respond to/accept the work plan.</p>				
Response	<p>Directive G.3 has been modified by adding the following sentence: "If within 30 days of submittal, the Regional Board has not taken an action, the Workplan shall be deemed acceptable."</p>				

Comment No.	229	Commenter No.	45	Comment Subject	WURMP
Comment	<p>Public review should occur prior to the workplan being submitted to the Regional Board, not after (prior to implementation). Changes to the workplan may be warranted in response to public comments. If this is the case, the version the Regional Board would approve prior to public review would essentially be a draft.</p> <p>Reverse the order of the Regional Board's acceptance and the public review period.</p>				
Response	<p>The Tentative Order requirement for acceptance by the Regional Board Executive Officer is listed as requirement G.3. The requirement for the public review period is listed as requirement G.5. This order is by chance and does not indicate a chronological order. We agree that the public review period should be prior to submittal for acceptance by the Regional Board Executive Officer. Directive G.5 has been modified to require public review prior to submission to the Regional Board.</p>				

Comment No.	230	Commenter No.	45	Comment Subject	Economic
Comment	<p>Business plan requirements</p> <p>Recommend changing from the proposed 5-year plan to a 1-year plan similar to R9-2007-01, based on the uncertainties of the economy.</p>				
Response	<p>The Business Plan requirements were removed at the request of the Copermittees.</p>				

Comment No.	231	Commenter No.	45	Comment Subject	General
Comment	<p>Per the definition in Attachment C, Environmentally Sensitive Areas include 303(d) listed waterbodies. It is therefore redundant and inefficient to require assessment for both 303(d) waterbodies and for ESAs.</p> <p>Remove Section J.1.a.(1)</p>				
Response	<p>Please see Comment no. 270 in the July 1, 2009, Response to Comments IV.</p>				

Comment No.	232	Commenter No.	45	Comment Subject	General
Comment	<p>The mention here of a Work Plan is redundant and subsequently confusing. Does the JRMP Work Plan replace the JRMP Plan (K.1.a)? Clarification is needed.</p> <p>Remove the requirement for a Work Plan or clarify that the Work Plan replaces the JRMP.</p>				
Response	<p>There is a distinction within each section regarding the JRMP Work Plan (J.4) and Jurisdictional Runoff Management Plan (K.1.a). These requirements are not redundant, but complementary. The Jurisdictional Runoff Management Plan is a "written account of the overall program to be conducted by each Copermittee to meet the jurisdictional requirements of section F" of the tentative Order. The JRMP Work Plan is "a work plan to address their (Copermittees) high priority water quality problems in an iterative manner over the life of the permit."</p> <p>It is expected that portions of the Jurisdictional Runoff Management Plan may be modified through development of the JRMP Work Plan to address high priority areas. For example, the JRMP Work Plan may identify a high priority 303(d) listed waterbody that requires additional BMP efforts. This may result in program adjustments under Section F of the Order.</p>				

Comment No.	233	Commenter No.	45	Comment Subject	General
Comment	<p>The reference to a watershed workplan should use a consistent naming convention. It is referred to as a "Watershed Workplan" in Section K.1.b., and a "Watershed Water Quality Workplan" in Section G.2.</p> <p>The reference to a watershed workplan should use a consistent naming convention.</p>				
Response	<p>Section G.2 is for the "Watershed Water Quality Workplan (Watershed Workplan)." Therefore, the "Watershed Water Quality Workplan" is subsequently referred to as the "Watershed Workplan" throughout the remainder of the Tentative Order. The term "Watershed Water Quality Workplan" is only used once in the Tentative Order at G.2. Therefore, no change has been made.</p>				

Comment No.	234	Commenter No.	45	Comment Subject	General
Comment	<p>The required components of the watershed workplans is discussed in Sections G.2 and K.1 .b.(4). The requirements should be consolidated to Section G.2, as Section K.1.b.(4) should only address reporting process/requirements.</p> <p>The requirements should be consolidated to Section G.2, as Section K.1.b.(4) should only address reporting process/requirements.</p>				
Response	<p>Section G.2, as written, provides flexibility to Copermittees in development of their Watershed Water Quality Workplans (Watershed Workplans). The section allows Copermittees to use all applicable information, identify the highest priority problems and develop strategies. It is not expected that all the information used in Watershed Workplan development be conveyed to the Regional Board. Thus, the Reporting requirements for Watershed Workplans under Section K.1.b.4 represents the minimum requirements on Watershed Workplans to be conveyed to the Regional Board. Section K.1.b. does, as the commenter requests, only address reporting process/requirements because section K.1.b.4 represents the minimum reporting requirement(s).</p>				

Comment No.	235	Commenter No.	45	Comment Subject	General
Comment	<p>The process and requirements for reviewing and updating the workplans is discussed in Sections G.6 and K.1.b. These requirements should be consolidated to one section.</p> <p>Consolidate to one section all requirements for the Watershed Workplan.</p>				
Response	<p>Please see response to Comment no. 234. Please note that the Reporting Section (K.1.b) specifies the timeframe for submittal of the Watershed Workplan(s) to the Regional Board and the minimum information to be submitted to the Regional Board. It does not specify the requirements for reviewing and updating workplans.</p>				

Comment No.	236	Commenter No.	45	Comment Subject	General
Comment	<p>Providing information for each program component by watershed is inefficient as this information is provided the WURMP annual reports. Recommend removing the reference "by watershed" from this requirement.</p> <p>Revise to state: Information for each program component as described in the following Table 9:</p>				
Response	<p>It should be noted that requirements under Section F may be different from watershed to watershed. Please see Comment no. 232. Thus, no change has been made.</p> <p>Please note under Section K, the Copermittees "may propose alternate reporting criteria and schedules, as part of their updated JRMP, for the Executive Officer's acceptance." Thus, the Copermittees can suggest the requested change as part of their updated JRMP.</p>				

Comment No.	237	Commenter No.	45	Comment Subject	General
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Comment A requirement for a description of ordinances or similar means to prohibit non-storm water discharge categories that are allowable per Section B.2. conflicts section B.2. Section B.2. clearly allows for the prohibition of the discharged or the development and implementation of appropriate control measures to prevent the discharge of pollutants to the MS4. Additionally, it is not clear if section (4)(b) is a requirement for ALL prohibited non-storm water discharges or those that are an allowable category but are subsequently identified as a source of pollutants.

Revise to state: A description of ordinance or orders to prohibit non-storm water discharges identified as sources of pollutants per section (4)(a) above, or a description of control measures to prevent the discharge of pollutants to the MS4.

Response Section K.3.a.4.b requires:
 "A description of ordinances, orders, or similar means to prohibit non-storm water discharge categories identified under section B.2 above."

Section B.2 clearly states:
 "Where the Copermittee(s) have identified a category as a source of pollutants, the category shall be addressed as an illicit discharge and prohibited through ordinance, order or similar means. The Regional Board may identify categories of discharge that either requires prohibition or other controls."

Under federal regulations, all illicit discharges are to be prohibited by order, ordinance or similar means (see Regional Board Counsel Memorandum dated November 05, 2009). As stated in Comment no. 39 in the July 1, 2009, Response to Comments IV, for the last 19 years NPDES storm water permits for Southern Orange County have required Copermittees to prohibit illicit discharges. Section B.2 requires prohibition of exempted discharges where identified by the Copermittees as a source of pollutants or as identified by the Regional Board. The Regional Board contends that the reference is clear and no change has been made.

Comment No.	238	Commenter No.	45	Comment Subject	Monitoring
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Comment Typo at the base of the table: "Nitrate and nitrate may be Monitoring combined ... "
 Change to: "Nitrite and nitrate may be combined .. ."

Response The Regional Board appreciates the comment and the correction has been made.

Comment No.	239	Commenter No.	45	Comment Subject	Monitoring
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Comment Comparing Metals SALs with CTR values.
 Question is if you can use the "1 hour maximum concentration" criteria in this way?

Response The SALs have been set as the 90th percentile of arid west MS4 discharge data (please see comment no. 156). The Regional Board, however, recognizes that the impact of metals in freshwater is hardness dependent. Thus, the 1-hour maximum concentration was selected because SALs target the "first flush" of storm water from MS4s. If a SAL for a metal is exceeded, the receiving water hardness should be used to compare the "first flush" criteria with the 1 hour concentration. The Regional Board contends this comparison is more valid that the 4 day continuous concentration, which is not consistent with required post-construction BMP design for storm events and "first flush" parameters. Please also note this is done for comparative purposes, as SALs are to be used in the iterative process and are not effluent limitations.

Comment No.	240	Commenter No.	45	Comment Subject	Monitoring
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Comment This creates a watershed based program for monitoring MS4 discharges. MS4s are inherently jurisdictional in nature. MS4s do not typically cross jurisdictional boundaries, hence this does not lend itself to a watershed base evaluation.
 Is this suppose to be our MS4 Outfall Monitoring program broken apart into a Wet and Dry components?

Response This monitoring approach is consistent with the current Order (R9-2002-0001).

Comment No.	241	Commenter No.	45	Comment Subject	NEL
Comment	States that copermittes must conduct the following dry weather field screening and analytical monitoring tasks. Does not define or outline the field screening tasks.				
Response	The Section requires specific field screening tasks (see E.II.C.b) and requires current dry weather field screening to continue under the Order.				
Comment No.	242	Commenter No.	45	Comment Subject	NEL
Comment	"Stations must be all major outfalls" plus "other outfall points ... " This far exceeds CWA 500 point maximum for dry weather monitoring.				
Response	A clarification has been made to the section. The word "all" has been removed to be consistent with other sections of the Tentative Order (please see Section C.4 of the Order).				
Comment No.	243	Commenter No.	45	Comment Subject	NEL
Comment	Map sites as a separate GIS layer or map overlay. This is in contradiction with the 4.b. "Maintain MS4 Map" pg. 71 which states that GIS is required.				
Response	The Regional Board contends this is not in contradiction with the GIS requirement, as it is the identification of individual monitoring stations, not the MS4 system. This identification can be done as a GIS layer for the overall GIS MS4 map, which is recommended, or as a map overlay.				
Comment No.	244	Commenter No.	45	Comment Subject	NEL
Comment	"... must sample a representative number of major outfalls ... " Contradicts Section E.II.C.a.(1) of Attachment E, which states that "Stations must be all major outfalls."				
Response	Please see response to Comment no. 242 as a correction has been made .				
Comment No.	245	Commenter No.	45	Comment Subject	Monitoring
Comment	Copermittes must sample a representative number of major water effluent outfalls. Should define or outline how to determine a representative number of outfalls.				
Response	Please see response to Comment no. 154.				
Comment No.	246	Commenter No.	45	Comment Subject	NEL
Comment	If flow is evident a 1 hour composite sample may be taken. Should elaborate on sampling procedures for flowing outfalls.				
Response	Please see response to Comment no. 247.				
Comment No.	247	Commenter No.	45	Comment Subject	NEL
Comment	"if flow is evident a 1 hour composite sample may be taken" There is no definition of what comprises a composite sample. This would significantly increase this program.				
Response	Please note this is not a permit requirement, but a suggestion. The language is flexible to allow for the Copermittes to utilize grab or composite samples. Composite sampling is a technique where multiple temporally discrete samples are combined and subsequently treated as a single sample. The language includes a 1-hour requirement if composite samples are taken to allow for flexibility due to potential variation in flow conditions between monitoring locations.				

Comment No.	248	Commenter No.	45	Comment Subject	NEL
Comment	<p>Typo at bottom of page: "Effluent samples must also under analysis for .. . "</p> <p>Change to: "Effluent samples must also undergo analysis for ... "</p>				
Response	The Regional Board appreciates the comment and the change has been made.				

Comment No.	249	Commenter No.	45	Comment Subject	NEL
Comment	<p>"Develop and/or update criteria for "</p> <p>This seems to contradict the NELs from section C of the permit. They say to include the NELs from section C and LC50 values, when you develop your criteria.</p>				
Response	<p>The Copermittees are required to develop response criteria when monitoring for pollutants potentially discharged in non-storm water from the MS4. This criteria must include the NELs found in Section C of the Order, as an exceedance of an NEL requires follow-up investigation. The criteria, however, should include other criteria for pollutants which do not have numeric effluent limitations. Furthermore, a Copermittee may wish to set response criteria for pollutants that have a numeric effluent limitation at a concentration lower than the numeric effluent limitation.</p>				

Comment No.	250	Commenter No.	45	Comment Subject	NEL
Comment	<p>This section is unclear.</p> <p>Should be reworded clearly (Develop and/or update action level criteria for dry weather non-storm water effluent analytical monitoring results. Exceedances of the action level criteria require follow-up investigations to detect and eliminate the source causing the exceedance.</p>				
Response	<p>This section has been clarified to read as follows:</p> <p>"Develop and/or update criteria for dry weather non-storm water effluent analytical monitoring results:"</p>				

Comment No.	251	Commenter No.	45	Comment Subject	NEL
Comment	<p>Section refers to dry weather field screening and analytical monitoring procedures from Sections F.4.d and F.4.e.</p> <p>Sections F.4.d and F.4.e refer to the Attachment E for this program. This is a circular reference and the procedures are not defined anywhere in the permit or attachment. There is no description for dry weather field screening and analytical monitoring in either Order No. R9-2009-0002 or Attachment E.</p>				
Response	<p>The Section States:</p> <p>"If monitoring indicates an illicit connection or illegal discharge, conduct the follow-up investigation and elimination activities as described in submitted dry weather field screening and analytical monitoring procedures and sections F.4.d and F.4.e of Order No. R9-2009-0002."</p> <p>The field screening and analytical monitoring has already been done extensively under the current Order, and the references in Attachment E build upon the efforts already established and implemented to date. Additionally, the section states the following:</p> <p>"Until the dry weather non-storm water effluent analytical monitoring program is implemented under the requirements of this Order, each Copermittee must continue to implement dry weather field screening and analytical monitoring as it was most recently implemented pursuant to Order No. 2002-01."</p>				

Comment No.	252	Commenter No.	45	Comment Subject	NEL
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Comment "Copermittees must choose a subset of major outfalls ... that discharge to the surf zone in conjunction with the ACRWM."
 The ACRWM program is only suppose to sample within ecologically sensitive areas. There does not appear to be a link between the ACRWM and the dry weather field screening and analytical monitoring program. This needs to be further developed.

Response The commenter misconstrues the section, which states:
 "The Copermittees must choose a subset of major outfalls and identified stations that discharge to the surf zone...Sampling may be done in conjunction with Ambient Coastal Receiving Waters Monitoring."
 The language is flexible, and there is no requirement to sample at locations that discharge to ACRW areas. There are MS4 outfalls that discharge to Areas of Special Biological Significance, Marine Life Refuges and Dana Point Harbor. Furthermore, the Regional Board contends there is a link as Attachment E clearly states the purpose of the ACRW is "to assess the impact of MS4 discharge to ecologically-sensitive coastal areas by analyzing water chemistry and aqueous toxicity in both dry and wet weather."

Comment No.	253	Commenter No.	45	Comment Subject	Monitoring
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Comment Trash and Litter Impairment Investigation is listed under "Special Studies," but is presently a part of the regular Dry Weather Monitoring Program.
 Trash/Litter monitoring should be included as part of the regular Dry Weather Monitoring Program.

Response Please note the the Trash and Litter Impairment Special Study requires the identification of sampling stations for dry season and wet weather. It is expected that the dry weather portion of the study will work within existing efforts.

Comment No.	254	Commenter No.	45	Comment Subject	Monitoring
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Comment This creates a new and separate program.
 The trash assessment program for San Diego was incorporated into the existing monitoring programs. This is more efficient and can be linked to other monitoring results.

Response Please note that the requirements under E.II.D.5 do not prevent the Copermittees from incorporating the Special Study to coincide with existing monitoring efforts. In fact, this section was written with the flexibility to allow Copermittees to do so, as they are required to identify suitable sampling stations.

Comment No.	255	Commenter No.	45	Comment Subject	Monitoring
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Comment Requires all monitoring to comply with SWAMP, unless otherwise specified.
 There are not "otherwise specified" instances. This means all sampling, analysis and QA/QC must comply with SWAMP.

Response Please note that the Trash Special Study (II.D.5) has its own specified monitoring protocol to be developed.

Comment No.	256	Commenter No.	45	Comment Subject	Monitoring
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Comment "The individual(s) who performed the analyses;"
 Specify: in the case of contracted lab work, for example, is the name of the project manager/lab supervisor sufficient?

Response This name of the individual(s) who performed the analyses is required under federal regulations (40 CFR 122.41(j)(3)(iv)). This includes contracted lab work.

Comment No.	257	Commenter No.	45	Comment Subject	Monitoring
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Comment Electronic Monitoring reports must be CEDEN or SWAMP uploadable.
 Will have to retool reporting.

Response Comment noted.

Comment No.	258	Commenter No.	46	Comment Subject	SUSMP
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Comment We respectfully request that the language "and acceptable to the Regional Board" be deleted from the tentative order for the following reasons:

(1) The Regional Board already knows what planning principles we will be and are using in our planning to protect water quality; and

(2) As it currently is drafted this language could result in the Regional Board reviewing RMV's water quality management plans twice - once in the context of the County's approval of master area plans and once in the context of the Regional Board consideration of 401 certifications and/or waste discharge requirements. This would not appear to be the best use of staff time and RMV financial resources. In addition duplicate review places RMV in double jeopardy regarding an approval that should rightly lie with the County as the MS4 permittee.

Response The planning principles are vague and open to interpretation. We do not anticipate multiple review of the water quality management plan. Our expectation is that review of the WQMP under the context of a Clean Water Act section 401 water quality certification will suffice to meet the intent of the Tentative Order.

Comment No.	259	Commenter No.	36	Comment Subject	General
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Comment The Draft Permit Does Not Address Cost Neutrality. Legal Authority or Consistency Issues as Directed by the Board.

At the public hearing on July 1, 2009, the Board members highlighted three issues of general concern that needed further consideration: (1) cost neutrality compared to the 2002 Permit, in the context of the impact that the prevailing economic climate has had on Cities' ability to support expanded programs; (2) legal authority for declaring that nonstormwater discharges are not subject to the Maximum Extent Practicable (MEP) standard of compliance; and (3) consistency with other regional Permits, especially North Orange County. Despite what we understood to be the Board's direction to its staff, it does not appear that these issues have resulted in substantive reconsideration of Permit provisions since the July hearing took place.

Response Please see the Regional Board Counsel Memorandum dated November 05, 2009 regarding the regulation of non-storm water discharges.

As stated in the response to Comment No. 24 in the July 1, 2009, Response to Comments IV, the Regional Board is sensitive to the Copermittee's concerns of consistency and has sought to write the draft Tentative Order to both protect Water Quality and to assist the County and those affected Cities to develop a single program. Please also see Comment no. 373.

To the extent economic information was submitted, the Regional Board staff considered economic considerations in developing elements of the Tentative Order, but the Regional Board is not required to conduct a cost-benefit analysis. The Regional Board, however, has attempted to minimize increased costs in the Tentative Order. Since the Regional Board is prohibited from prescribing the exact manner of compliance with many provisions of the Tentative Order, it is inappropriate for the Regional Board to attempt to estimate costs. That is best left to the Copermittees. The Regional Board is only able to discuss the differences between the existing and proposed MS4 Permits.

It is important to note that existing efforts under Order 2002-001 are not sufficient to protect water quality standards, as evidenced in the Draft 2008 303(d) report, which has identified additional receiving waters proposed to be listed as impaired due to MS4 discharges, including for additional pollutants (see Comment no. 387). Additional requirements within the Tentative Order are required to address non-storm water discharges and are a component of the iterative process for treating storm water discharges to the MEP standard. These requirements are necessary to improve water quality and restore the Beneficial Uses of impaired waters.

Comment No.	260	Commenter No.	47	Comment Subject	NEL
Comment	<p>Dry Weather Numeric Effluent Limitations are Untenable</p> <p>We believe that the most critical intersection of the cost neutrality and legal authority issues is the imposition of Dry Weather Numeric Effluent Limitations (NELs) at the end-of-pipe. The City adopts and incorporates herein the legal positions taken by the County of Orange as Lead permittee and the other co-permittees regarding the applicability of the MEP standard. The practical ramifications of the proposed NELs are overwhelming: Dry Weather Monitoring Program measurements taken since 2002 at almost every pipe outfall in our City - and in all our Co- ermittee Cities - have shown that exceedances of the proposed bacteria, nutrients and dissolved solids NELs are the rule rather than the exception; and that exceedances of the metals NELs are common. A growing body of evidence suggests these constituents are largely natural in origin. Nevertheless, the proposed Permit provisions would appear to trigger the investigation requirement each time and every place that "an exceedance" occurs. Our experience has already shown that a single investigation may entail dozens of man-hours and substantial costs in equipment and laboratory analyses, and yet may still be inconclusive as to source, or be unable to confidently differentiate mixed natural versus anthropogenic sources. The way the NELs provisions are currently written, even naturally-occurring concentrations may be considered non-compliant if their "conveyance" is "anthropogenically-influenced" - a definition that would criminalize all dry-weather flow in the MS4, which locally carries spring flows and groundwater. Such stringent provisions and/or fuzzy outcomes would make the City (and all the other Co-Permittees) continuously non-compliant under the Permit provisions as currently drafted, making us subject to third-party lawsuits and/or enforcement actions and Mandatory Minimum Penalties. The potential costs cannot even be estimated. Such an ill-conceived framework will invite litigation on all fronts: even the Board itself could be subject to third-party lawsuits for failure to enforce. The City requests and recommends that the dry-weather NELs be removed from the draft Permit; or at a minimum be re-framed as Dry Weather Action Levels in essential conformance to the existing Dry Weather Monitoring Program parameters.</p>				
Response	<p>Please see Regional Board Counsel Memorandum dated November 05, 2009.</p> <p>The Copermittee must conduct further investigation into all non-storm water discharges unless it is known with certainty that the discharge either is exempted from prohibition or covered by another NPDES permit, as non-storm water discharges are to be effectively prohibited. This requirement to investigate the source of the discharge, regardless of chemical composition, is already part of the existing permit.</p> <p>Please also see Comment no. 82 in the July 1, 2009, Response to Comments IV.</p>				

Comment No.	261	Commenter No.	47	Comment Subject	General
Comment	<p>The Draft Permit Continues to be Overly Prescriptive</p> <p>The current Stormwater Permit (No. R9-2002-0001) imposed a comprehensive set of stormwater management and regulatory requirements on the Co-Permittees. The Draft Permit substantially expands the requirements and prescriptions of the current Permit without clear or compelling supportive findings, evidence or rationale. While some minor adjustments have been made to the Draft Permit language since the previous Draft version in response to these observations, the City believes that the it remains too prescriptive, increases costs, and limits the discretion and flexibility of the City to implement programs and practices that are appropriate, sensible and practical for our community. For example, the requirements for on-site storm retention, coupled with the prioritization scheme for selection of BMPs for new developments, impose procedures and costs that are locally unsuitable; furthermore the BMP maintenance tracking requirements are more detailed than is supportable. The City requests that the Regional Board carefully review and reconsider all the new requirements of the Draft permit, and wherever possible, provide maximum discretion and flexibility to the Co-Permittees.</p>				
Response	<p>Please see Comment Nos. 61 and 277 in the July 1, 2009, Response to Comments IV.</p> <p>The Copermittees requested the greater consistency in the LID provisions between the Tentative Order and the Santa Ana Regional Board's MS4 permit for North Orange County. The BMP maintenance tracking requirements are similar to those found in the San Diego County MS4 Permit and are wholly supported by the findings from audits of the Copermittee's programs and recommendations from USEPA.</p>				

Comment Intolerable Impacts on Municipal Co-Permittee Budgets

In addition to the ongoing budgetary 'wild card' represented by the Dry Weather NELs as discussed above, the City will incur significant extra one-time costs during the FY09-10 fiscal year for the development of new ordinances, plans, and assessments. Each of the new local requirements - revising the General Plan, updating the Environmental Review process, updating the Grading Ordinance, adopting Homeowner Association regulations, prohibiting irrigation runoff, reworking the Jurisdictional Urban Runoff Management Plan, setting up the Best Management Practices (BMP) Maintenance Tracking system, and developing an Existing Development Retrofitting Plan - may require dozens and in some cases hundreds of staff and/or consultant hours to be expended by each CoPermittee City for each task. Additionally, each City will be charged its cost-share for development by the Lead Permittee of new regional documents, including the Watershed Workplans, the Model Hydromodification Criteria and Waiver Programs, Regional Monitoring Programs, TMDL Load Reduction Plans, etc. The cumulative FY09-10 cost of all this is likely to be well over \$150,000 just in our City - more than doubling our Program Administration budget, without directly achieving any water quality improvement.

The City will also incur new costs on an annual basis for implementing all these new programs. While the City recognizes that the Regional Board has made some effort to 'cost-neutralize' the regional monitoring requirements by reducing some prior commitments while adding new ones in the Draft Permit, the City will still incur higher operational obligations for investigating NEL and Storm Water Action Level exceedances, inspecting existing developments, training staff, educating the public, enforcing the irrigation runoff prohibition, tracking BMP maintenance and reviewing new development proposals. Operational costs are estimated to go up by about 15%, or an additional \$200,000+ annually in this City alone. Capital improvement costs fluctuate year-to-year and cannot really be estimated before the planning efforts defining the projects are completed, but implementing retrofitting at existing developments may cost additional hundreds of thousands of dollars per year.

These cost increases could not come at a worse time for the City budget. The City has experienced a 6% decline overall in municipal revenues this year due to decreases in property tax, sales tax, real property transfer tax, planning and building fees, and interest income, so that we have had to draw on reserves just to maintain our current programs. Most of our planned capital improvement projects have been put on hold and no new ones are being scheduled for this year. Staff furloughs have been imposed in many CoPermittee cities. Against this backdrop, it is challenging for the Co-Permittees to maintain current funding levels for our existing Stormwater Programs, let alone increase funding. The City requests that the Regional Board make every effort to ensure that the new Permit is, at most, cost-neutral to the Co-Permittees. At the very least, we recommend substantially extending the timeframes for developing and deploying any new program plans and components, in order to reduce financial impacts concentrated during this lowest (we hope) point for local government operating revenues.

Response The Regional Board is well aware of the current economic climate. As such, several changes have been made to the Tentative Order to seek a cost neutral permit when compared to the previous permit. Most significantly, the Tentative Order eliminates multiple monitoring requirements and allows the Copermittees to substitute participation in regional Monitoring programs. These actions are expected to be more cost efficient and prevent redundancy.

Many of the costs associated with this permit are not new and recur every permit cycle, such as updating local ordinances and management plans. The cost to update these plans is likely lower than having to draft an entirely new management plan as was the case with the previous permit. The BMP Maintenance Tracking System is necessary in response to findings from program audits and recommendations from USEPA. The Tentative Order requires Copermittees to only inspect high priority and public agency projects. Other post construction BMPs may be verified through other means. The requirements to retrofit existing development have been extensively modified to require implementation only where feasible and should take advantage of simultaneous efforts to repair and maintain infrastructure. In addition, the South Orange County Integrated Regional Water Management Plan, May 2006, examined retrofitting opportunities in South Orange County. Many of the new programs are given several years to plan and prepare for implementation. For example, the numeric effluent limitations start after year three. The dry weather numeric effluent limitations fits into the City's already existing Illicit Discharge Detection and Elimination Program and requires only minor modification to existing monitoring by the City. The City should already be conducting follow up investigations for any dry weather flow that is prohibited and not known to be exempted or covered by another permit.

The cost share assessment by the Lead Permittee is outside of the Regional Board's control. Any concerns with the cost share by the Lead Permittee should be addressed to that Lead Permittee. The Copermittees also have the option of selecting a different Lead Permittee if they are not satisfied with the cost share or with actions taken by the Lead Permittee on their behalf.

Regional Board staff considered any submitted economic considerations in developing elements of the Tentative Order. The Regional Board, however, is not required to conduct a cost-benefit analysis.

Comment No.	263	Commenter No.	47	Comment Subject	SUSMP
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Comment Impacts on New Development and Re-Development

The Draft Permit's imposition of substantial additional requirements on New Development and Significant Redevelopment projects will create substantial cost impacts for developers as well as for existing businesses, institutions and residents in the City. The current economic climate - when property values are down by 30% or more - suggests that this is a most inappropriate time to create larger financial disincentives to the spread of low-impact design and re-design across the City. In particular, we note that the requirements continue to be more onerous than defined for North Orange County or for San Diego; and that new requirements to evaluate water rights and sediment loads have been added in the August Draft to the already-substantive burden of retroactively mitigating hydromodification impacts. The City requests that the Regional Board carefully review and reconsider the necessity, appropriateness and timing of these new requirements.

Response The changes are reasonable and necessary to further the protection of Water Quality Standards. In particular, the LID requirements within the Tentative Order are substantially consistent with the requirements found in the Santa Ana Regional Board's North Orange County MS4 permit. The requirements for water rights are necessary as pointed out by Camp Pendleton's comment letter. Improper implementation of the LID capture volume requirement could potentially diminish volumes of water that reach downstream receiving waters and ultimately recharge downstream aquifers. The hydromodification requirements include consideration of sediment load, as it is an important part of calculating hydromodification impacts. No changes have been made in response to this comment.

Comment No.	264	Commenter No.	47	Comment Subject	Overirrigation
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Comment Impacts on Residents

The Draft Permit's defining of landscape irrigation runoff as an illicit discharge that must be eliminated will overnight convert a large percentage of the City's 20,000 landowners into unintentional scofflaws. Whether they react voluntarily or in response to enforcement actions, eliminating irrigation runoff will cost homeowners money. A new single-family controller with automatic weather-based scheduling and multi-short-cycle capacity costs \$300 to \$500. Correcting overspray and distribution problems even on a flat home lot may cost a homeowner \$200 to \$1,200. If a homeowners' association has to retrofit thousands of feet of sprinkler lines on common areas, each resident will have to pay a share of potentially tens of thousands of dollars. Enforcement against residents who do not or cannot afford to comply will not be 100% because watering happens at night, half-hidden in back yards, for a few minutes at a time; and Cities cannot issue a citation without actually seeing the offense being committed. The reality is that irrigation runoff can only be controlled to the maximum extent practicable.

Response The comment regarding the prohibition on overirrigation practices was addressed in the previous response to comments. The comment does not raise any new issues from the previous comments.

Please see the discussion in the Fact Sheet for finding C.15; and the July 1, 2009, Response to Comments IV, Response Nos. 28, 52, 76, and 159. No changes have been made in response to this comment.

In summary, over irrigation is a non-storm water discharge required by federal regulations to be prohibited where identified to be a source of pollutants. The comment is over-reaching in asserting potential new costs to homeowners and their associations. Limiting overirrigation does not necessarily have to include capital outlay expenses for landscaping improvements. Instead, overirrigation can be limited simply by adjusting watering duration and frequency. Overirrigation can also be limited by adjusting sprinkler heads to not overspray impervious surfaces.

Comment No.	265	Commenter No.	47	Comment Subject	unfunded mandate
Comment	<p>Porter Cologne Act and Unfunded State Mandates</p> <p>The City believes that many of the new regulations and requirements in the Draft Permit exceed the requirements of the Clean Water Act. As such, these new regulations and requirements must be considered and evaluated in accordance with applicable provisions of the State Porter Cologne Act. If such regulations and requirements are included in the Final Permit, the City believes that they would constitute unfunded State mandates.</p>				
Response	<p>The comment regarding unfunded mandates has been extensively considered in all previous response to comments. The comment does not raise any new issues from the previous comments.</p> <p>The Fact Sheet and Response to comments Nos. 155 and 165 in the July 1, 2009, Response to Comments IV; Comment No. 5 in the July 6, 2007, Response to Comments I; Comment Nos. 1 and 9 in the December 12, 2007, Response to Comments II; Comment No. 1, 2, and 3 in the February 13, 2008 Response to Comments III; all provide discussions of these issues. No changes were made in response to this comment.</p> <p>In summary, the State's water quality protection requirements within the Tentative Order are authorized by Federal Law, and are not unfunded mandates</p>				

Comment No.	266	Commenter No.	47	Comment Subject	Overirrigation
Comment	<p>Finding E.14 and E.1, B.2 Removing Exemption of Non-Storm water Discharges</p> <p>The Draft Permit removes landscape irrigation, irrigation water and lawn watering from the categories of non-stormwater discharges that are not prohibited, and further declares that non-stormwater discharges are not subject to the MEP standard. The City does not believe that the Regional Board has the legal authority to unilaterally declare that these categories of urban runoff are now to be deemed prohibited discharges and must be completely eliminated. Even if the City passed an ordinance to prohibit such discharges, the most cost-intensive "zero tolerance" enforcement still could only achieve compliance to the MEP, and would likely be politically unacceptable to the public. The City also notes that our Dry Weather Monitoring Program investigations have shown that it is typically reclaimed water - not potable water from residents - that causes the most common water quality problems. The producers, purveyors and users of reclaimed water are separately regulated under permits that require them to control such discharge; Cities should not be required to shoulder the primary burden in their stead. The City requests that the Regional Board keep landscape irrigation on the non-prohibited list, and remove the language asserting that non-stormwater discharges are not subject to the MEP standard.</p>				
Response	<p>The comment regarding the prohibition on overirrigation practices was addressed in the previous response to comments. The comment does not raise any new issues from the previous comments.</p> <p>Please see the discussion in the Fact Sheet for findings C.14 and C.15; and the July 1, 2009, Response to Comments IV, Response Nos. 28, 52, 76, and 159. Please also see comments Nos. 84, and 264 in this Response to Comments. No changes have been made in response to this comment.</p> <p>In summary, over irrigation is a non-storm water discharge required by federal regulations to be prohibited where identified to be a source of pollutants. CWA sections 402, 402(p)(3)(B)(ii-iii), 40 CFR 122.26(d)(2)(iv)(B)(1) clearly give the legal authority to prohibit overirrigation discharges.</p>				

Comment No.	267	Commenter No.	47	Comment Subject	LID
Comment	F.1.d.(4) & F.1.d.(7) - Low Impact Development (LID) Requirements				
	<p>The City is very concerned about the proposed Low Impact Development (LID) requirement that stormwater be retained on-site. Many areas of South Orange County, including Laguna Niguel, have experienced slope failures and landslides. The proposed LID Site Design BMPs, which emphasize infiltration, could in combination with local soil and geological conditions have the potential to increase the risk of such events. As mentioned before, the City is concerned that the significant financial impacts associated with the various reviews, assessments and site improvements necessary to comply with the proposed LID requirements would discourage New Development and Significant Redevelopment, the primary means by which water quality objectives are currently achieved. The proposed requirements also would impose additional demands on the City's water quality program both in terms of staff resources and budgetary impacts. Given the potential negative impacts of such requirements as noted above, the City is particularly concerned with the underlying and inadequately supported presumption that LID methods are superior to conventional treatment methods in achieving water quality objectives.</p>				
Response	<p>The Tentative Order's requirements for LID provide exceptions for sites demonstrating technical infeasibility. The soil type of a site would not necessarily rule out rainwater harvesting for reuse, or evapotranspiration BMPs as technically infeasible. To the extent economic information was submitted, the Regional Board staff considered economic considerations in developing elements of the Tentative Order, but the Regional Board is not required to conduct a cost-benefit analysis. The Copermittees already have plan approval processes in place that can implement the LID provisions. No changes have been made in response to this comment.</p>				

Comment No.	268	Commenter No.	47	Comment Subject	Hydromod
Comment	G. Hydromodification Limitations				
	<p>The inclusion of hydromodification requirements in the current draft permit represents a significant shift away from the regulatory framework of prior permits. As stated in the draft permit, the purpose of this shift is to reduce erosion and/or facilitate removal of existing hardened channels. This justification however fails to address the fact that hardened channels are necessary to safeguard public health and safety and the general welfare in the event of a large storm event. The requirements also place a significant burden on the limited resources of the Copermittees to develop and implement a Hydromodification Management Plan, which includes on-going financial obligations and labor intensive tasks such as assessment of channel conditions, modifications to development review and approval processes, additional field inspections of development sites, and assessment of cumulative impacts within the watershed on channel morphology. As previously noted, these additional requirements also have the potential to inhibit the City's ability to achieve water quality objectives by discouraging New Development and Significant Redevelopment.</p>				
Response	<p>The Regional Board disagrees that the hydromodification requirements in the Tentative Order represents a significant shift away from the regulatory framework of prior permits. On the contrary, the requirements are consistent with recently adopted municipal permits such as the San Diego Municipal Permit (Order No. R9-2007-0001).</p> <p>The commenter incorrectly states that the requirements fail to address the fact that hardened channels are necessary to safeguard public health in the event of a large storm event. The Regional Board recognizes that it is not always possible to restore creek segments to their natural states because of concern for flood control. For this reason, section F.1.h of the Tentative Order does not contain requirements for the copermittees to restore creeks. Please also see response to Comment No. 123.</p> <p>The Regional Board disagrees that the requirements will place a significant burden on the Copermittees to develop a regional HMP. The Orange County Copermittees can look to HMPs developed elsewhere in the State for guidance (Contra Costa County, Santa Clara County, or San Diego County). The Regional Board expects the Copermittees to heavily reference these other HMPs in developing a local one. In terms of labor-intensive tasks, the hydromodification requirements can be incorporated into plan checking processes that already exist. Field inspections of development sites can be the responsibility of the developer, not the Copermittees. Furthermore, the Regional Board disagrees that the requirements have the potential to inhibit the City's ability to achieve water quality objectives because the requirements include measures to protect and restore degraded creeks, which will in turn help achieve water quality objectives.</p>				

Comment No.	269	Commenter No.	47	Comment Subject	Retrofitting
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Comment F.3.d - Retrofitting Existing Development

This section requires each Co-Permittee to implement a retrofitting program that reduces impacts from hydromodification, promotes Low Impact Development, supports riparian and aquatic habitat, reduces the discharges of storm water pollutants from the MS4 to the MEP, and prevents discharges from the MS4 from causing or contributing to a violation of water quality standards. First, it is difficult to imagine the scope and cost of performing the retrofitting evaluation required by Section F.3.d. Second, even if such an evaluation was performed, the Co-Permittees have no legal authority to compel private landowners of existing developments to implement or cooperate on retrofit projects. The City requests that the Regional Board delete Section F.3.d from the Storm Water Permit.

Response This comment regarding retrofitting has been considered in the previous response to comments. Please see the Fact Sheet discussion on retrofitting; and the July 1, 2009, Response to Comments IV, Response Nos. 46, 136, 161, and 162.

In summary, the Tentative Order's requirements for retrofitting existing development is practicable for a municipality through a systematic evaluation, prioritization and implementation plan focused on impaired water bodies, pollutants of concern, areas of downstream hydromodification, feasibility and effective communication and cooperation with private property owners. The Tentative Order's requirement realized the legal limitations that the Copermittees have in requiring retrofitting on privately held land. Therefore, the Tentative Order requires the Copermittees to cooperate with private landowners in implementing retrofitting opportunities.

Comment No.	270	Commenter No.	47	Comment Subject	TMDL
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Comment Finding E.11 and E.1. and I. Total Maximum Daily Loads

The Draft Permit imposes strict concentration-based numeric targets for a bacteria TMDL in addition to strict load-based targets, for both dry and wet weather. This language disregards years of painstaking work by staff and stakeholders in crafting TMDL documents firmly promoting the need for better science and iterative-BMP-based WQBELs; and completely contradicts the implementation provisions of the Basin Plan Amendment approved last year, establishing bacteria TMDL implementation provisions under a Reference System/Natural Source Exclusion approach. The City requests and recommends that the concentration-based numeric targets and the load-based allocations both be qualified as "subject to adjustment in accordance with the bacteria TMDL implementation provisions contained in the Reference System/Natural Source Exclusion Basin Plan Amendment approved by the Board in 2008. "

Response The Tentative Order does not disregard the TMDL. The Waste Load Allocation Reductions, Final Allocations and Numeric Targets come directly from the adopted TMDL. This is in compliance with the requirement that all NPDES Permits are consistent with the assumptions and requirements of the Waste Load Allocations of adopted and applicable TMDLs [40 CFR 122.33(d)(1)(vii)(B)]. The Tentative Order requires the Copermittees to implement BMPs capable of achieving these allocations and targets. It is expected that an iterative approach will be taken. It must be remembered that the allocations and targets are chosen and designed to demonstrate protection of Water Quality Standards, which is the goal of the TMDL.

Regional Board Resolution No. R9-2008-0028, "A Resolution Amending the Water Quality Control Plan for the San Diego Basin (9) to Incorporate Implementation Provisions for Indicator Bacteria Water Quality Objectives to Account for Loading from Natural Uncontrollable Sources Within the Context of a Total Maximum Daily Loads," has essentially revised the Water Quality Standards for bacteria in water bodies that are addressed by TMDLs. The Water Quality Standards for bacteria, within the context of a TDML, allows for exceedances of the bacteria WQOs, as long as the exceedances are due to natural and background (non-anthropogenic) sources using a "reference system and antidegradation approach" or a "natural sources exclusion approach." To date, a TMDL containing either approach has not been fully approved in Southern Orange County. The Bacterial Indicators TMDL for Baby Beach has the option of developing a "natural sources exclusion approach." Once developed, the TMDL must be amended prior to any changes to the MS4 Permit to be consistent with the assumptions and requirements of the TMDL Waste Load Allocations.

Comment No.	271	Commenter No.	48	Comment Subject	Overirrigation
Comment	We note with approval the progress the Regional Board has made towards drafting a Permit that will meet the Clean Water Act's maximum extent practicable ("MEP") standard, and again approve of the Board's decision to omit lawn irrigation from the list of permitted non-storm water discharges in section B.2. of the Discharge and Legal Provisions portion of the Permit.				
Response	Comment noted.				

Comment

A.
 Biofiltration Should Not Count Towards the Permit's LID Obligations
 Section F.1.d.(4)(d)(i) requires a site to use LID BMPs to retain onsite the runoff from a design storm event.2 Section F.1.d.(4)(d)(ii), in turn, allows a site to biofiltrate any portion of that runoff which cannot feasibly be retained onsite. The section allows biofiltrated runoff to count toward LID retention requirements, and would conceivably allow a site demonstrating technical infeasibility of onsite retention to discharge all of its stormwater to the MS4 system through biofiltration, without undertaking any offsite mitigation. But, as discussed in our previous comment letters, biofiltration is not as effective a means of reducing pollutant load as onsite retention, nor does biofiltration ensure downstream impacts such as flooding or erosion will be reduced to the same extent. As a result, biofiltration without offsite mitigation falls short of the maximum extent practicable standard.

Other jurisdictions have developed policies that reflect the strengths of retention and the shortcomings of biofiltration. As discussed in our previous letters, Philadelphia, West Virginia, and Anacostia (Washington D.C.) have adopted standards that infiltrate, use onsite, or evaporate all precipitation except that which exceeds a specified storm volume. More locally, the Los Angeles Regional Water Quality Control Board recently approved NPDES No. CAS00402, the MS4 permit for Ventura County and its incorporated cities. That permit does not, like the current draft Permit, allow biofiltration BMPs to count toward LID obligations. Rather, the Ventura permit requires that a project employing biofiltration must compensate through mitigation measures.

We recommend that you revise your Permit in a similar manner so that a site must mitigate offsite any reduction in the removal of pollutants resulting from the use of biofiltration instead of retention-based BMPs. Such a move could help to ensure compliance with the Clean Water Act and would further serve important policy goals of the State. Given our current state of drought, Governor Schwarzenegger has issued a proclamation calling on water agencies to take additional actions to protect and enhance water supplies. By requiring offsite mitigation through practices that retain stormwater runoff, captured or infiltrated water could be used to increase water supplies through onsite use or recharging groundwater, in furtherance of this goal. In contrast, as currently written the draft Permit would allow most or all of that water to be discharged through use of biofiltration, without any volume retained to increase water supplies.

Finally, given the Permit's current language we see no reason why the Regional Board should require a site to demonstrate that biofiltration is infeasible prior to deciding to implement conventional controls and participate in the LID waiver program under section F.1.d.(4)(d)(iii). The purpose of the permit's LID BMPs sizing criteria requirements is to reduce harmful water impacts to the maximum extent practicable. While onsite retention ensures that 100 percent of pollutants in the design storm volume of water never leave the site, both biofiltration and conventional controls fail to reduce impacts as effectively. But, as currently drafted, the Tentative Order would at least require a site employing conventional controls to participate in the LID waiver program, thereby ensuring that the site would achieve an equivalent level of pollutant reduction within the same hydrologic subdivision or unit. Thus, while biofiltration may in many circumstances represent an approach for addressing stormwater runoff that is preferable to the use of conventional controls, a site implementing conventional controls could counterintuitively achieve greater pollutant reduction due to its required participation in the waiver program.

The Regional Board can, and should, correct this result by requiring participation in the LID waiver program for any site implementing biofiltration to meet its LID obligations. But in the absence of any such requirement, a site should be able to participate in the waiver program even if biofiltration is a feasible practice. In the case where a site is able to demonstrate technical infeasibility of onsite retention, the site should be permitted to choose between biofiltration on the one hand, and conventional controls with participation in the waiver program on the other, and should not have to demonstrate that the use of biofiltration is infeasible as a prerequisite.

Response

The Regional Board maintains that bio-filtration is part of a comprehensive LID program. Effective bio-filtration provides pollutant removal and energy dissipation. Biological removal of pollutants can even be an improvement over simply keeping pollutants on-site until rainfall over the design-storm criteria washes pollutants into receiving waters. Removal of pollutants and prevention of downstream hydromodification ensures any discharge to be low impact.

The USEPA's Green Infrastructure website includes filtration as a Low Impact Development technique; <http://cfpub.epa.gov/npdes/greeninfrastructure/information.cfm#glossary>. In addition, the U.S. Department of Housing and Urban Development's report titled "The Practice of Low Impact Development," (July 2003, H-21314CA) incorporates filtration techniques. The County of San Diego's LID manual also utilizes bio-filtration as an acceptable LID practice.

In the future as the science and knowledge of storm water treatment evolves, filtration may not be a suitable LID practice to meet the maximum extent practicable standard. For this permit iteration, LID BMPs that capture the

design storm for reuse, infiltration or evapotranspiration are preferred over bio-filtration techniques. The draft permit provides design-criteria for "LID bio-filtration BMPs" in section F.1.4.d.ii and requires demonstration that retention LID BMPs are technically infeasible prior to implementing bio-filtration BMPs.

Comment No.	273	Commenter No.	48	Comment Subject	SUSMP
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Comment

B.
The Permit Should Require that Watershed-Based Projects Demonstrate the Infeasibility of Onsite Retention Before Allowing the Use of Biofiltration or Conventional Controls and Offsite Mitigation Measures.

Section F.1.c.(8) of the Permit provides that, for watershed or sub-watershed based development projects, "Regional BMPs may be used provided that the BMPs capture and retain the volume of runoff produced from the 24-hour 85th percentile storm event as defined in section F.1.d.(6)(a)(i)," mimicking the performance standard required for Priority Development Projects under section F.1.d.4(d)(ii). However, unlike the Priority Development Projects provision, which requires that a site demonstrate the technical infeasibility of onsite retention prior to implementing biofiltration or prior to implementing conventional treatment controls and participating in the Permit's offsite mitigation or in-lieu program, section F.1.c.(8) states that "[a]ny volume that is not retained by the LID BMPs, up to the design capture volume, must be treated using LID biofiltration," with no required demonstration of infeasibility. Likewise, section F.1.c.(8) states that "[a]ny volume up to and including the design capture volume, not retained by LID BMPs, nor treated by LID biofiltration, must be treated using conventional treatment control BMPs in accordance with Section F.1.d.(6) . . . and participate in the LID substitution program," again failing to require that the site demonstrate infeasibility of onsite retention. The wording of these provisions suggests that, so long as a large development is involved, a site need not satisfy any threshold condition before deciding to biofiltrate water or substitute conventional treatment controls, rather than retain the water onsite.

Instead, the draft language gives the developer discretion to determine what volume of water to retain and what volume of water to biofiltrate or treat with conventional controls. Thus, (and in addition to the problems identified with allowing biofiltration to count towards a site's LID obligations above), a developer of a watershed based project could, for reasons completely unrelated to any finding of technical infeasibility, choose not to retain any water onsite, yet still comply with the permit's LID requirements. By failing to ensure that water will be retained onsite absent a finding of infeasibility, this provision fails to meet the MEP standard. To correct this oversight, the Permit should require that a large development demonstrate infeasibility of onsite retention prior to use of biofiltration or conventional treatment and participation in the Permit's LID substitution program.

Response

Section F.1.c(8) regulates the implementation of regional-based BMPs on large projects, as such we agree that technical infeasibility must be demonstrated prior to using less than full LID for the 85th percentile storm. Language to that effect has been added to the Tentative Order.

Comment No.	274	Commenter No.	48	Comment Subject	LID
Comment	<p>C. Any LID Waiver Program Credit System Must be Closely Tied to Equivalent Water Quality Benefits to be Achieved and Subject to Public Notice and Comment</p> <p>Section F.1.d.(7)(g) allows a copermittee “to implement a pollution credit system as part of the LID waiver program provided that such a credit system clearly exhibits that it will not allow PDPs to result in a net impact from pollutant loadings over and above the impact caused by projects meeting LID requirements.” While we withhold comment on the propriety of a credit system in general, we state here that any pollutant credit system designed by the copermittees must be clearly tied to resulting water quality benefits, and not to benefits derived in furtherance of other environmental or policy oriented goals. For example, while projects such as brownfield redevelopment, construction of low-income housing, or development close to public transportation or transit centers may serve admirable purposes—even purposes for which we may advocate—these types of projects also may not provide any demonstrable benefit in terms of water quality or pollutant load reduction. In addition to requiring that any credit system not result in a net impact from pollutant loadings over and above the impact from meeting LID requirements, F.1.d.(7)(g) should be revised so that it clearly requires any credit system to award credits only for measures that yield equivalent water quality benefits.</p> <p>Further, in the current draft, any credit system that a copermittee devises only need “be submitted to the Executive Officer for review and approval as part of the waiver program.” But putting such review authority solely in the Executive Officer shields the credit system from oversight and creates a self-regulatory scheme in violation of the Clean Water Act. In <i>Environmental Defense Center, Inc. v. U.S. E.P.A.</i>, 344 F.3d 832, 854-56 (9th Cir. 2003), the court explained: “[S]tormwater management programs that are designed by regulated parties must, in every instance, be subject to meaningful review by an appropriate regulated entity ... Congress identified public participation rights as a critical means of advancing the goals of the Clean Water Act in its primary statement of the Act’s approach and philosophy.” Given that implementation of a credit system has the potential to exempt development participating in the LID waiver program from portions of the Permit’s core requirements to prevent the discharge of pollutants to the MS4 system, the public and the regional board must have a way to meaningfully review the system. In order to “ensure that each [MS4 permit] program reduces the discharges of pollutants to the maximum extent practicable,” any credit system under the LID waiver program should be publically noticed and presented for comment, and subject to approval by the Regional Board.</p>				
Response	<p>Any credit system proposed by the Copermittees will be part of the SSMP, which per section F.1.d. will have a 30-day public review and comment period. We agree with the commenter that otherwise laudable projects may not provide equal water quality benefits. In other words, the ends do not justify the means. That is why any credit system must demonstrate that any participating project will not result in a net impact from pollutant loadings over and above the impact caused by projects meeting LID requirements. The pollutant loadings in the context of the permit only refers to pollutant loadings that impact water quality.</p>				

Comment No.	275	Commenter No.	48	Comment Subject	LID
Comment	<p>D. The Permit Contains a Clerical Error with Regard to the LID Waiver Program</p> <p>Finally, we note that Sections F.1.c.(8) and F.1.d.(4)(c)(iii) both, while referencing the LID waiver program, refer to that program as falling under section F.1.d.(8). It appears that this section corresponds to the LID waiver program’s location in previous drafts of the Permit. In the current draft of the Permit, the LID waiver program is located at section F.1.d.(7), and all references to the LID waiver program in the Development Planning Component should be revised to correct this error.</p>				
Response	<p>Thank-you for the comment. The Tentative Order has been corrected.</p>				

Comment No.	276	Commenter No.	49	Comment Subject	General
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Comment At the Public Hearing on July 1, 2009, your Board members highlighted two key issues of common concern: the permit's consistency with May 2009 permit adopted in the Santa Ana Region and cost neutrality with our current permit in the San Diego Region. Permitting consistency is a key issue for the Orange County Stormwater Program because our compliance programs are integrated countywide and four jurisdictions are split between the two regions. Fundamentally different requirements between our two permits - particularly within the same city - damage the credibility of the regulatory framework and thwart our ability as local government to cost effectively address key environmental mandates. Since the Tentative Order continues to present a number of unprecedented requirements, it is necessary for us to continue to seek revisions to the Tentative Order that support alignment between the North and South County permit requirements.

Response Please see response to Comment No. 373. Please also see Comment no. 24 in the July 1, 2009, Response to Comments IV.

Please also see response to Comment 259 regarding cost neutrality.

Comment No.	277	Commenter No.	49	Comment Subject	NEL
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Comment With respect to "cost neutrality" and cost effectiveness, there are three aspects of the permit to bring to your attention. First, your staff has indicated its intention to remain steadfast on the inclusion of numeric effluent limits for dry weather flows. Even though exceedances of these limits are written to function as "action levels," by using the term "effluent limits" and specifically "numeric effluent limits" (NELs) the permit potentially subjects permittees to mandatory minimum penalties under the Water Code for exceedances of NELs. While we would strongly oppose any effort to impose mandatory minimum penalties in such a situation, the entire process imposes potentially significant legal and transactional costs upon the Permittees.

Response Please see Comment no. 82 in the July 1, 2009, Response to Comments IV.

Comment No.	278	Commenter No.	49	Comment Subject	NEL
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Comment Our analysis of environmental quality data shows that a number of these NELs will not be achieved at any time or in any part of our storm drain system. Moreover, they are not being achieved at reference sites in areas completely removed from any urban influence. Their technical derivation is clearly flawed and there is no legal requirement for their inclusion. Consequently, we strongly object to the inclusion of NELs in the Tentative Order and would once again recommend the model application of water quality benchmarks in our existing dry weather reconnaissance program as the basis of non-stormwater permitting. This approach will achieve meaningful water quality improvements in a cost effective manner and is consistent with the Santa Ana Region permit.

Response Please see Regional Board Counsel Memorandum dated November 05, 2009..

Please see response to Comment no. 317.

Comment No.	279	Commenter No.	49	Comment Subject	General
Comment	<p>There is a second cost concern presented by the escalating administrative burden from a number of the Tentative Order's provisions. New requirements arbitrarily establish municipal responsibility for sanitary sewer collection systems already subject to separate State regulation.</p> <p>Annual inspection of treatment controls in completed land development and redevelopment projects would be required for the first time. Greater regulatory oversight of and attention on private residences and mobile businesses is prescribed. There is a requirement to augment existing countywide, regional, watershed, and jurisdictional plans, with an additional jurisdictional planning process. In addition, technically challenging new standards will need to be developed and implemented for land development. There are also significant new monitoring obligations. All of these new requirements have significant resource implications for local government. In the current economy, local governments in Orange County are dealing with shrinking budgets not unlike State agencies. Consequently, a key test of the acceptability of the Tentative Order will be a calculation that shows that all of the prescriptive new requirements represent the most cost effective and cost neutral means of achieving our common goal of further improved water quality.</p>				
Response	<p>Please see Comment nos. 44, 61 and 277 in the July 1, 2009, Response to Comments IV.</p> <p>Please note the Regional Board has made significant reductions in monitoring requirements in an attempt to minimize the impact of additional monitoring requirements.</p> <p>To the extent economic information was submitted, the Regional Board staff considered economic considerations in developing elements of the Tentative Order, but the Regional Board is not required to conduct a cost-benefit analysis. The Regional Board is not required, as the commenter states, to provide a "calculation that shows that all of the prescriptive new requirements represent the most cost effective and cost neutral means of achieving our common goal of further improved water quality." Please see the Fact Sheet; July 6, 2007, Response to Comments I, Response No. 5; December 12, 2007, Response to Comments II, Response Nos. 1 and 9; February 13, 2008, Response to Comments, Response No 3. No changes have been made in response to this comment.</p> <p>It is important to distinguish that NPDES permits are not a right to discharge, and are issued to protect water quality standards for those waters receiving the discharge. The goal of NPDES permitting is not to determine cost neutrality, but to maintain and protect Water Quality Standards</p>				

Comment No.	280	Commenter No.	49	Comment Subject	LID
Comment	<p>Finally, a major portion of the additional cost burden presented by the Tentative Order will ultimately be borne by the proponents of land development and redevelopment projects and therefore new owners of property. There is significant concern here regarding the potential imposition requirements that will stymie redevelopment, lead to limited environmental benefits and possibly even undesirable environmental outcomes, and for which there is currently no technical consensus. To illustrate this uncertainty, each recently released municipal stormwater permit in California applies its own version of hydromodification standards for land development. The North Orange County Permittees are now working to craft a model for land development that presumes the application of low impact development (LID) best management practices (BMPs) based upon a prioritized consideration of infiltration, capture and reuse, evapotranspiration, and bio-retention/bio-filtration, and requires treatment of residual runoff volumes when the application of LID BMPs has been determined to be infeasible at site, sub regional, and regional scales. The model will also integrate options for water quality credits and provide for alternate compliance approaches including participation in a watershed project and contributions to an in-lieu fund. Because it is imperative that the Order eventually adopted by the Board provide similar direction for land development as the North County permit, deliver meaningful water quality outcomes, and be accepted by the development community, there is now a vital need for a change in direction in this key area of the Tentative Order.</p>				
Response	<p>The Tentative Order's requirements for LID implementation are functionally identical to that in the Santa Ana Regional Board's North Orange County MS4 Permit, R8-2009-0030. The Tentative Order includes the same consideration of infiltration, capture and reuse, evapotranspiration, and bio-retention/bio-filtration, and requires treatment of residual runoff volumes when the application of LID BMPs has been determined to be technically infeasible. The Tentative Order's LID waiver provisions provide the Copermittees discretion to include regional or sub regional treatment of residual runoff volumes as mitigation projects. The Tentative Order also allows the Copermittees the discretion to implement a credit system as part of the waiver program.</p> <p>Contrary to the Commenter's statement regarding hydromodification requirements being different, the Tentative Order's hydromodification requirements are significantly similar to those requirements found in the San Diego MS4 permit. The hydromodification requirements allow for specific differences in watersheds.</p>				

Comment

A. The Clean Water Act and Federal Regulations are Very Clear as to the Scope of Non-Stormwater Regulation Required in an MS4 Permit

Section 402(p)(3)(B)(ii) of the Clean Water Act requires that MS4 permits include a requirement to effectively prohibit non-stormwater discharges into the MS4. The federal regulations include two requirements or provisions designed to begin implementation of the "effective prohibition." 55 Fed. Reg. 47989, 48037 (Nov. 16, 1990). The first provision requires permittees to perform a screening analysis, intended to provide sufficient information to develop priorities for a program to detect and remove illicit discharges. 1 Id.; 40 C.F.R. 122.26(d)(1)(iv)(D). The second provision requires permittees 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 MS4s. Id.; 40 C.F.R. 122.26(d)(2)(B). The federal regulations, thus, focus on two types of non-stormwater discharges:

- Illicit discharges (discharges that are plumbed into the MS4 or that result from leakage of sanitary sewer systems); and
- Improper disposal of materials such as used oil and other toxic materials. Id. at 48055.2

Of the second provision to implement the "effective prohibition" standard, the preamble to the federal rule says that permittees are required to "detect and remove" or prevent illicit discharges (or ensure they are covered by an NPDES permit) and to "control" improper disposal. 55 Fed. Reg. at 48037.

1. Illicit Discharges

With respect to detecting and removing illicit discharges, the proposed stormwater rule required permittees to have a program to prevent all illicit discharges into the MS4. 53 Fed. Reg. 49415, 49472 (December 7, 1988); 40 C.F.R. 122.26(d)(2)(iv)(B)(1). Commenters on the proposed rule suggested that there was no need to prevent numerous categories of commonly occurring discharges that did not pose significant environmental problems. 55 Fed. Reg. at 48037. U.S. EPA disagreed that the commonly occurring discharges would never pose significant environmental problems, but did admit that it was unlikely that Congress intended to require permittees to effectively prohibit "seemingly innocent flows that are characteristic of human existence in urban environments and which discharge to municipal separate storm sewers." Id.

As a compromise, U.S. EPA revised the final rule by generally exempting from the illicit discharge prevention program the categories of discharges identified by commenters. As stated in the preamble: "the following categories of non-storm water discharges or flows [must be addressed by the program] only where such discharges are identified by the [permittee] as sources of pollutants to waters of the United States..."³ 55 Fed. Reg. at 48037 [emphasis added]. U.S. EPA summarized the requirement in its Guidance Manual for the Preparation of Part 2 of the NPDES Permit Application for Discharges from Municipal Separate Storm Sewer Systems, November 1992 ("Part 2 Guidance Manual"):

While EPA does not consider these flows to be innocuous, they are only regulated by the storm water program to the extent that they may be identified [by the permittee] as significant sources of pollutants to waters of the United States under certain conditions.

Part 2 Guidance Manual at p. 6-33.

Where a permittee identifies a specific discharge, within an otherwise exempt category, that is a source of pollutants to waters of the United States, the permittee must address the discharge as part of its illicit discharge program. See 55 Fed. Reg. at 47995 (discharges identified on a case-by-case basis); Part 2 Guidance Manual at p. 6-33 (landscape irrigation from a particular site may result in a water quality impact).

2. Improper Disposal

With respect to controlling improper disposal, the preamble provides that permittees' program is to "assist and facilitate in the proper management of used oil and toxic materials." 55 Fed. Reg. at 48056. The regulation itself provides that the program is to include a description of educational activities, public information activities, and other appropriate activities to facilitate the proper management of used oil and toxic materials. 40 C.F.R. 122.26(d)(2)(B)(6). Thus, rather than using a stick to mandate that no used oil or other toxic materials ever enter the MS4, the regulations require that permittees assist and facilitate, through public education, the proper disposal of these materials such that they shouldn't enter the MS4. Improper disposal does not have to be prevented, it has to be controlled.

The Tentative Order ignores much of these clear requirements for regulating non-stormwater through preventing illicit discharges and controlling improper disposal. It allows the Regional Board to identify as sources of pollutants discharges within otherwise exempt non-stormwater categories, rather than just permittees as provided by federal law. It deletes three entire categories of exempt non-stormwater discharges rather than just the specific discharges within those categories that may be a source of pollutants. More significantly, it imposes numeric effluent limitations on non-stormwater discharges from the MS4. Because none of these requirements or acts are authorized by federal law (and the Regional Board has not indicated it is relying on state law), as discussed below in more detail, the County requests that all of them be removed, revised or undone.

Response Please see Regional Board Counsel Memorandum dated November 05, 2009.

The Regional Board agrees that federal regulations require the effective prohibition of non-storm water discharges into the MS4, as well as require a program to detect and remove illicit discharges.

The Regional Board, however, does not agree with the comment that there are two types of non-storm water discharges (illicit discharges and improper disposal). The federal regulations define an illicit discharge as any discharge to an MS4 that is not composed entirely of storm water except discharges pursuant to an NPDES permit and discharges resulting from fire fighting activities (40 CFR 122.26(b)). The improper disposal of materials into the MS4 is/are an activity that results in an illicit discharge, which is prohibited. Thus, federal requirements also require that activities that may result in illicit discharges be controlled through ordinance, order or similar means and not just education as the commenter states (Please see response to Comment no. 285).

Please see response to Comment no. 282 regarding categories of exempted discharges.

Comment

B. For Exempt Categories of Non-Stormwater Discharges, Only Where a Permittee Identifies a Specific Discharge of Non-Stormwater to the MS4 as a Source of Pollutants to Waters of the U.S. Must the Permittee Prevent the Discharge to the MS4

Staff's response to the County's May 15, 2009 comment on this issue ignores authority cited by the County, misreads other authority, and fundamentally misconstrues the reason U.S. EPA provided exempt categories of non-stormwater discharges.

The Part 2 Guidance Manual clearly explains, by way of example, that it is only where landscape irrigation runoff from a particular site results in a water quality impact that the MS4 permittee must address the discharge, either through its management plan or by requiring the discharger to obtain an NPDES permit. See Part 2 Guidance Manual at p. 6-33 (quoted in the County's May 15, 2009 comment letter). Staff's response to comments does not address this authority. Just because runoff from one site is a source of pollutants to waters of the United States doesn't mean that the entire landscape irrigation category loses its exempt status.

Staff does address language in the preamble to the federal regulation, but misreads it. U.S. EPA explains in the preamble the idea of exempt categories (or components) of non-stormwater:

[I]n general, municipalities will not be held responsible for prohibiting some specific components of discharges or flows listed below through their municipal separate storm sewer system, even though such components may be considered non-storm water discharges, unless such discharges are specifically identified on a case-by-case basis as needing to be addressed.

55 Fed. Reg. at 47995 (emphasis added). Staff somehow reads this language as providing authority for removing entire categories (or components) of non-stormwater discharges from the list of exempt categories of non-stormwater discharges provided in the federal regulations. The language, however, very clearly refers to "discharges" being identified on a case-by-case basis as needing to be addressed (i.e., a source of pollutants). It does not refer to "categories" being identified as needing to be addressed.

Moreover, as alluded to above, staff's position does not make sense. U.S. EPA established the list of exempt non-stormwater categories because Congress did not intend to require permittees to prohibit commonly occurring, "seemingly innocent flows that are characteristic of human existence in urban environments." 55 Fed. Reg. at 48037. Under staff's position, that is precisely the result. Any time a single discharge from an exempt discharge category is identified as a source of pollutants, the entire discharge category would be subject to the "effective prohibition" standard, regardless of whether any other discharges from that category presented a problem. This is not what U.S. EPA intended.

Finally, the County notes that the Tentative Order is inconsistent with federal law in that it allows the Regional Board to identify as sources of pollutants discharges within otherwise exempt non-stormwater categories. As discussed above, the federal regulations and guidance are clear that it is the permittees alone that are to identify such discharges.

For all of the above reasons, the County requests that the Board restore the three deleted exempt non-stormwater discharge categories in Directive B.2 (landscape irrigation, irrigation water, and lawn water) and strike "or the Regional Board" from the second line of the first paragraph of Directive B.2.

Response

The Regional Board does not agree with the commenter's assessment that Regional Board staff have ignored and misread authority as well as misconstrued the reasoning behind exempted categories. It is important to note that the copermitees have identified the discharge of landscape irrigation runoff as a source and conveyance of pollutants. The identification was not for a specific site, but for the discharge category. It is therefore appropriate to remove the category of non-storm water discharge from exempt status under 40 CFR section 122.26(d)(iv)(B). USEPA's preamble to the federal regulations clearly supports this approach. Where categories of non-storm water discharges have been identified as sources of pollutants, discharges in those categories must be addressed and the status as exempt from the effective prohibition requirement in the Clean Water Act is no longer appropriate.

Comment

C. The Proposed Numeric Effluent Limits For Discharges of Non-Stormwater From The MS4 Are Contrary to Federal Law and Could Subject Permittees to Mandatory Minimum Penalties

The Tentative Order proposes numeric effluent limitations for non-stormwater dry weather discharges from the MS4. In its May 15, 2009 comment letter the County pointed out that the Clean Water Act requires that discharges from the MS4 meet the MEP standard, not numeric effluent limitations. The Response to Comments suggests that staff fundamentally misconstrues the authority provided by federal law to regulate MS4s.

1. The Relevant Clean Water Act Provision and Federal Regulations Regulate Discharges From MS4s

In response to Comment No. 39, staff begins their analysis by stating that section 402(p) of the Clean Water Act “regulates the discharge of storm water from a point source.” This is not entirely accurate. Section 402(p) does regulate discharges of stormwater from a point source (e.g., the MS4), but it also regulates discharges of non-stormwater from the MS4. More accurately stated, section 402(p)(3)(B) regulates the discharge of pollutants from the MS4. In the clearest language possible, the relevant section provides in pertinent part:

Permits for discharges from [MS4s] . . . shall require controls to reduce the discharge of pollutants to the maximum extent practicable [MEP]. . .

33 U.S.C. 1342(p)(3)(B)(iii).

Staff assert that, because section 402(p)(3)(B)(ii) requires permittees to effectively prohibit nonstormwater discharges into the MS4, the MEP standard in section 402(p)(3)(B)(iii) must apply only to discharges of stormwater. In essence, staff would re-write the Clean Water Act to provide:

Permits for discharges from [MS4s] . . . shall require controls to reduce the discharge of pollutants in stormwater to the maximum extent practicable . . .

That of course is not what the Clean Water Act says. If Congress had intended to apply the MEP standard only to stormwater discharges from the MS4, as suggested above, it would have been very easy to do. Congress, however, chose to apply the MEP standard to the discharge of pollutants from the MS4, regardless of the source. That makes sense in that it is pollutants, not stormwater or non-stormwater, that impacts receiving water quality.

This is consistent with *Defenders of Wildlife v. Browner*, 191 F.3d 1159 (9th Cir. 1999). There, in discussing the two different standards applicable to industrial dischargers and municipal dischargers, the Court consistently tracked the language from the Clean Water Act, referring to “industrial storm-water discharges” and “municipal storm-sewer discharges.” See 191 F.3d at 1164-65 (emphasis added). The Court did not refer to the standard as applying to stormwater discharges or non-stormwater discharges. The Court, of course, held that “Congress did not require municipal storm-sewer discharges to comply strictly with 33 U.S.C. § 1311(b)(1)(C) [e.g., water quality standards].”

Response

Please see Regional Board Counsel Memorandum dated November 05, 2009. Noncompliance with numeric effluent limits for discharges of non-storm water from the MS4 that are subject to the effective prohibition requirement in Clean Water Act section 402(p)(3)(B)(ii) results in both a violation of the limitation and triggers the requirement to achieve one of three outcomes. The Regional Board disagrees with the Commenter’s interpretation that the Clean Water Act requires discharges of unauthorized non-storm water to meet only the more relaxed MEP standard when in fact these discharges of non-storm water are required to be effectively prohibited in the first instance.

Comment No.	284	Commenter No.	49	Comment Subject	Legal
Comment	<p data-bbox="203 997 966 1039">2. All Discharges From the MS4 are Subject to the MEP Standard</p> <p data-bbox="203 1627 1534 1690">Staff assert, in their response to comments and in Finding C.14 that non-stormwater discharges from the MS4 are not subject to the MEP standard. An examination of the federal regulations and preamble indicates otherwise.</p> <p data-bbox="203 1711 1550 1921">The focus of the Clean Water Act and the federal regulations is on a management program or programs. Under the federal regulations, the overall goal of the management program is to include a comprehensive planning process to reduce the discharge of pollutants to the MEP. 40 C.F.R. 122.26(d)(2)(iv). One of the elements of the management program is the illicit discharge prevention program. 40 C.F.R. 122.26(d)(iv)(B)(1). Thus, the prevention of illicit discharges into the MS4 is intended to help achieve the overall MEP standard for discharges from the MS4. This is confirmed by the preamble to the federal regulations where U.S. EPA discusses the required elements of the management plans or programs. According to U.S. EPA:</p> <p data-bbox="203 1953 1559 2026">[Permittees are required] to develop management programs for four types of pollutant sources which discharge to large and medium municipal storm sewer systems. Discharges from large and medium municipal storm sewer systems are usually expected to be composed primarily of: (1) Runoff from commercial and residential areas; (2) storm water runoff from industrial areas; (3) runoff from construction sites; and (4) non-storm water discharges. Part 2 of the permit application has been designed to allow [permittees] the opportunity to propose MEP control measures for each of these components of the discharge.</p> <p data-bbox="203 2047 1550 2100">55 Fed. Reg. at 48052 (emphasis added). See also 55 Fed. Reg. at 48045 (“Part 2 of the proposed permit application [which includes the illicit discharge prevention requirement] is designed to . . . provide municipalities with the opportunity of proposing a comprehensive program of structural and non-structural control measures that will control the discharge of pollutants, to the maximum extent practicable, from municipal storm sewers.”) (Emphasis added.)</p> <p data-bbox="203 2142 1502 2100">Thus, just as the discharge of non-stormwater into the MS4 is subject to the “effective prohibition” standard, the discharge of pollutants in non-stormwater from the MS4 is subject to the MEP standard.</p>				
Response	Please see Regional Board Counsel Memorandum dated November 05, 2009.				

Comment 3. No "Narrative Prohibition" or "Zero Discharge" Requirement

In their Response to Comments, staff then go on to assert that the effective prohibition standard applicable to discharges of non-stormwater to the MS4 is, in effect a "narrative prohibition" of discharges of non-stormwater from the MS4; i.e., a "zero discharge" requirement. In support, staff assert that non-stormwater discharges are defined as "illicit discharges." This, again, is inaccurate.

First, as discussed above, "non-stormwater discharges" are not defined in federal law. As made clear in the preamble to the federal regulations, U.S. EPA intended to implement the "effective prohibition" mandate of the Clean Water Act by focusing on two types of non-stormwater discharges -- illicit discharges and improper disposal. While non-exempt categories of illicit discharges must be prevented from entering the MS4, improper disposal needs only be controlled, not prevented. Moreover, it is to be controlled not through direct enforcement or some "stick" approach, but rather through public education. In other words, U.S. EPA acknowledged and accepted that some non-stormwater likely would enter the MS4. There is not a "narrative prohibition" or "zero discharge" requirement on non-stormwater discharges from the MS4. This doesn't present significant risk to water quality, however, because all pollutants discharged from the MS4 must be controlled or reduced to the maximum extent practicable.

Second, as noted, U.S. EPA's approach to regulating non-stormwater arises from trying to implement the Clean Water Act's "effective prohibition" standard. Congress did not say that non-stormwater discharges into the MS4 had to be "absolutely prohibited" or "completely prohibited" or even just "prohibited." Congress said that non-stormwater discharges into the MS4 had to be "effectively prohibited." As indicated by U.S. EPA's regulations, something may be effectively prohibited even when some of it is allowed. Effectively prohibiting the discharge of non-stormwater into the MS4 suggests that some non-stormwater may still enter the MS4. Thus, there is no "zero discharge" requirement on discharges of non-stormwater from the MS4.

Response Please see Regional Board Counsel Memorandum dated November 05, 2009 regarding the definition of non-storm water and non-storm water regulation.

The Regional Board maintains that the federal language is clear: that the term "illicit discharge" is used to describe any discharge to (and thus through and from) a municipal separate storm sewer system that is not composed entirely of storm water and that is not covered by an NPDES permit. Such illicit discharges are not authorized under the Clean Water Act.

The Regional Board also disagrees with the comment regarding improper disposal. The federal regulations are clear under 40 CFR 122.26(d)(2)(i), which require Copermittees to:
 "Control through ordinance, order or similar means, the discharge to a municipal separate storm sewer of spills, dumping or disposal of materials other than storm water." The Regional Board is concerned with the commenter's assertion that only education, and not enforcement, is required for improper disposal activities.

The Regional Board maintains that USEPA's preamble to the final storm water regulations (Please see Comment no. 39 in the July 1, 2009, Response to Comments IV) is quite clear in the "effective prohibition" of non-storm water discharges:
 "Ultimately, such non-storm water discharges through a municipal separate storm sewer must either be removed from the system or become subject to an NPDES permit."

The Regional Board does not agree with the interpretation by the commenter of the word "effective." "Effectively" prohibit means to accomplish the result of prohibiting, whether using the tool of imposing a "prohibition" or some other means. Considered together with the discussion in the federal regulations and USEPA's preamble thereto, effectively prohibit does not imply that some level of unpermitted (non-storm water discharges that are not permitted either by a separate NPDES permit or excepted under 40 C.F.R. 122.26(d)(2)(iv)(B)) non-storm discharges is acceptable. "Effectively" prohibit requires the control of activities and accidents that can result in an illicit discharge to the MS4. The federal regulations require the prohibition of illicit discharges to the MS4 by the Copermittees and require Copermittees control spills, dumping or improper disposal (via ordinance, order or similar means). These are activities that may occur despite the legal implementation of an illicit discharge prohibition, and they may occur by accident. This in no way, as the commenter suggests, condones the introduction of illicit discharges into and from the MS4, or subjects non-storm water flows to the MEP standard.

Comment No.	286	Commenter No.	49	Comment Subject	Legal
Comment	<p data-bbox="203 94 462 126">4. BMPs versus NELs</p> <p data-bbox="203 157 1559 241">Next staff appear to suggest that, because permittees' efforts at addressing non-stormwater discharges into the MS4 have not been successful, under 40 C.F.R. 122.44(k) and 122.44(d)(1), the Board can impose numeric effluent limits on discharges from the MS4. Once again staff is mistaken.</p> <p data-bbox="203 283 1550 493">Section 122.44(k) simply provides that NPDES permits shall include BMPs (when applicable) under certain circumstances. The regulation does not govern when NELs must be included in an NPDES permit. Staff characterize permittees' efforts to address non-stormwater discharges into the MS4 as BMPs and then, because staff assert the BMPs are not working, suggest section 122.44(d)(1) allows the Board to impose numeric effluent limits on the discharge of nonstormwater from the MS4. To the extent section 122.44(d)(1) is applicable, it does not require numeric effluent limitations. It simply provides the method for determining when effluent limitations generally -- not necessarily a numeric limit -- are required to achieve water quality standards.</p> <p data-bbox="203 525 1534 577">Because nothing in sections 122.44(k) or 122.44(d)(1) require numeric effluent limitations on the discharge of non-stormwater from the MS4, staff's reliance on these two sections is misplaced.</p>				
Response	<p data-bbox="203 598 1242 630">Please see Comment no. 307 by USEPA in the July 1, 2009, Response to Comments IV.</p> <p data-bbox="203 661 1144 693">Please also see Comment no. 39 in the July 1, 2009, Response to Comments IV.</p>				

Comment 5. State Board Order WQ 2009-0008

In the August 12, 2009 Fact Sheet/Technical Report, staff place reliance on the State Board's recent Los Angeles County TMDL decision (WQ 2009-0008 [LA County TMDL Order]) to support the notion that the Clean Water Act requires (or at least authorizes) NELs for discharges of non-stormwater from the MS4. Such reliance is misplaced.

The issue in the LA County TMDL Order was not whether the Regional Board could impose NELs on discharges of non-stormwater from the MS4. The issue addressed in the order was the implementation of dry weather wasteload allocations (WLAs) in the LA County MS4 permit. The relevant TMDL established a bacteria WLA for summer dry weather of zero days of exceedance of the bacteria water quality standards. The TMDL included a WLA for MS4s.

The Los Angeles Regional Board amended the LA County MS4 permit to implement the summer dry weather bacteria WLA. As amended, the permit provided, as a receiving water limitation, that during summer dry weather "there shall be no discharges of bacteria from MS4s into the Santa Monica Bay that cause or contribute to exceedances in the Wave Wash, of the applicable bacteria objectives." The amendment also included corresponding discharge prohibition language. Los Angeles County argued that the receiving water limitation and discharge prohibition were improper numeric effluent limits and that, therefore, the permit amendment should be remanded.

The State Board disagreed. Interpreting summer dry weather as applying only to nonstormwater flows the Board found the authority cited to by LA County as inapposite. The State Board found, generalizing federal law, an overarching principle that "[f]ederal law requires municipal storm water permit limitations to be consistent with applicable wasteload allocations."

Order WQ 2009-0008 at p. 9. Finding the permit amendment to be consistent with the dry weather bacteria WLA and with other federal and state requirements, the Board upheld the amendment.

Significantly for purposes of the Tentative Order, the Board held that the permit amendment did not impose NELs as asserted by LA County, but rather receiving water limitations.

The contested provisions are receiving water limitations, not numeric effluent limitations. The contested provisions do not impose a numeric limitation measured at a point source outfall. Instead, compliance with the limitation is measured in the receiving water, and more specifically, at the "wave wash" for the individual beaches.

Order WQ 2009-0008 at p. 10.

By comparison, the NELs at issue here are to be measured at a point source outfall -- "at the end-of-pipe prior to discharge into the receiving water." Tentative Order, Directive C.4 (emphasis added). Thus, because the LA County order pertains to implementing a TMDL through receiving water limitations, it provides no support for staff's assertion that NELs are appropriate (or required) for non-stormwater discharges from the MS4.

Because NELs are not required by federal law, the County requests that Directive C be removed from the Tentative Order.

Response The Regional Board disagrees with the commenter's assertion that State Board Order 2009-0008 does not support directives within the Tentative Order. The Regional Board is not saying the numeric effluent limitations for non-storm water discharges are specifically authorized by State Water Board Order WQ 2009-0008, but the Order does not foreclose the possibility and separate federal authority exists to establish the requirement.

Please see Regional Board Counsel Memorandum dated November 05, 2009.

Comment 6. NELs, SALs and MMPs

The Tentative Order includes both NELs for the discharge of non-stormwater and stormwater action levels (SALs) for the discharge of stormwater. Both require that permittees monitor discharges from the MS4. To the extent exceedances of either the NELs or SALs are detected, permittees have to investigate and address the probable cause of the exceedance. An exceedance of either an NEL or an SAL is not a violation of the permit per se.

With respect to the NELs in Directive C, the Tentative Order explicitly provides that compliance requires that an exceedance of an NEL must result in investigation of the source of the exceedance and a determination that the source is natural in origin, an illicit discharge, or a discharge from an exempt category of non-stormwater discharge. Depending on the source, appropriate action is required. Similarly an exceedance of a SAL requires that permittees to reevaluate and augment their stormwater control measures.

Notwithstanding that an NEL exceedance is not a permit violation and compliance with the NELs requires investigation and appropriate action, an exceedance of an NEL may still subject permittees to mandatory minimum penalties (MMPs) under section 13385 of the Water Code. The Tentative Order acknowledges this possibility in footnote 12 where it provides that permittees may not be subject to MMPs if they can show that an exceedance was caused by an intentional act of a third party.

Because there is little if any substantive difference between the NEL and SAL requirements, there is no reason for the difference in terminology. The County submits that, to the extent the final Order will include provisions similar to those currently provided in Directive C (and as discussed above the County strongly believes it should not), they should be re-characterized as non-stormwater action levels.

Response Please see Comment no. 82 in the July 1, 2009, Response to Comments IV.

The Regional Board disagrees with the deduction that there is little substantial difference between the NEL and SAL requirements and that NELs should be action levels. For non-storm water discharges, NELs are included pursuant to NPDES permitting requirements under 40 CFR 122.44, which requires a permit to contain effluent limitations when a discharge causes, has the reasonable potential to cause, or contributes to an exceedance of water quality criteria for a pollutant. Regardless of investigative outcome, an exceedance of a numeric effluent limitation may be considered a violation.

Conversely, the exceedance of a SAL is not a violation. A SAL exceedance may only be considered a violation if the SAL exceedance is not utilized as part of the iterative process to the MEP standard.

Comment No.	289	Commenter No.	49	Comment Subject	unfunded mandate
Comment	<p data-bbox="194 672 1567 703">C. Because NELs Are Not Required By Federal Law, To The Extent The Board Has Authority to Impose Them, The NELs Must Be Authorized by State Law and the Board Must Comply With All State Law Requirements</p> <p data-bbox="194 703 1567 766">Neither the Clean Water Act nor the federal regulations require NELs in MS4 permits. Staff's prior "tentative draft update" of the Tentative Order conceded this significant point: "Compliance with numeric limits does not constitute compliance with CWA requirements which require nonstorm water discharges into the MS4 to be effectively prohibited. . . " June 18, 2009 Draft Updates (Tentative) at p. 9 of 56.</p> <p data-bbox="194 766 1567 913">To the extent the Board has discretion under the Clean Water Act to impose NELs (see Defenders of Wildlife, supra), the California Supreme Court has made it clear that the Board must comply with state law requirements. See City of Burbank v. State Water Resources Control Board, 35 Cal.4th 613 (2005). These state law requirements include considering the water quality that could reasonably be achieved by the NEL requirement, and economic considerations. See Water Code sections 13263(a) and 13241. Moreover, because the NEL requirement is not mandated by federal law, it would constitute an impermissible unfunded state mandate (unless the State proposes to fund the costs of implementing the program). See, e.g., County of Los Angeles v. Commission on State Mandates (2007) 150 Cal.App.4th 898.</p> <p data-bbox="194 913 1567 976">For all of the above reasons, the County requests that the Board revise the Tentative Order consistent with and pursuant to federal and state law.</p>				

Response	<p data-bbox="194 686 1567 976">The comment regarding unfunded mandates has been extensively considered in all previous response to comments. The commenter misinterprets and misapplies the statement "Compliance with numeric limits does not constitute compliance with CWA requirements which require nonstorm water discharges into the MS4 to be effectively prohibited." This statement does not imply that NELs in MS4 permits are beyond the scope of the federal regulations. Rather, this statement points out that in effect, the Clean Water Act prohibits all non-storm water discharges regardless if those discharges comply with numeric effluent limits. Furthermore, the Clean Water Act and federal regulations do not prohibit the use of numeric effluent limitations for storm water or non-storm water discharges as evidenced by the many NPDES permits that have NELs for storm water discharges and non-storm water discharges. Please see the Fact Sheet and Response to Comment no. 320 for more discussion on NELs.</p> <p data-bbox="194 976 1567 1081">The Fact Sheet and Response to comments Nos. 155 and 165 in the July 1, 2009, Response to Comments IV; Comment No. 5 in the July 6, 2007, Response to Comments I; Comment Nos. 1 and 9 in the December 12, 2007, Response to Comments II; Comment No. 1, 2, and 3 in the February 13, 2008 Response to Comments III; all provide discussions of these issues.</p> <p data-bbox="194 1081 1567 1144">The comment regarding the Regional Board's compliance with California Water Code §13263, 13241, and 13000 and the consideration of balancing factors has been extensively considered in previous response to comments.</p> <p data-bbox="194 1144 1567 1207">Please see the Fact Sheet; July 6, 2007, Response to Comments I, Response No. 5; December 12, 2007, Response to Comments II, Response Nos. 1 and 9; February 13, 2008, Response to Comments, Response No 3.</p> <p data-bbox="194 1207 1567 1444">To the extent economic information was submitted, the Regional Board staff considered economic considerations in developing elements of the Tentative Order, but the Regional Board is not required to conduct a cost-benefit analysis. In summary, the State's water quality protection requirements within the Tentative Order are authorized by Federal Law, and are not unfunded mandates. No changes have been made in response to this comment.</p>
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Comment No.	290	Commenter No.	49	Comment Subject	Legal
Comment	<p data-bbox="196 1003 1477 1060">II. Compliance With the Wasteload Allocations in The Tentative Order Should be Subject to the Iterative BMP Process</p> <p data-bbox="196 1060 1550 1207">Finding E.11 provides that the Tentative Order incorporates only those MS4 WLAs developed in TMDLs that have been adopted by the Regional Board and approved by the State Board, OAL, and U.S. EPA. However, federal law does not require that MS4 permits incorporate WLAs as numeric limits. Nowhere in the Clean Water Act, or the federal stormwater or TMDL regulations, does it say that MS4 permits shall incorporate TMDLs/WLAs. The federal regulations do say that, when developing water quality-based effluent limits (“WQBELs”) under 40 C.F.R. 122.44(d), the permitting authority must ensure that effluent limits developed to protect a narrative water quality criteria, a numeric water quality criteria, or both, “are consistent with the assumptions and requirements of any available wasteload allocation for the discharge prepared by the State and approved by EPA pursuant to 40 CFR 130.7” 40 C.F.R. 122.44(d)(1)(vii)(B) (emphasis added).</p> <p data-bbox="196 1207 1559 1270">This section itself does not apply to all NPDES permits. Section 122.44(d) applies only when an NPDES permit must include provisions to achieve water quality standards established under section 303 of the Clean Water Act (33 U.S.C. 1311). As discussed above, the Ninth Circuit in Defenders of Wildlife has held that MS4 permits do not have to strictly comply with water quality standards under section 303.12. Thus, section 122.44(d) does not necessarily apply to MS4 permits.</p> <p data-bbox="196 1270 1542 1333">Even if it is applicable, section 122.44(d)(1)(vii)(B) simply says that WQBELs in the permit must be “consistent with the assumptions and requirements” of the WLA. The permit does not have to incorporate the WLA as a numeric effluent limitation. U.S. EPA has indicated that an iterative BMP approach is appropriate for incorporating WQBELs in MS4 permits; numeric WQBELs are not required. 61 Fed. Reg. 43761 (Aug. 26, 1996) (U.S. EPA’s “Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits”).</p> <p data-bbox="196 1333 1559 1396">The County appreciates that Directive I of the Tentative Order provides that permittees are to achieve the interim and final WLAs through implementation of BMPs. To be consistent with U.S. EPA’s guidance, this section should be revised to clarify that any exceedances of the WLAs will be addressed through the iterative BMP approach. As receiving water limitations, this would also be consistent with the required language of State Board Order WQ 99-05.</p>				

Response	<p data-bbox="196 1020 1542 1186">Please note the the Tentative Order is an NPDES permit for non-storm water and storm water discharges from the MS4. Please see Regional Board Counsel Memorandum dated November 05, 2009 for discussion of non-storm water discharges from the MS4. 40 CFR 122.44 establishes limitations, standards and other permit conditions for NPDES permits. The Regional Board does not agree that federal regulations under 40 CFR 122.44, specifically 122.44(d) do not apply to NPDES permits for MS4s.</p> <p data-bbox="196 1186 1550 1297">None of the sections cited by the commenter prevent the Regional Board from directly incorporating the Numeric Targets and Waste Load Allocations into the Tentative Order. Once these numeric allocations and targets are met, the Water Quality Standards of Baby Beach should no longer be negatively impacted by bacterial indicators.</p>
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Comment Any Water Quality Benefits Achieved From the Retrofitting Requirement Will Be Significantly Outweighed by The Costs

The Tentative Order would require permittees to develop and implement a retrofitting program for existing development. While the County agrees that retrofitting existing development could have beneficial water quality impacts, the program required by the Tentative Order would be very expensive to develop and implement with very little if any water quality improvement to show for the effort. Moreover, the program is not authorized or required by federal law.

Permittees would be required to identify existing development candidates, evaluate and rank the candidate sites to prioritize them for retrofitting, cooperate with landowners of priority sites and encourage them to retrofit their properties, and track and inspect all sites that do complete retrofitting. Where constraints at a candidate site preclude retrofitting, permittees may propose regional mitigation projects. The weak link of this program is that permittees cannot force private landowners to retrofit their properties. So after all the expense of developing this program, there may be nothing gained from it.

Because permittees cannot necessarily force private landowners to retrofit their developments, U.S. EPA recognized that MS4 regulation would largely be limited to undeveloped sites (and sites being developed/redeveloped).

"[O]pportunities for implementing [structural control] measures may be limited in previously developed areas." 55 Fed. Reg. at 48054. "The unavailability of land in highly developed areas often makes the use of structural controls infeasible for modifying many existing systems." Id. at 48055. As a result, none of the five required components to reduce pollutants in runoff from commercial and residential areas include a retrofitting requirement. Id. at 48054-55.

Because the retrofitting requirement as proposed in the Tentative Order would exceed the requirements of the Clean Water Act, the Board can impose the requirement, if at all, only after it has considered certain factors, including economic considerations and the water quality condition that could reasonably be achieved by the requirement. See Water Code sections 13263(a) and 13241; City of Burbank, supra, 35 Cal.4th 613. In addition, unless funded by the State, the retrofitting requirement could be considered to be an impermissible unfunded state mandate. See, e.g., County of Los Angeles v. Commission on State Mandates, supra, 150 Cal.App.4th 898.

The County therefore requests that the retrofitting requirement be significantly revised or deleted from the Tentative Order.

Response The comment regarding retrofitting was considered in the previous response to comments. Please see the Fact Sheet discussion on retrofitting; and the July 1, 2009, Response to Comments IV, Response Nos. 46, 136, 161, and 162.

In summary, the Tentative Order's requirements for retrofitting existing development is practicable for a municipality through a systematic evaluation, prioritization and implementation plan focused on impaired water bodies, pollutants of concern, areas of downstream hydromodification, feasibility and effective communication and cooperation with private property owners. The Tentative Order's requirement realized the legal limitations that the Copermittees have in requiring retrofitting on privately held land. Therefore, the Tentative Order requires the Copermittees to cooperate with private landowners in implementing retrofitting opportunities. Please note that prioritization ranking is to include review of a project's feasibility [see Directive F.3.d(2)(a)]. The presence of reluctant property owners would necessarily decrease a retrofitting project's feasibility.

Retrofitting is authorized by federal law. The Clean Water Act in section 402(p)(3)(B)(iii) states "Permits for discharges from municipal storm sewers shall require controls to reduce the discharge of pollutants [in storm water] 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." Retrofitting existing development is an appropriate management practice and control technique that includes design and engineering methods. Because the Regional Board has determined that the requirement is necessary to meet the MEP standard, the requirement does not exceed federal law and tax monies are not required to pay for implementation of the requirement. As such, the requirement is not an unfunded mandate subject to reimbursement by the state. See also general discussion in Regional Board counsel legal memorandum dated November 5, 2009.

The comment regarding the Regional Board's compliance with California Water Code §13263, 13241, and 13000 and the consideration of balancing factors has been extensively considered in previous response to comments. Please see the Fact Sheet; July 6, 2007, Response to Comments I, Response No. 5; December 12, 2007,

Response to Comments II, Response Nos. 1 and 9; February 13, 2008, Response to Comments, Response No 3.

To the extent economic information was submitted, the Regional Board staff considered economic considerations in developing elements of the Tentative Order, but the Regional Board is not required to conduct a cost-benefit analysis. No changes have been made in response to this comment. To date, the Regional Board has not received any specific economic evaluations regarding the retrofitting requirement; but rather, has received non-specific broad comments on the cost of retrofitting such as "...the program required by the Tentative Order would be very expensive to develop and implement ..." without any economic analysis.

Comment No.	292	Committer No.	49	Comment Subject	Legal
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Comment IV. Permittees Should be Provided Flexibility in Implementing Any Low Impact Development And/Or Hydromodification Management Plan Requirements

The County agrees that the concepts of Low Impact Development and reducing hydromodification may be effective tools in controlling the discharge of pollutants from the MS4. However, the County objects to the LID and hydromodification management plan (HMP) requirements in the Tentative Order because they go beyond the requirements of federal law and violate state law requirements.

Because nothing in the Clean Water Act or federal regulations requires that MS4 permits include LID or HMP requirements, as noted above, the Board can impose the requirements, if at all, only after it has considered certain factors, including economic considerations and the water quality condition that could reasonably be achieved by the requirement. See Water Code sections 13263(a) and 13241; City of Burbank, supra, 35 Cal.4th 613. In addition, unless funded by the State, these programs could be considered to be impermissible unfunded state mandates. See, e.g., County of Los Angeles v. Commission on State Mandates, supra, 150 Cal.App.4th 898.

In addition, because the Board can require that permittees meet the MEP standard but cannot prescribe the manner in which they do so, the LID/HMP requirements violate Water Code section 13360(a).

Response Federal law mandates that permits issued to MS4s require management practices that will result in reducing pollutants to the maximum extent practicable. The state is required, by law, to select the BMPs. (See NRDC v. USEPA (9th Cir. 1992) 966 F.2d 1292; Environmental Defense Center v. USEPA (9th Cir. 2002) 344 F.3d 832, 855; Rancho Cucamonga v. Regional Water Quality Control Bd., Santa Ana Region (2006) 135 Cal.App.4th 1377, 1389.) The Tentative Order's requirements for Low Impact Development and hydromodification controls do not go beyond federal law; but are authorized by federal law. Federal NPDES regulation 40 CFR 122.26(d)(2)(iv)(A)(2) provides that Copermittees develop and implement a management program which is to include "A description of planning procedures including a comprehensive master plan to develop, implement and enforce controls to reduce the discharge of pollutants from municipal separate storm sewers which receive discharges from areas of new development and significant redevelopment. Such plans shall address controls to reduce pollutants in discharges from municipal separate storm sewers after construction is completed." The exercise of some discretion in implementing the federal program does not mean that a provision exceeds federal law. See also general discussion of unfunded state mandates in Regional Board Counsel legal memorandum dated November 5, 2009.

The comment regarding the Regional Board's compliance with California Water Code §13263, 13241, and 13000 and the consideration of balancing factors has been extensively considered in previous response to comments. Please see the Fact Sheet; July 6, 2007, Response to Comments I, Response No. 5; December 12, 2007, Response to Comments II, Response Nos. 1 and 9; February 13, 2008, Response to Comments, Response No 3.

To the extent economic information was submitted, the Regional Board staff considered it in developing elements of the Tentative Order, but the Regional Board is not required to conduct a cost-benefit analysis. No changes have been made in response to this comment.

Comment No.	293	Commenter No.	49	Comment Subject	Legal
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Comment V. Stormwater Action Levels May Be a Useful Tool But Permittees Should Benefit From Their Use

The County appreciates the revisions that have been made to the Stormwater Action Levels (SALs) section of the Tentative Order. While we do not necessarily agree that the SAL provision, as currently crafted, is appropriate, we do agree that the concept of action levels may be a useful tool in addressing water quality impacts from the discharge of pollutants from the MS4. However, just as an exceedance of a SAL may give rise to a presumption that permittees are not meeting the MEP standard, to the extent permittees are meeting the SALs, there should be a presumption that they are meeting the MEP standard. That presumption would be lost if permittees do not implement other required elements of the permit.

The County suggests that Directive D.3. be revised accordingly.

Response The exceedance of a Stormwater Action Levels (SALs) does not result in a direct presumption that MEP is not being met. In fact, the exceedance of a SAL is to be used in the iterative process to meet the MEP standard. Continued exceedances of a SAL without consideration in the iterative process may result in MEP not being met and enforcement from the Regional Board.

If a specific outfall sampled does not exceed a SAL, then that information should be utilized by the Copermittees to indicate that the particular area draining the discharge point is not a "bad actor" discharge point and should be considered a lower priority for additional and/or better-tailored BMPs. It does not create a presumption that MEP is being met for the permit.

Comment No.	294	Commenter No.	49	Comment Subject	Legal
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Comment I. Findings
Finding D.3.c. -- Urban Streams

The County has previously objected to the Board's characterization of urban streams as part of MS4. We point out now that, in addition to all of the other reasons why urban streams should not necessarily be considered to be part of the MS4, U.S. EPA has explicitly rejected this characterization. In the preamble to its proposed stormwater rule U.S. EPA states: "The Agency also wants to clarify that streams, wetlands and other water bodies that are waters of the United States are not storm sewers for the purpose of this rule." 55 Fed. Reg. 49415, 49442 (December 7, 1988).

Response Similar comments regarding urban streams being part of the MS4 have been considered in previous response to comments. Please see the Fact Sheet; December 12, 2007, Response to Comments II, Response No. 13; and July 6, 2007, Response to Comments I, Response No. 3.

In summary, an MS4 is defined in the federal regulations as a conveyance or system of conveyances owned or operated by a Copermittee, and designed or used for collecting or conveying runoff. Therefore, the Regional Board considers natural drainages that are used by the Copermittees as conveyances of runoff, as both part of the MS4 and as receiving waters. No changes have been made in response to this comment. Although such language may have been in the proposal for the stormwater rule, such a distinction did not appear in the final rule. In addition, this finding appeared in the previous Tentative Order, R9-2002-0001, and did not receive comment from USEPA.

Comment No.	295	Commenter No.	49	Comment Subject	Legal
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Comment II. Directives
Directive A.3.b -- Prohibitions and Receiving Water Limitations

As noted in the County's May 15, 2009 comments, Finding A.3 says the permit is consistent with the State Board's precedential Order 99-05. However, the language in Directive A.3.b (which requires permittees to continue the iterative process unless directed otherwise by the Executive Officer) is not consistent with Order 99-05 (which says permittees do not have to repeat the process unless directed otherwise by the E.O.). Accordingly, Section A.3.b should be revised consistent with State Board Order 99-05.

In their Response to Comments and June 18, 2009 errata, staff addressed this issue (albeit inadequately). The current draft of the Tentative Order does not address the concern at all.

Response Section A.3.b is consistent with State Board Order 99-05. The State Board Order does not specify the manner in which the Executive Officer directs that the process be repeated.

Comment No.	296	Commenter No.	49	Comment Subject	Legal
Comment	<p>Directive E.1 -- Legal Authority</p> <p>This provision includes a statement that nothing in the permit “shall authorize a Co-Permittee or other discharger regulated under the terms of the order to divert, store or otherwise impound water if such action is reasonably anticipated to harm downstream water right holders in the exercise of their water rights.” As noted in our technical comments (Attachment B), this statement points out the conflict that the permit’s LID provisions have with common water rights law. Directive F.1.d(4)(d)(i) would require permittees to retain onsite all stormwater runoff. However, as apparently acknowledged by Directive E.1, this could harm the rights of downstream water rights holders.</p> <p>To resolve this conflict, the County suggests simply changing “authorize” to “require” in the above quoted language in Directive E.1.</p>				
Response	<p>LID is a site-specific practice. As such, the Tentative Order is not saying that LID practices in all cases harm downstream water rights. For the vast majority of Orange County watersheds, there is not a downstream water right holder. In the small areas where there is a downstream water rights holder, it is not assured that implementing LID practices would cause a harm to their water right. In addition, LID practices are required to capture only up to the design storm (0.7-0.8 inches of rainfall in 24 hours). Storms with rainfall above the design storm would not be captured and potentially flow to downstream water right holders. Furthermore, capture of the 85th percentile ensures that downstream water right holders receive water of a higher quality. Demonstrated impacts to downstream water rights should be considered as part of the Copermittees LID Waiver Program.</p>				

Comment No.	297	Commenter No.	49	Comment Subject	Legal
Comment	<p>Directive F -- JRMP</p> <p>Throughout this section of the Tentative Order, permittees are required to develop and implement programs meeting designated elements “and” to reduce discharges to the MEP standard, prevent discharges from causing or contributing to impairments, prevent illicit discharges, etc. See, e.g., Directive F.1, Directive F.1.d, Directive F.3.a, Directive F.3.b, Directive F.3.c. The County previously pointed out, in the context of the retrofitting requirement (Directive F.3.d), that the requirement should be for permittees to develop and implement a program that meets the required elements. The goal of the program should be to meet the MEP standard, prevent illicit discharges, etc. Otherwise, permittees could meet the required elements of a program, but still face charges that they have not met MEP, etc.</p> <p>Staff revised the retrofitting provision to clarify that permittees must meet the elements of the retrofitting program and that the goal of the program is to meet the MEP standard, etc. The County requests that the rest of Directive F be similarly clarified.</p>				
Response	<p>The inclusion of the language in the cited sections is appropriate to ensure the Copermittee's focus on improving water quality and not simply superficially complying with the requirements. As such, the requirements in the sections prescribe the elements needed in the Copermittee's program to fulfill the goals of directive.</p>				

Comment No.	298	Commenter No.	49	Comment Subject	Legal
Comment	<p>Directive F.1.d(6) -- Treatment Control BMP Requirements</p> <p>This Directive appears to be a vestige from the current permit, when the consensus was that treatment control BMPs (not LID BMPs) were the best practicable means of meeting the MEP standard. The Tentative Order now requires that LID BMPs be implemented at all priority development projects (PDPs). However, it still also requires that treatment control BMPs be implemented at all PDPs. It attempts to reconcile these to inconsistent requirements by providing, in footnote 16, that certain LID BMPs are considered treatment control BMPs. However, it is not clear that LID BMPs can meet all of the elements required for treatment control BMPs. The County would ask that these two requirements be carefully reconciled before adoption.</p>				
Response	<p>Comment noted. The Regional Board has added clarifying language to the Tentative Order to reconcile these requirements.</p>				

Comment No.	299	Commenter No.	49	Comment Subject	Legal
Comment	Directives F.2.d(c) and F.2.e(c) -- BMP Implementation and Inspection of Construction Sites The County would ask that "exceptional threat to water quality" in Directive F.2.d(c) and "significant threat to water quality" in Directive F.2.e(c) be reconciled.				
Response	The Regional Board finds that those construction sites under F.2.d.c that qualify are indeed exceptional, and that the risk is more than significant. For example, a construction site tributary to a 303(d) listed waterbody impaired for sediment arguably poses an exceptional risk to that waterbody.				

Comment No.	300	Commenter No.	49	Comment Subject	NEL
Comment	Non-Stormwater Numeric Effluent Limits (NELs) – The County's concerns with the imposition of non-stormwater NELs have been presented to your staff. However, the Tentative Order continues to make the case that the non-stormwater discharges are not subject to the maximum extent practicable standard and, therefore, subject to water quality based effluent limits. The application of the MEP standard to discharges from municipal storm drain systems is a fundamental tenet of the stormwater mandate and County strongly disagrees with the inclusion of NELs for a number of technical and legal reasons.				
Response	Please see Regional Board Counsel Memorandum dated November 05, 2009.				

Comment No.	301	Commenter No.	49	Comment Subject	LID
Comment	Development Planning Component – Low Impact Development (LID), has become the defining issue of permit renewal for municipal stormwater programs in California. Reflective of the significance of this issue was the creation by the Santa Ana Regional Board of a stakeholder group to assist specifically with creating land development requirements for its municipal permit. As a result of the many stakeholder meetings and discussion at the adoption hearing, a framework was created for land development that is technically robust and is broadly supported. It is absolutely vital for Orange County that the land development standards for water quality protection be uniform on a countywide basis. Consequently, the County is providing revised language that would effect a cogent alignment of the land development requirements in the two permits.				
Response	Comment noted. The Tentative Order's requirements for LID implementation are functionally identical to that in the Santa Ana Regional Board's North Orange County MS4 Permit, R8-2009-0030. The Tentative Order includes the same consideration of infiltration, capture and reuse, evapotranspiration, and bio-retention/bio-filtration, and requires treatment of residual runoff volumes when the application of LID BMPs has been determined to be technically infeasible. The Tentative Order's LID waiver provisions provide the Copermittees discretion to include regional or sub regional treatment of residual runoff volumes as mitigation projects. The Tentative Order also includes the Copermittees the discretion to implement a credit system as part of the waiver program.				

Comment No.	302	Commenter No.	49	Comment Subject	TMDL
Comment	The Total Maximum Daily Loads – As more and more TMDLs are adopted and the resulting language and allocations incorporated into permits, it is critical that the assumptions and requirements of the allocations are incorporated into the stormwater permits as they were intended. It is of concern to the County that the Tentative Order indicates that the Regional Board staff are interpreting the TMDL instead of incorporating the TMDL into the permit. In this regard the County is providing alternate language which is consistent with EPA guidance and has been successfully adopted into other municipal stormwater permits.				
Response	The Tentative Order does not interpret the TMDL. The Waste Load Allocation Reductions, Final Allocations and Numeric Targets come directly from the adopted TMDL. This is in compliance with the requirement that all NPDES Permits are consistent with the assumptions and requirements of Waste Load Allocations of adopted and applicable TMDLs [40 CFR 122.33(d)(1)(vii)(B)]. Please also see response to Comment no. 354.				

Comment No.	303	Commenter No.	49	Comment Subject	General
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Comment The County shares with the Board an interest in seeing a San Diego Region Municipal Stormwater Permit reasonably consistent with the Santa Ana Region Municipal Stormwater Permit (Order No. R8-2009-0030). This consistency is necessary to ensure that the Permittees who are regulated by both jurisdictions do not have conflicting and/or wholly different requirements to implement. Consistency between the permits will allow the Permittees to leverage their limited resources and increase the ability to convey consistent messages within the public education and outreach materials for the various program elements. Since, in spite of previous assurances and concerns, the August 12, 2009 Tentative Order is fundamentally different from the Santa Ana Region Municipal Stormwater Permit in many key programmatic areas, this is a critical issue identified within the technical comments presented below.

Response Please see Comment no. 24 in the July 1, 2009, Response to Comments IV.

The Regional Board contends that the Tentative Order is reasonably consistent with the Santa Anta Region Order. Please see response to Comment no. 373.

Comment No.	304	Commenter No.	49	Comment Subject	NEL
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Comment TENTATIVE ORDER INAPPROPRIATELY USES THE TERM "VIOLATION" INSTEAD OF "EXCEEDANCE"

The Tentative Order continues to persist in the inappropriate reference to data that exceed Water Quality Objectives (WQOs) as violations. In particular, the language in the Tentative Order has been changed from the prior Order (R9-2002-0001) to replace the term "exceedance" with the term "violation". For example, "exceedances of water quality objectives" has been replaced with "violations of water quality objectives" (emphasis added).

Although there are other instances of this within the Findings, the most notable section of the permit where this language change occurred is Page 19, Permit Section A.3. In this section of the permit the term "violation" is not only inconsistent with Order R8-2009-0030, it is also inconsistent with language within SWRCB Order WQ 99-05. The iterative language in the receiving water limitations speaks to exceedances of water quality standards, not violations. Further, it is unclear why both the terms "violations" and "exceedances" would be used within Permit Section A.3. The use of both terms would implicitly indicate that there is a difference between the interpretation and follow up actions resulting from a "violation" versus and "exceedance".

Careful use of these terms is important, because an "exceedance" does not equate with a "violation." For example, while it may be useful to compare water quality monitoring data to receiving water quality objectives and use identified "exceedances" to target geographic areas and pollutants, it is inappropriate to make this same comparison and determine that there is a "violation". The term "violation" connotes that the point of compliance is the actual comparison of the urban runoff data to the receiving water quality objective rather than the process and follow up actions as described within the receiving water limitations.

Urban runoff data should not be used, in itself, to indicate a violation of water quality standard since the standard consists of the beneficial use(s) and the water quality objective established to protect that use. The exceedance of a water quality objective does not necessarily result in a violation of a water quality standard. Runoff data can be described as exceeding water quality objectives, but the assessment of whether or not water quality standards are violated is based upon samples and data from the receiving water and impacts or lack of impacts on beneficial uses.

The County requests that the term "violation" in the noted sections be modified to the term "exceedance" to more accurately reflect point of compliance as well and the assessment and follow up action(s) that are required.

Response This comment repeats earlier comments to Revised Tentative Orders R9-2008-001 and R9-2007-002 that were addressed via written response for the 2007 and 2008 tentative Orders.

Please also see Comment no. 62 in the July 1, 2009, Response to Comments IV.

Comment No.	305	Commenter No.	49	Comment Subject	NEL
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Comment DISCHARGE CHARACTERISTICS

- Compliance with Water Quality Standards (Finding C.2, Page 2) Finding C.2. seems to be establishing the fact that MS4s are responsible for all sources of pollutants and manner of discharges (see last sentence). The County would submit that municipalities are limited in their ability to control all sources of pollutants (e.g. air deposition) and, in fact, are not responsible for discharges outside of the jurisdiction/control of the Permittees as well as those non-stormwater discharges that are identified in Section B.2. unless they are found to be a source of pollutants.

In fact, Order No. R8-2009-0030 recognizes this limitation within Findings C.8. and C.10. on pages 3 and 4, respectively.

C.8. This order is intended to regulate the discharge of pollutants in urban storm water runoff from anthropogenic (generated from human activities) sources and/or activities within the jurisdiction and control of the permittees and is not intended to address background or naturally occurring pollutants or flows.

C.10. The permittees may lack legal jurisdiction over urban runoff 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 by the Regional Board. The Regional Board recognizes that the permittees should not be held responsible for such facilities and/or discharges. Similarly, certain activities that generate pollutants present in urban runoff may be beyond the ability of the permittees to eliminate. Examples of these include operation of internal combustion engines, atmospheric deposition, brake pad wear, tire wear and leaching of naturally occurring minerals from local geography.

The County requests that this Finding be modified to recognize that the permittees lack legal jurisdiction over runoff into their systems from some facilities, utilities, special districts, agencies and other point and non-point source discharges otherwise permitted by the Regional Board and that some pollutants in urban runoff may be beyond the ability of the permittees to eliminate.

Response Please see Comments nos. 44 and 159 in the July 1, 2009, Response to Comments IV.

It is important to note that the Tentative Order does not regulate discharges outside of the Copermitees jurisdiction. Once pollutants have entered the MS4, however, the Permittee is responsible for that discharge from their MS4. Please also see Finding D.4.c.

Comment No.	306	Commenter No.	49	Comment Subject	NEL
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Comment Water Quality Monitoring Data (Finding C.9, Page 4) Finding C.9. states, in part, that the water quality monitoring data collected to date indicates that there are persistent violations of Basin Plan objectives for a number of pollutants and that the data indicates that runoff discharges are a leading cause of such impairments. While the receiving water quality may exceed Basin Plan objectives for constituents identified by the municipalities as pollutants of concern, there is inadequate data to make such a definitive statement that the runoff discharges are the leading cause of impairment in Orange County.

The County requests that the last sentence of Finding C.9. be modified to read:

“In sum, the above findings indicate that urban runoff discharges may be causing or contributing to water quality impairments, and warrant special attention.

Response Please see Comment no. 64 in the July 1, 2009, Response to Comments IV as this comment has been previously submitted and addressed.

Comment New or Modified Requirements (Finding D.1.c, Page 6)

Finding D.1.c. states that the Tentative Order “contains new or modified requirements that are necessary to improve the Copermittees’ efforts to reduce the discharge of pollutants to the MEP and achieve water quality standards”. The Finding further states some of these new or modified requirements “address program deficiencies that have been noted in audits, report reviews, and other Regional Board compliance assessment activities.” In fact, in many cases the new or modified requirements do not have adequate findings of fact and technical justification within the accompanying Fact Sheet.

In many instances the Fact Sheet not only provides little or no justification of the need for the new requirement, it also does not identify the “program deficiency” that warrants the modification. In many cases the Fact Sheet also does not consider the thorough program analysis that the Permittees conducted as a part of their preparation of the ROWD and the deficiencies and program modifications that Permittees themselves identified as necessary for the program.

The Permit Provisions comments in the next section of these comments identify many of the areas where new or modified provisions of the Tentative Order lack factual or technical support in the Fact Sheet.

Response Please see the Fact Sheet discussion for Finding D.1.c. The Copermittees are required to update and expand their runoff management programs on jurisdictional and watershed levels in order to improve their efforts to reduce the contribution of storm water pollutants in runoff to the MEP and meet water quality standards. Changes to Order No. R9-2002-01’s requirements have been made to help ensure these two standards are achieved by the Copermittees

The Orders’ jurisdictional requirements have changed based on findings by the Regional Board during typical compliance assurance activities or receipt of complaints. The Regional Board performed full jurisdictional program audits of 8 of the 13 Copermittees during the Order No. R9-2002-01 permit term. Where the audits found common implementation problems, requirements have been altered to better ensure compliance. In addition, the Regional Board conducted detailed reviews of every jurisdictional annual report submitted by the Copermittees. Updates to the Copermittees’ programs are also based on recommendations found in the Copermittees’ ROWD. In many instances, the Copermittees and the Regional Board have identified similar issues that merit program modifications.

To better focus on attainment of water quality standards, the Order’s watershed requirements have been improved. The conditions of the receiving waters now drive management actions, which in turn focus diminishing resources on the highest priority water quality problems within the receiving waters in each watershed. Improvements to watershed requirements were also made to facilitate a mutually clear understanding of the requirements between the Regional Board and Copermittees.

No changes have been made in response to this comment.

Comment No.	308	Commenter No.	49	Comment Subject	Finding
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Comment Development Planning - Treatment Control BMPs (Finding D.2.b, Page 8)

Finding D.2.b. seems to be making the case that treatment control BMPs are ineffective and should not be used. This Finding overstates or incorrectly states the constraints of treatment control BMPs. It is fair to say that without a performance standard for treatment control BMPs then treatment control BMPs can suffer from the constraints noted. However, treatment control BMPs can be effective in removing pollutants for a wide range of storms and, when combined with source control BMPs, provide a comprehensive pollutant reduction strategy. This finding should be significantly modified to support the statement that “using a combination of onsite source control and site design BMPs augmented with treatment control BMPs... is important.”

NOTE: The previous comments on this issue made by the Permittees were not adequately addressed in the Regional Board’s Response to Comments document dated July 1, 2009, and are therefore resubmitted. The Response to Comments document dated July 1, 2009 identifies that “The Finding simply points out the difference between on-site source control / site design BMPs and end-of-pipe BMPs.”, however the finding goes further to identify that “end of pipe BMPs are often incapable of capturing and treating a wide-range of pollutants”, and that end-of pipe BMPs are more effective when used as polishing BMPs”. These statements are incorrect and should be deleted from the finding as many treatment control BMPs are very effective at removing pollutants and should not just be considered as a polishing BMP.

Given the insufficient technical basis for these statements the County requests that Finding D.2.b be deleted from the Tentative Order.

Response Please see the response to comment #66 in the July 1, 2009, Response to Comments IV. The Regional Board agrees that a combination of source control and treatment BMPs are both necessary components of a comprehensive strategy. Experience has shown that end of pipe treatment systems, such as the Munger Sand Filter Water Quality Project and the J01P28 Media Filter and UV treatment system, are not always reliable and sometimes even fail to deliver any substantial benefits.

Comment Hydromodification (Finding D.2.g, Page 9)

Finding D.2.g. identifies that hydromodification measures for discharges to hardened channels are needed for future restoration of the hardened channels to their natural state, thereby restoring the chemical, physical, and biological integrity and Beneficial Uses of local receiving waters. The Response to Comments document dated July 1, 2009 identifies that "The goal of hydromodification requirements are to prevent or further prevent hydromodification impacts on downstream watercourses and eventually restore natural flow regimes.", however if the downstream watercourses are designed (i.e hardened channels) to accept flows from upstream development then no hydromodification impacts would occur. The goal of eventually restoring natural flow regimes is not feasible in most parts of urbanized Orange County as the hardened channels in most cases are designed as a flood control features to prevent flooding and damage to the surrounding urbanized area. Removal of hardened channels in these areas would result in an unacceptable significant danger to life and property due to flooding and/or erosion and so removal and restoration of natural flow regimes is simply not feasible.

The concept of 'restoring' channels to a 'natural' state has been examined by the researchers at SCCWRP, they note that restoration is not feasible in watersheds with a total impervious area greater than about 10% (SCCWRP, 2005)3. This is due to the fact that the channel cross section, grade, and sediment supply have also been changed in the watershed. Simply restoring pre-development flows will not allow restoration of the channel to pre-development conditions and this reality should be acknowledged in the Finding.

Furthermore, the Santa Ana Regional Water Quality Control Board has identified in Order NO. R8-2009-0030 (MS4 Permit for Orange County) that a Hydrologic Condition of Concern does not exist if "All downstream conveyance channels that will receive runoff from the project are engineered, hardened and regularly maintained to ensure design flow capacity, and no sensitive stream habitat areas will be affected." Finding D.2.g should be revised to be consistent with the Santa Ana Regional Board Order NO. R8-2009-0030.

The County requests that Finding D.2.g be modified as follows:

The increased volume, velocity, frequency and discharge duration of storm water runoff from developed areas has the potential to accelerate downstream erosion in natural drainages, impair stream habitat in natural drainages, and negatively impact beneficial uses. Development and urbanization increase pollutant loads in stormwater and volume of stormwater runoff. Impervious surfaces can neither absorb water nor remove pollutants and thus lose the purification and infiltration provided by naturally vegetated soil. Some channels that are either engineered and maintained, or hardened may not be susceptible to the impacts of hydromodification.

Response

The stated objective of the Clean Water Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." As such, the Copermittees in compliance with the Clean Water Act should seek to restore the physical integrity of these creeks and channels that have been greatly impaired by flood control projects. As a goal, it is premature to say it is infeasible to restore hardened channels to their beneficial uses without a full-blown assessment. Hydromodification controls alone may not be sufficient to restore some of the hardened channels. Some areas may need floodplain restoration, easements and setbacks. Nevertheless, the Copermittees are not required by the Tentative Order to restore concrete lined channels. Finding D.2.g has been modified to: "hydromodification measures for discharges to hardened channels allow for the future restoration of the hardened channels to their natural state..." This change has been made to avoid confusion regarding the perceived requirement to restore concrete lined channels. The Copermittees' development planning approval process, however, should explore creek restoration as an alternative to meet the hydromodification requirements of the Tentative Order.

The Commenter misinterprets the findings of the SCCWRP study. The SCCWRP study recommended four general strategies; preservation, restoration, rehabilitation, and stabilization. Areas with 10 to 20 percent total impervious area have stream channels that probably have experienced irreparable change and efforts will be to create a new "natural" stream channel configuration given existing constraints. Likewise, the Commenter has misinterpreted the findings of the Santa Ana Regional Water Quality Control Board's MS4 permit for Orange County that says "... no sensitive stream habitat areas will be affected." The reasoning that no sensitive stream habitat area will be affected is because sensitive stream habitat no longer exists in these engineered, hardened, and regularly maintained channels. The Santa Ana Regional Board's finding does not speak about the potential for future restoration of beneficial uses in the channel.

Comment Treatment and Waters of the U.S. (Finding E.7, Page 14)

Finding E.7. states that, "[u]rban runoff treatment and/or mitigation must occur prior to the discharge of urban runoff into a receiving water." We believe that Finding E.7. is based on a misinterpretation of CWA regulations and misconstrues USEPA guidance on stormwater treatment BMPs. The Fact Sheet refers to USEPA Guidance from 1992, which refers to locating structural controls in a natural wetland and not waters of the U.S. Furthermore in the Regional Board Response to Comments dated December 12, 2007 the Regional Board states "The Regional Board agrees that there is not a federal prohibition on placing pollution control practices within waters of the U.S." We wish to comment here on the implications it has for watershed restoration activities.

This concern has been discussed in detail in comments on previous versions of the Tentative Order (see, e.g., Attachment A (Pages 1-7) to the County's April 4, 2007 comment letter). We wish to comment here on the implications it has for watershed restoration activities

Prohibiting treatment and mitigation in receiving waters severely limits the potential locations for installation of treatment control BMPs and will adversely affect many watershed restoration projects. For example, this Finding may have unintended adverse effects for the Aliso Creek Water Quality SUPER Project.

The Aliso Creek Water Quality SUPER Project proposes a multi-objective approach to Aliso Creek watershed development and enhancement, accommodating channel stabilization, flood hazard reduction, economic uses, aesthetic and recreational opportunities, water quality improvements, and habitat concerns. The project is aimed at water supply efficiency and system reliability through reclamation, along with benefits for flood control and overall watershed management and protection. The ecosystem restoration and stabilization component of the project will include:

- Construction of a series of low grade control structures and reestablishment of aquatic habitat connectivity;
- Shaving of slide slopes to reduce vertical banks; and

Invasive species removal and riparian revegetation and restoration of floodplain moisture.

The Permittees are concerned that some of these activities may be deemed "urban runoff treatment and/or mitigation" in a receiving water and, thus, may not be allowed, compromising the project objectives. In addition, this Finding seems to conflict with Existing Development Component Section 3.a.(4) Page 51 of the Tentative Order, which requires the Permittees to evaluate their flood control devices and identify the feasibility of retrofitting the devices to provide for more water quality benefits.

Given the lack of any proper legal or factual basis for these limitations as well as the adverse impacts on watershed restoration efforts, the County requests that Finding E.7 be deleted from the Tentative Order.

Response The comment was responded to in the 2007 response to comments and again in the July 1, 2009, Response to Comments IV (Please see Comment no. 69). Furthermore, the commenter misconstrues the 2007 Regional Board response by only quoting a single sentence from the entire response. We have discussed the purported "implications" below:

The Regional Board remains firm in that federal regulations under 40 CFR 131.10(a) are very clear: "In no case shall a State adopt waste transport or waste assimilation as a designated use for any waters of the United States." The Regional Board encourages the restoration of waters of the United States via activities such as reestablishment of aquatic habitat connectivity (e.g. re-connection with the floodplain), invasive species removal, and riparian revegetation and restoration. It is important to make clear such activities are considered the restoration of Beneficial Uses of these waters. These activities are not and should not be considered as treatment BMPs for MS4 discharges. As quoted from the full 2007 Regional Board response:

"The Regional Board agrees that there is not a federal prohibition on placing pollution control practices within waters of the U.S. Finding E.7 was previously revised to provide clarification, and Response No. 11 of RTC 1 provided a detailed discussion with numerous examples to demonstrate the factors that must be considered when evaluating such proposals. It is also relevant to distinguish practices used to meet waste discharge / NPDES requirements from practices used to improve conditions within a water body. The NPDES regulations clearly require the use of management practices to remove pollutants to the maximum extent practicable from MS4 storm water discharges before such discharges enter waters of the U.S. Therefore, the Tentative Order must require treatment BMPs (Section D.1.6) to be implemented prior to receiving waters. In cases where practices are proposed within waters to improve ambient water quality conditions, the Regional Board will evaluate such proposals and consider the guidance provided by the U.S. EPA on constructed treatment wetlands. This may occur under the Regional Board's

responsibilities in the NPDES program or elsewhere, such as federal Clean Water Act Section 401 or CWC Section 13260. No changes have been made in response to this comment."

Thus, it is unclear if the purpose of the SUPER Project is to restore Beneficial Uses and improve ambient receiving water conditions or to treat discharges from the MS4.

Comment No.	311	Commenter No.	49	Comment Subject	Finding
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Comment TMDLs (Finding E.11, Page 16-17)

This finding indicates that it is the intention of the Regional Board to incorporate MS4 WLAs as end-of-the-pipe numeric Water Quality Based Effluent Limitations for adopted TMDLs. US EPA's 2002 guidance memorandum on establishing stormwater permit requirements to implement WLAs stated that EPA expected that most WQBELs for NPDES-regulated municipal ... will be in the form of BMPs and that numeric limits will be used only in rare instances [emphasis added]. This reference was specifically cited in the Beaches and Creeks TMDL Technical Report and reflects the intent of the Regional Board staff and the understanding of the Stakeholder Advisory Group as to how the TMDL would be incorporated into the NPDES permit. This approach to incorporating WLAs into stormwater permits is maintained in the draft handbook TMDLs to Stormwater Permit, in which Chapter 6 identifies methods of coordinating TMDLs and stormwater permits. Six options are put forward as methods for permit writers to incorporate TMDLs in a stormwater permit, the last of which is to consider numeric effluent limitations. Furthermore, the County would also note that as required by 40 C.F.R. §122.44(d)(1)(vii)(B), the Permit must be "consistent with the assumptions and requirements of available WLAs".

The Regional Board should follow the guidance in the 2002 Memorandum and the Draft Handbook and the intent of the Regional Board TMDL staff and express the WLAs in the Tentative Order as being implemented through the BMPs. This is especially true in California where an implementation plan is required for TMDLs and which in turn may be incorporated into the Permit consistent with EPA guidance.

In addition, it is of concern to the County that the Finding indicates that the Regional Board staff are interpreting the TMDL instead of incorporating the TMDL into the permit. The County submits that it is inappropriate for the Board staff to be interpreting the TMDL and, instead, that they should only be establishing in the permit effluent limitations consistent with the WLAs from any adopted TMDL.

In order to provide the greatest amount of flexibility and to be consistent with the adopted TMDL, the County requests that the Board replace the existing language with the following language from the recently adopted Ventura County MS4 Stormwater Permit (R4-09-0057 Pages 12 and 14):

This order incorporates applicable WLAs that have been adopted by the Regional Water Board and have been approved by the Office of Administrative Law and the U.S. EPA. The TMDL WLAs in the Order are expressed as water quality-based effluent limits in a manner consistent with the assumptions and requirements of the TMDL from which they are derived.

Collectively, the restrictions contained in the TMDL Provisions for Storm Water and Non-Storm water Discharges of this Order on individual pollutants are no more stringent than required to implement the provisions of the TMDL, which have been adopted and approved in a manner that is consistent with the CWA. Where a TMDL has been approved, NPDES permits must contain effluent limits and conditions consistent with the assumptions and requirements of the available WLAs in TMDLs (40 C.F.R. 122.44(d)(1)(vii)(B)).

Response Please see responses to comments nos. 59 and 72 in the July 1, 2009 Response to Comments IV as the majority of this comment is a repeat of a previously submitted comment.

The TMDL Wasteload Reduction Milestones, Final Waste Load Allocations, Final Numeric Targets and compliance dates come directly from adopted TMDL. No changes have been made to this section of the permit in response to the latest submission of this comment.

Comment No.	312	Commenter No.	49	Comment Subject	General
Comment	<p>Prohibitions and Receiving Water Limitations (Section A, Page 19)</p> <p>Despite the fact that this issue was raised during the last comment period, the Regional Board have further modified the permit to inherently make it inconsistent and counter to State Water Board WQ Order 99-05. The Response to Comments IV (comment #57 and #74) state “The Tentative Order has been modified to clarify that through the adoption of this Tentative Order, the Executive Officer issues a standing order that the Copermittees must repeat the process until directed otherwise.” In addition, this modification also sets up an inconsistency between the Tentative Order and the Fact Sheet for Finding A.3. which states “This Order is consistent with the following precedential Orders adopted by the State Board addressing municipal storm water NPDES Permits:.....Order 99-05”. In fact, this language is inconsistent with Order 99-05 as well as Order No. R8-2009-0030.</p> <p>In section A.3.b., the Regional Board has modified the standard state-wide receiving water limitations language to require the Permittees to repeat the assessment process for exceedances of the same water quality standard. In the previous permit, and in permits throughout the state, including the permit recently issued by the Regional Board to MS4 dischargers to the watersheds draining San Diego County, this provision of the RWL language is set up such that the process is only repeated once unless otherwise directed. The original language recognizes the length of time it can take for new BMP programs to be developed, deployed, and fully implemented before a change in water quality may be observed and avoids pointless reassessments of the same pollutant. Even in cases where there has been a significant reduction of the source of a pollutant, it typically takes several years for monitoring programs to see the change in the receiving water. In cases where the pollutant is persistent in the environment, it can take decades to detect changes in water quality or indicator monitoring.</p> <p>The County requests that the Regional Board reinstate the original language from WQ Order 99-05 (see below) regarding iterations of the assessment process for exceedances of the same water quality standard.</p> <p>So long as the Copermittee has complied with the procedures set forth above and is implementing the revised Jurisdictional Urban Runoff Management Program, the Copermittee does not have to repeat the same procedure or continuing or recurring exceedances of the same receiving water limitations unless directed by the Regional Board to do so.</p>				
Response	<p>Under Order State Board Order no. 99-05, Permittees do not have to repeat the process unless directed to do so by the Regional Board. Under the Tentative Order, the Executive Officer has directed that the Permittees must repeat the process until directed otherwise. It is unclear how this is inconsistent with State Board Order no. 99-05, as the Executive Officer has made the direction to continue.</p>				

Comment No.	313	Commenter No.	49	Comment Subject	General
Comment	Conditionally Exempt Non-Stormwater Discharges (Section B, Page 20-21)				
<p>The Regional Board has modified the list of conditionally exempt non-stormwater discharges so that it no longer includes landscape irrigation, irrigation water, and lawn watering. We would contend that a prohibition on these discharges is potentially problematic from the perspective of fostering and sustaining public support for the Program and that the approach should be focused more on collaborative public education and water conservation in conjunction with the water agencies.</p> <p>The Orange County DAMP contains a variety of BMPs and efforts to reduce pollutants in discharges associated landscape irrigation. These practices include public outreach on the use of landscape chemicals (fertilizers and pesticides) and overwatering, implementation of integrated pest management (IPM) practices within municipal programs, and water conservation measures that mandate the use of efficient irrigation systems, as well as other programs that general control pollutant sources which reduce the pollutants that might be conveyed into the MS4s by excess irrigation flows. The use of BMPs to reduce pollutants associated with runoff is a preferable and more practical approach.</p> <p>Additionally, the Permittees have sought grant funding to assist with the implementation of programs to reduce irrigation-related urban runoff. Grant programs frequently prohibit the award of grants to meet requirements of NPDES permits requirements. The inclusion of the prohibition may limit the types of grants the Permittees might otherwise be eligible for to help address this discharge since it will be a permit requirement.</p> <p>Finally, a prohibition of irrigation-related runoff may be in conflict with other permits that allow such discharges including the industrial general permit and the construction general permit. In particular, the construction permit authorizes such discharges if they are necessary for the completion of construction (and are identified in the SWPPP with appropriate BMPs). The final phase of construction includes the installation and establishment of landscaping (also known as vegetative stabilization). The establishment of new plantings to ensure long-term survival typically requires higher than normal levels of irrigation to ensure good root growth and vegetative cover prior to the onset of the rainy season to reduce erosion and sediment transport from the project site. The complete prohibition of irrigation related runoff may impede the ability of the Permittees to establish erosion resistant vegetative covering.</p> <p>The County requests that Section B. Non-Storm Water Discharges be modified to include landscape irrigation, irrigation water, and lawn watering in Section B.2.</p>					

Response

The Regional Board recognizes the efforts to date from the Copermittees to implement BMPs for non-storm water discharges such as landscape irrigation. The Regional Board, however, maintains that the federal regulation regarding the identification of exempted non-storm water discharges is clear (Please see Regional Board Counsel Memorandum dated November 05, 2009). Furthermore, the Regional Board cannot consider the ability of a Copermittee to obtain grants when considering the protection of water quality standards.

The removal of landscape irrigation as an exempted discharge is not in conflict with other NPDES requirements. As previously stated in Comment no. 227 in the July 1, 2009, Response to Comments IV, Copermittees are responsible for accepting flows into their MS4, and are required under federal regulations to have the legal authority to prevent these flows from occurring. In regards to vegetative stabilization, the establishment of vegetation is required under the NPDES General Construction permit as a post-construction BMP for erosion protection. Additional construction BMPs are available for use during the establishment of vegetation.

The comment regarding the prohibition on over-irrigation practices was addressed in the previous response to comments. The comment does not raise any new issues from the previous comments. Please see the discussion in the Fact Sheet for findings C.14 and C.15; and the July 1, 2009, Response to Comments IV, Response Nos. 28, 52, 76, and 159. Please also see comments Nos. 84, and 264 in this Response to Comments. No changes have been made in response to this comment.

In summary, over irrigation is a non-storm water discharge required by federal regulations to be prohibited where identified to be a source of pollutants.

Comment

The technology based effluent limitation of “effectively prohibit” should continue to be the compliance standard for non-stormwater.

CWA section 402(p) (3) (B) (ii) reads as follows:

(B) Municipal Discharge – Permits for discharges from municipal storm sewers –

(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewer;

The corresponding regulations associated with the CWA section is 40 CFR 122.26.(d)(2)(iv)(B)(1) which clarified “effectively prohibit” by acknowledging that discharge exemptions are allowed if determined not to be sources of pollutants. Thus the CWA section and corresponding regulations may be read that a permit shall “effectively prohibit nonstormwater discharges” but may exempt certain discharges that are not sources of pollutants (i.e. de minimis discharges) from the prohibition. The CWA section does not require a full prohibition but rather an effective prohibition. The more correct finding for the Orange County permit is that non-stormwater discharges are effectively prohibited (per 402 (p) (3) (B) (ii)). However discharges that are not sources of pollutants are exempted from the prohibition.

The County would submit that the technology based standard for non-stormwater discharges into the MS4 is “effectively prohibit” just as “maximum extent practicable” is the technology based standard for all pollutants from the MS4. Furthermore, the County would submit that this technology based limit is in fact protective of water quality and compliance with water quality standards. The County has an extensive dry weather monitoring program to identify problematic discharges, including illegal discharges, which support the protection of water quality standards. It is unclear to the County how the Board has determined that these efforts are in fact inadequate to necessitate the development of water quality based effluent limits. Furthermore the TMDL program as noted in Finding E.10 and E.11 provide the appropriate regulatory vehicle to address discharges from the MS4 (both stormwater and non-stormwater discharges) that are causing and contributing to an exceedance of a water quality standard in impaired waters.

Moreover, not only are the proposed numeric WQBELs not technically or legally appropriate, they may put the permittees in constant non-compliance and subject to more draconian enforcement action (i.e. mandatory minimum penalties –see discussion below).

Response

Please see Regional Board Counsel Memorandum dated November 05, 2009.

Please note the development of water quality-based effluent limitations is discussed in the Tentative Order Fact Sheet.

Please also see responses to Comments nos. 317 and 319.

Comment The San Diego draft permit for Orange County is inconsistent with the Santa Ana adopted permit for Orange County

The Santa Ana issued permit for Orange County mirrors the approach noted above, that being non-stormwater discharges are subject to the “effectively prohibit” standard. The findings and provisions relevant to non-stormwater discharges in the Santa Ana issued permit are provided below:

Findings:

C.10. The permittees may lack legal jurisdiction over urban runoff 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 by the Regional Board. The Regional Board recognizes that the permittees should not be held responsible for such facilities and/or discharges. Similarly, certain activities that generate pollutants present in urban runoff may be beyond the ability of the permittees to eliminate. Examples of these include operation of internal combustion engines, atmospheric deposition, brake pad wear, tire wear and leaching of naturally occurring minerals from local geology.

C. 11. This order regulates storm water runoff and certain types of de-minimus discharges specifically authorized under Section III of this order (collectively referred to as urban runoff) from areas under the jurisdiction of the permittees. For purposes of this order, urban runoff includes storm water and authorized non-storm water (see Section III) discharges from residential, commercial, industrial and construction areas within the permitted area and excludes discharges from feedlots, dairies, and farms. Urban runoff consists of surface runoff generated from various land uses in all the hydrologic drainage areas that discharge into waters of the US. The quality of these discharges varies considerably and is affected by land use activities, basin hydrology and geology, season, the frequency and duration of storm events, and the presence of illicit discharge practices and illicit connections.

M. 68. The MS4s generally contain non-storm water flows such as irrigation runoff, runoff from non-commercial car washes, runoff from miscellaneous washing and cleaning operations, and other nuisance flows generally referred to as de-minimus discharges. Federal regulations, 40 CFR Part 122.26(d)(2)(i)(B), prohibit the discharge of non-storm water containing pollutants into the MS4s and to waters of the U.S. unless they are regulated under a separate NPDES permit, or are exempt, as indicated in Discharge Prohibitions, Section III.3 of this order. The Regional Board adopted a number of NPDES permits to address de-minimus type of pollutant discharges.

Provision

III. 3. The permittees shall effectively prohibit the discharge of non-storm water into the MS4s, unless such discharges are authorized by a separate NPDES permit or as otherwise specified in this provision.

The County’s approach is consistent with Federal and State law and regulations. The significantly different approach being proposed by San Diego Board will lead to considerable costs not commensurate with the water quality benefits and unhelpfully redirect Program resources from baseline program implementation to special studies.

Response Please see Regional Board Counsel Memorandum dated November 05, 2009.

Please see Comments nos. 44 and 159 in the July 1, 2009, Response to Comments IV.

It is important to note that the Tentative Order does not regulate discharges outside of the Copermitees jurisdiction. Once pollutants have entered the MS4, however, the Permittee is responsible for that discharge from their MS4. Please also see Finding D.4.c

The Regional Board contends the Tentative Order is consistent with federal and State regulations.

Comment No.	316	Commenter No.	49	Comment Subject	NEL
Comment	<p>Numeric effluent limits were developed primarily based on Basin Plan water quality objectives and not all the constituents with NELs are relevant to water quality issues in southern Orange County.</p> <p>Notwithstanding the argument that water quality based effluent limits are inappropriate and not justified, the Board, if it determines that technology based limits are insufficient to meet water quality standards, is obligated to stipulate additional requirements consistent with 40 CFR 122.44. In this context the Regional Board must determine whether the discharge has a “reasonable potential” to cause or contribute to an excursion of the applicable water quality standard. (40 CFR 122.44 (d)(1)(i-iii). If determined to “cause or contribute” then effluent limits (either narrative or numeric) must be developed for the discharge. Furthermore, if numeric effluent limits are developed then they must be consistent with 40 CFR 122.45. However upon closer review there appears to be some inconsistencies between Table 4 and Finding E. 10. In Table 4 the Board has established numeric effluent limits for a list of some 17 constituents. This table would imply that the Board has determined reasonable potential for each of these constituents. However, in Finding E.10 the Board acknowledges that only four pollutants have been shown to have reasonable potential, indicator bacteria, phosphorus, toxicity, and turbidity. Furthermore Finding E.10 does not differentiate between non-stormwater and stormwater thus it’s difficult to determine which pollutant is associated with the different types of discharges.</p>				
Response	<p>The constituents included in the referenced Finding E.10 are based on the 2006 303(d) list for pollutants that have reasonable potential for both non-storm water and storm water discharges. Please refer to the Tentative Order Fact Sheet for the full reasonable potential analysis for non-storm water discharges from the MS4.</p>				

Comment No.	317	Commenter No.	49	Comment Subject	NEL
Comment	<p>Preliminary compliance assessment of outfall data showed frequent and ongoing exceedances of numeric limits which equates to ongoing investigation.</p> <p>Of primary importance to the County is that the Regional Water Board adopt a permit that protects water quality in a reasonable and feasible manner. As currently drafted, the Permittees are exposed to significant risk to comply with the NELs for dry weather discharges. We have completed a comparison of existing dry weather discharges with the selected NELs noted in Table 4. The results of that comparison are shown below:</p> <p>Constituent Percentage of time > NELs Turbidity 4.9 Surfactants 5.7 Dissolved Oxygen 5.4 below 5 ppm Total Phosphorus@ 93.6 Orthophosphate Fraction Nitrate + Nitrite >93.8 – NEL changed to Total N Fecal coliform 90.0 Enterococcus 97.3 Nickel (dissolved) >5.0 Copper (dissolved) >3.0 Cadmium (dissolved) >16.0</p> <p>Clear from this analysis is that for certain constituents, notably nutrients and bacteria, the entire drainage system will very rarely be found to be meeting the NELs. An analysis of data from Orange County stream reference sites, i.e. sites removed from urban influence, shows the same patterns of NEL exceedance.</p>				
Response	<p>Language has been added to the Order (Section C.3) to clarify that the Tentative Order does not regulate natural sources and conveyances of constituents.</p> <p>The Regional Board contends that the primary importance is to adopt a NPDES permit that protects water quality standards.</p> <p>It is important to note that the Copermitees have identified over-irrigation activities to be a source and conveyance of pollutants to waters of the United States, and that nutrients and indicator bacteria were included as identified pollutants. Thus, eliminating over-irrigation is likely to reduce the frequency of NEL exceedances for these constituents.</p> <p>Furthermore, the commenter has made a blanket statement regarding reference sites, but has failed to provide the analysis, nor the data, in support of their claim. Evidence exists in information submitted to the Regional Board that contradicts the Counties statement. For example, required aqueous chemistry conducted at bioassessment reference sites for the 2007-2008 reporting period shows receiving waters do not exceed NELs for dissolved oxygen, nutrients, turbidity, or metals (no reported measurement for surfactants).</p>				

Comment No.	318	Commenter No.	49	Comment Subject	NEL
Comment	<p>Current language still exposes Municipalities to Mandatory Minimum Penalties for not complying with the numeric limits.</p> <p>As demonstrated above, the County/Permittees will face enforcement action for not complying with all the NELs. Where there is exceedance, the Permittees will be faced with financial liability under several different enforcement regimes. First, the NELs, as proposed in the Revised Tentative Order, would clearly constitute numeric effluent limitations. Violation of effluent limitations in an NPDES permit subjects the Permittees to potential mandatory minimum penalties (MMPs). (See Water Code §§ 13385(h) and 13385.1). In addition, non-compliance with the NELs may subject the Permittees to additional enforcement actions imposed by the Regional Water Board and through third party actions under the citizen suit provisions of the CWA. Although the Tentative Order is structured to clarify that compliance with Non-Stormwater Dry Weather Numeric Effluent limits Section C is met by one of three follow-up actions, the structure appears in conflict with the options available under §13385 to avoid MMPs. Once a numeric limits is established then there are limited options available to avoid MMPs. As a case in point during the 09/02/09 State Water Board hearing regarding the subject of MMPs resulting from non-compliance with proposed numeric effluent limits in the Construction General Permit, the State Board chair was seeking flexibility in implementing the numeric effluent limits without subjecting the discharger to MMPs. He suggested a phase in period. When this question was posed to Board legal counsel she said that such an approach was not legally valid and that MMPs would apply immediately. Thus it would appear that even though the San Diego Board staff may have intentions to provide flexibility to the Permittees to conduct the iterative process and follow up investigation efforts to avoid MMPs, the California Water Code does not provide such flexibility and the Permittees would be subject to MMP should they violate the NELs.</p>				
Response	<p>Please note the iterative process does not apply to non-storm water discharges (see Regional Board Counsel Memorandum dated November 05, 2009).</p> <p>Please see Comment no. 82 in the July 1, 2009, Response to Comments IV.</p>				

Comment

Derivation of numeric effluent limits are based on numerous assumptions and puts the Permittees in a position of endless monitoring and investigation.

Notwithstanding our comments above regarding the inappropriateness of WQBELs the County reviewed the derivation of the NELs and found a number of assumptions that will need to be verified to support modification of the NELs. We have highlighted some of the major assumptions below:

- No dilution was available for inland surface water bodies and bays and harbors. Such an approach assumes a worst case situation and essentially results in the dischargers having to meet water quality objectives at the point of discharge.
- Reasonable potential was not conducted on individual outfalls but rather on the overall drainage system, resulting in a single set of effluent limits for all outfalls to a specified water body. If, however, reasonable potential is done on an outfall by outfall basis the number of constituents and magnitude of the effluent limitations will be different.
- With the exception of chromium VI, freshwater water quality criteria were not used in determining effluent limitations. The Water Board calculated all effluent limitations using saltwater water quality criteria, which are not hardness-dependent. This approach essentially assumes that the receiving waters are all saltwater which is inappropriate for discharges to inland surface waters. The Tentative Order does allow adjustment in site specific hardness for determining the applicable water quality criteria when calculating effluent limitations. However, the use of the hardness-based water quality criteria equations needs to be clarified as to whether they apply to the receiving water and used in effluent limitation calculations or if they are the actual effluent limitations. In addition, all hardness-based water quality criteria equations should include an appropriate compliance period.
- Default conversion factors were used to convert dissolved metal water quality criteria to total metal water quality criteria. Again this assumption has typically been shown to be a worst case assumption and more appropriate conversion factors are available.

The overall effect of these assumptions is that reasonable potential was determined for a number of constituents for all outfalls. Given the exposure and liability of NELs the Permittees would be well served to conduct numerous special studies (e.g. dilution studies, translator studies) to validate the assumptions and develop site specific objectives for individual outfalls. Such an effort, although prudent from the Permittees perspective, seems misplaced and not the best use of our limited resources.

Response

The Regional Board followed required federal requirements when evaluating non-storm water discharges and considering a mixing zone or dilution. The Regional Board considered critical conditions for flow, pollutant concentrations and environmental effects. This is fully discussed in the Tentative Order Fact Sheet on page 109.

The Tentative Order is considered a General Order under 40 CFR 122.28.

In regards to freshwater water quality criteria, the Tentative Order is consistent with the requirements of the State Board Policy for Implementation of Toxics Standards for Surface Waters, Enclosed Bays and Estuaries. Section C.5 of the Order (see Table 4.a.2) specifically states:

"The Effluent Limitations for Cadmium, Copper, Chromium (III), Lead, Nickel, Silver and Zinc will be developed on a case-by-case basis because the freshwater criteria are based on site-specific water quality data (receiving water hardness). For these priority pollutants, the following equations (40 CFR 131.38.b.2) will be required:

- Cadmium (Total Recoverable) = $\exp(0.7852[\ln(\text{hardness})] - 2.715)$
- Chromium III (Total Recoverable) = $\exp(0.8190[\ln(\text{hardness})] + .6848)$
- Copper (Total Recoverable) = $\exp(0.8545[\ln(\text{hardness})] - 1.702)$
- Lead (Total Recoverable) = $\exp(1.273[\ln(\text{hardness})] - 4.705)$
- Nickel (Total Recoverable) = $\exp(.8460[\ln(\text{hardness})] + 0.0584)$
- Silver (Total Recoverable) = $\exp(1.72[\ln(\text{hardness})] - 6.52)$
- Zinc (Total Recoverable) = $\exp(0.8473[\ln(\text{hardness})] + 0.884)$ "

Thus, the hardness of the receiving water determines the effluent limitation.

In regards to conversion factors, again the Regional Board followed requirements of the State Board Policy for Implementation of Toxics Standards for Surface Waters, Enclosed Bays and Estuaries. The Policy clearly states that it is necessary to express a dissolved metal as total recoverable and, when a site-specific factor has not yet been developed, the Regional Board shall use the applicable conversion factor found in 40 CFR 131.38. The Regional Board will consider other conversion factors that are developed. The commenter provides a statement that there are more appropriate factors available, but fails to provide that information.

In summary, what the commenter claims to be "assumptions" are actually requirements under federal and State regulations for NPDES permitting. Furthermore, monitoring is required under 40 CFR 122.44. It is unclear how "endless monitoring and investigation" is a problem, as NPDES permits to discharge require monitoring and investigation of exceedances of effluent limitations. This is done to protect water quality standards.

Comment No.	320	Commenter No.	49	Comment Subject	NEL
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Comment

Closing

In closing, the County would submit that the use of NELs for non-stormwater discharges is inappropriate and premature at best. The TMDL program provides the safety net for ensuring that our water bodies are protected in the most reasonable and effective manner. The direct translation of water quality objectives into numeric effluent limits bypasses the TMDL process. Some of our non-stormwater discharges will exceed the NEL but have no effect on the receiving water quality or beneficial uses. But under the proposed Order the Permittees would be obligated to expend considerable investigative resources without a reciprocal water quality benefit. This requirement will prove to be poor public policy and use of public funds.

The establishment of NELs for non-stormwater discharges is fundamentally flawed from a technical and legal perspective. The current TBEL of "effectively prohibit" for non-stormwater discharges from the MS4 when implemented fully, coupled with the MEP standard for discharges of all pollutants from the MS4, will lead to compliance with water quality standards, negating the need for WQBELs. If, on the other hand, they are proposed as water quality based numeric limits then their derivation must also follow Federal and state regulations (primarily the State Implementation Plan). The County has suggested and continues to suggest that the values be used as "Non Stormwater Action Levels", similar to the approach taken with stormwater (see discussion that follows). Furthermore, the technical feasibility of complying with these numeric limits is questionable especially since our drinking water supply would not be able to comply with the limits.

Response

The Regional Board contends that the derivation of numeric effluent limitations follows Federal and State regulations as outlined in the Tentative Order Fact Sheet. Furthermore, as previously stated in Comment no. 39 in the July 1, 2009, Response to Comments IV, the Copermitees have implemented BMPs for the last 18 years for non-storm water discharges, and have failed to meet water quality standards, as evidenced by 303(d) listings and monitoring conducted to date.

In regards to the "effectively prohibit" interpretation and MEP, please see Regional Board Counsel Memorandum dated November 05, 2009 and Comment nos. 78 and 84 in the July 1, 2009, Response to Comments IV.

In regards to the drinking water comment please see Comment no. 84 in the July 1, 2009, Response to Comments IV.

Please also see responses to Comments nos. 319 and 391.

Comment

The County appreciates the Regional Board staff efforts to address our many concerns with the earlier draft Orders regarding municipal action levels. The County believes that the current structure for storm water action levels (SWALs) is consistent with the approach proposed by the State Water Resources Control Board's "Blue Ribbon Panel of Experts," as expressed in the June 2006 Blue Ribbon Panel Report ("BRP Report"). This approach would also meet the Regional Water Board's desire to include performance measures in a municipal stormwater program for Orange County.

To achieve these goals, we support an approach that "would set "an 'upset' value, which is clearly above the normal observed variability, which would allow bad actor catchments to receive additional attention" (see BRP Report at p. 8.). The BRP Report further clarified that upset value as "...an Action Level because the water quality discharge from such locations are enough of a concern that most all could agree that some action should be taken..." (Id.) In general, the August 12, 2009 Tentative Order accomplishes this goal.

However, the SWAL would be even more relevant and constructive to our Program by considering the following:

- Not all constituents for which action levels were developed are identified as pollutants of concern by the Program;
- Considerable resources are required to address this requirement without relief from other monitoring efforts; and
- No 'safe harbor' provision - thus municipalities may be in a never ending iterative process.

The County submits that Table 5 should be modified to reflect the Program constituents of concern (COCs). As such, SWALs should only include turbidity, nitrogen forms, total phosphorus, copper, lead and zinc. By focusing our limited resources on our COCs we will be better able to address water quality issues relevant to our discharges. In addition, some of our constituents of concern may serve as surrogates for a generic class of pollutants. Thus, by addressing one constituent, the program will receive the benefit of addressing the entire generic class (e.g. by addressing copper we will likely address lead, nickel and zinc).

More importantly, the Tentative Order represents a quantum leap in program costs associated with monitoring and follow-up investigations. Given our limited to non-existent ability to raise revenues to support our program and the general state of the economy, we respectfully request that the constituents subject to SWAL be limited to the constituents of concern noted above. Furthermore, we request that the Board develop a "program cost neutral" permit, meaning that the new Order will reflect the costs currently encumbered. SWAL monitoring for 2 outfalls in each hydrologic sub-area would require an immediate investment of an additional \$217,000 - \$224,000 in monitoring equipment and a significant subsequent commitment of staff and analytical resources.

The County requests that the SWALs only include turbidity, nitrogen forms, total phosphorus, copper, lead and zinc and that an opportunity to validate the utility of wet weather outfall monitoring using no more than 7 outfalls be provided prior to possible system-wide application of this approach to benchmarking.

Response

The Regional Board has reduced the list of required pollutants under the SALs. Those that remain have been identified as pollutants of concern through monitoring required under the current Order (R9-2002-0001).

In regards to relief from other monitoring efforts, the Regional Board has already reduced significant monitoring requirements in addition to allowing participation in a Regional Bacteria monitoring program. Furthermore, language in the monitoring section encourages proposals for participation in other regional monitoring efforts to supplement or replace existing monitoring requirements. The Regional Board expects the Copermittees to propose a monitoring program for SALs in compliance with Section D.2, which provides for flexibility in monitoring a representative percent of outfalls within each hydrologic subarea. It does not require 2 per hydrologic subarea.

While the Regional Board agrees that addressing one pollutant may benefit an entire class of pollutants., certain pollutants are associated with specific activities within the watershed area discharging at a particular SAL monitoring location. This will enable the Copermittees to better target BMPs at activities that produce that pollutant within the watershed.

Comment Effectiveness of BMPs (Section E.1.j, Page 27)

The Tentative Order continues to include a new provision that requires the Permittees to demonstrate that they have the legal authority to require documentation on the effectiveness of BMPs. In fact, the County is unaware of any other MS4 permit within the State of California with this requirement. The County has concerns about this provision for the following reasons:

- As it is currently written, this provision broadly applies to any aspect of the stormwater program where BMPs have been implemented – the result is that this provision sets up a process for the establishment of multiple third party monitoring programs and expenditure of a significant amount of funds to monitor the effectiveness of BMPs. If the desire is to document the effectiveness of certain types of BMPs, it would be much more effective and scientifically sound to establish special studies by entities qualified to conduct such sampling instead of requiring potentially hundreds of third parties to conduct a monitoring program for every BMP that is implemented.
- This provision is redundant with other requirements in the permit in that it ignores the fact that the New Development/Significant Redevelopment section of the DAMP (Section 7.0) establishes a process for the selection, design, and longterm maintenance of permanent BMPs for new development and significant redevelopment projects and requires developers to select BMPs that have been demonstrated as effective for their project category. By going through a thorough process, the Permittees have determined what BMPs would be effective for a particular project – thus eliminating the need to establish a monitoring program for every BMP implemented.
- This provision ignores the fact that the Permittees have already established legal authority for their development standards so that project proponents have to incorporate and implement the required BMPs.
- In the Response to Comments IV, Regional Board staff state, as a part of their justification for this requirement, that USEPA identified that the MS4s need to have the authority to enter, sample, review, inspect, and require regular reports (in addition to some other aspects). However, while USEPA identified that they want the MS4s to establish basic legal authority – the legal authority did not, in fact, specifically extend to the monitoring of all BMPs implemented by third parties. In addition, this section of the guidance speaks to the municipalities legal authority to control the discharge of pollutants, which the County has pursuant to the codes and ordinances that have been adopted and the guidance documents that have been developed.

The County requests that this provision be deleted from the Order.

Response This comment has been previously addressed in the July 1, 2009, Response to Comments IV (Comment no. 98).

The requirement is that the Copermittees have the legal authority to ensure that effective BMPs are being implemented by requiring the third parties to document BMP effectiveness. This legal requirement is not, as the commenter states, "a process for the establishment of multiple third party monitoring programs and expenditure of a significant amount of funds to monitor the effectiveness of BMPs." It does not, as the commenter implies, require that every BMP implemented by a third party be monitored for pollutant removal effectiveness. It requires the Copermittees have the legal authority to ensure that BMPs implemented are effective at treating storm water discharges.

The Regional Board acknowledges that the Copermittees already are required to review and approve BMPs for new/re-developments, and that BMP effectiveness is reviewed in the development phase. However, many post-construction BMPs can be rendered ineffective at treating storm water. For example, BMPs can be removed, reconfigured or lack proper maintenance. As such, no change has been made to the Tentative Order.

Comment No.	323	Commenter No.	49	Comment Subject	Legal
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Comment Water Rights Issue (Section E.1. Page 26 and Section F.1.d.(4)(d) Page 35-36) The Tentative Order appears to have conflicting objectives regarding water rights. The conflict arises in the following permit sections (the conflicting language is underlined below).

E.1. Each Copermittee must establish, maintain, and enforce adequate legal authority to control pollutant discharges into and from its MS4 through ordinance, statute, permit, contract or similar means. Nothing herein shall authorize a Co-Permittee or other discharger regulated under the terms of this order to divert, store or otherwise impound water if such action is reasonably anticipated to harm downstream water right holders in the exercise of their water rights. [emphasis added]

F.1.d.(4)(d) LID BMPs sizing criteria
 (i) LID BMPs shall be sized and designed to ensure onsite retention without runoff, of the volume of runoff produced from a 24-hour 85th percentile storm event, as determined from the County of Orange's 85th Percentile Precipitation Map15 ("design capture volume"); [emphasis added]

The LID BMP criterion clearly changes the natural water balance and may be construed to harm the downstream water rights holders. The effort to determine whether downstream water rights users are harmed from upstream development that changes the water balance will be a challenge and may ultimately lead to legal action. Given the uncertainty of downstream water rights, the Tentative Order should provide flexibility with the LID standard to allow runoff when conditions limit on-site retention. Whether these conditions are technical or legal in nature it is important to have flexibility in the permit to accommodate either or both conditions.

Since the framework for addressing new development and significant redevelopment must be as flexible in order to address the variety of issues that will arise during the course of the permit implementation, the County strongly recommends that the Development Planning Component be modified as necessary for greater consistency with Order R8-2009-0030 (Water Quality Management Plan for Urban Runoff) which provides for flexibility.

Response Please see response to Comment no. 296.

Comment No.	324	Commenter No.	49	Comment Subject	LID
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Comment LID BMPs (Section F.1.c.(2), Page 29)

Provision F.1.c.2 identifies that the LID BMPs listed in the provision shall be implemented at all Development Projects where applicable and feasible, however no definition of "applicable and feasible" is identified in the provision or within the fact sheet. The determination of feasibility of implementing the LID BMPs identified in the provision should be the responsibility of the Permittees.

NOTE: The previous comments on this issue made by the Permittees were not adequately addressed in the Regional Board's Response to Comments document dated July 1, 2009, and are therefore resubmitted. The Response to Comments document dated July 1, 2009 identifies that the LID requirements have been substantially modified and that more robust criteria is expected in the Copermittee's updated SUSMP document. The updated SUSMP document is the responsibility of the co-permittees which will include a definition of applicable and feasible for LID BMPs so ultimately it will be the determination by the permittee of where LID BMPs are applicable and feasible.

The County requests that the Provision be modified as follows:

Response This comment was adequately addressed in the July 1, 2009, Response to Comments IV, Response to comment No. 99, which states: "The LID requirements have been extensively modified following meetings with the Copermittees and the interested stakeholders. The Tentative Order addresses the conditions of technical infeasibility. More robust criteria is expected in the Copermittee's updated SUSMP document." LID BMP requirements are applicable at all priority development projects. The Copermittees are required to develop the specific criteria for the technical feasibility analysis per Section F.1.d(7)(b).

Comment No.	325	Commenter No.	49	Comment Subject	LID
Comment	<p data-bbox="198 1003 1023 1033">Infiltration and Groundwater Protection (Section F.1.c.(6), Page 29-30)</p> <p data-bbox="198 157 1559 394">The Regional Board Response to Comments dated July 1, 2009 identifies that the criteria set forth in this section are the minimum requirements for infiltration and that there is flexibility in the Tentative Order for the Copermittees to develop criteria for infiltration treatment devices. We have a number of concerns with this provision. First is the apparent free pass onsite infiltration BMPs receive even in areas with high groundwater and/or brown fields with legacy contamination issues. Such environmental conditions should be acknowledged and addressed. Second the “minimum requirements” identified in the Tentative Order are not minimum but are very prescriptive and no current technical basis is provided for these provisions in the Fact Sheet or in the Response to Comments dated July 1, 2009.</p> <p data-bbox="198 430 1542 760">The document U.S. Environmental Protection Agency. 1994. Potential Groundwater Contamination from Intentional and Nonintentional Stormwater Infiltration. EPA 600 SR- 94 051 that is referenced as guidance for infiltration of stormwater in the Order No. R9-2002-0001 Fact Sheet and in the Response to Comments dated July 1, 2009 is more than 15 years old and does not provide an adequate technical basis for the requirements related to infiltration of stormwater, except for provision F.1.c.(6) g.. And even for provision F.1.c.(6)g, a closer review of this document will show that the study evaluated the impact of industrial stormwater discharges into local groundwater. However, the site soil conditions had a poorly defined soil structure and included gravel. Thus stormwater from the industrial site was discharged in an almost direct conduit to the groundwater. The County would submit that the Tentative Order should require the Permittees to develop criteria for the use of infiltration BMPs (both on site and centralized BMPs) that consider land use, runoff quality, groundwater depth, site soil conditions and other information relevant to groundwater protection.</p> <p data-bbox="198 793 1510 877">Since the Fact Sheet, and the Regional Board Response to Comments dated July 1, 2009 does not provide adequate technical basis for the requirements, the County requests that Section F.1.c.(6) should be deleted and replaced with the following language:</p> <p data-bbox="198 913 1534 997">The Copermittees shall, within 2 years of the adoption of this order, develop criteria for the use of infiltration BMPs that consider land use, runoff quality, groundwater depth and quality, site soil conditions and other information relevant to groundwater protection.</p>				

Response	<p data-bbox="198 1020 1559 1234">This comment regarding the infiltration requirements has been answered in previous response to comments. The language proposed is consistent with the language used in Section F.1.b.2.h of Order NO. E9-2002-0001 (the current Permit). As discussed in the Fact Sheet for Order No. R9-2002-0001, the restrictions placed on urban runoff infiltration are based on recommendations provided by the U.S. EPA Risk Reduction Engineering Laboratory and supported by the State Water Board. The language contained in the Tentative Order also allows the Copermittees to develop alternative criteria to replace the suggested restrictions. Any separate infiltration criteria developed by the Copermittees, must be submitted as part of their updated SSMP for public review and comment.</p> <p data-bbox="198 1270 1494 1327">Please see the July 6, 2007, Response to Comments I, Response No. 24; December 12, 2007, Response to Comments II, Response No. 17; and July 1, 2009, Response to Comments IV, Response to comment No. 100.</p>
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Comment No.	326	Commenter No.	49	Comment Subject	LID
Comment	<p>The Copermittees shall, within 2 years of the adoption of this order, develop criteria for the use of infiltration BMPs that consider land use, runoff quality, groundwater depth and quality, site soil conditions and other information relevant to groundwater protection.</p> <p>Notwithstanding our comment and recommendation above we have specific concerns regarding the restrictions being specified in the draft Order.</p> <p>First, the requirement in Section F.1.c.(6)(a) to implement pretreatment prior to infiltration is excessive. It may be appropriate to require pretreatment for sites with certain pollutant generating activities but to have a broad brush requirement for pretreatment for all land uses make little sense and is not technically supported.</p> <p>In Section F.1.c.(6)(b) the requirement that infiltration BMPs cannot be used for dry weather flows containing significant pollutant loads is impractical and does not reflect the performance of the soil. The soil mantel is an effective treatment media and the blanket prohibition of the use of infiltration BMPs for dry weather flows eliminate an effective BMP from the permittees tool box.</p> <p>Section F.1.c.(6)(g) restricts the use of infiltration treatment control BMPs in areas of industrial or light industrial activity and areas subject to high vehicular traffic. High vehicular traffic is defined as 25,000 or greater average daily traffic on main roadway or 15,000 or more average daily traffic on any intersecting roadway. The Regional Board Response to Comments dated July 1, 2009 identifies that "The restriction on areas with high vehicular traffic is included on the recommendation of the USEPA guidance that the commenter (County of Orange) cited." The USEPA guidance that was cited is the U.S. Environmental Protection Agency. 1994. Potential Groundwater Contamination from Intentional and Nonintentional Stormwater Infiltration. EPA 600 SR-94 051, which contains no recommendation regarding vehicular traffic and infiltration devices and therefore doe not provide a specific technical basis for this restriction. As such, prescriptive requirements should not be included in the Tentative Order unless there is a strong technical basis. Moreover, we are not aware of any demonstrated relationship between traffic counts and frequency of materials deposited on the street, nor are such restrictions placed on the California Department of Transportation, which operates facilities that routinely exceed the ADT level indicated.</p> <p>Since the Fact Sheet, and the Regional Board Response to Comments dated July 1, 2009 does not provide adequate technical basis for the requirement, the County requests that Section F.1.c.(6)(g) should be deleted from the permit.</p>				

Response	<p>This comment regarding the infiltration requirements has been answered in previous response to comments. The language proposed is consistent with the language used in Section F.1.b.2.h of Order NO. E9-2002-0001 (the current Permit). As discussed in the Fact Sheet for Order No. R9-2002-0001, the restrictions placed on urban runoff infiltration are based on recommendations provided by the U.S. EPA Risk Reduction Engineering Laboratory and supported by the State Water Board. The language contained in the Tentative Order also allows the Copermittees to develop alternative criteria to replace the suggested restrictions. Any separate infiltration criteria developed by the Copermittees, must be submitted as part of their updated SSMP for public review and comment.</p> <p>Please see the July 6, 2007, Response to Comments I, Response No. 24; December 12, 2007, Response to Comments II, Response No. 17; and July 1, 2009, Response to Comments IV, Response to comment No. 100.</p> <p>The requirement in Section F.1.c.6.(g) restricting infiltration in certain areas has been modified to be allow infiltration, provided the runoff is treated or filtered to remove pollutants prior to entering the infiltration device. This change is in light of the findings of the Los Angeles and San Gabriel Rivers Watershed Council's Water Augmentation Study Phase II Final Report. The study found that "Filtration methods employed at industrial sites seemed to be effective at removing certain pollutants prior to entering the infiltration system, which may make infiltration more feasible at these more polluted sites." This provision is in keeping with the goal of maximizing infiltration opportunities to benefit surface water quality and maximize local sources of water supply.</p>
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Comment No.	327	Commenter No.	49	Comment Subject	SUSMP
Comment	Native/Low Water Landscaping (Section F.1.c.(7), Page 31)				
	<p>This provision identifies that landscaping with native or low water species where feasible shall be preferred in areas that drain to the MS4 or waters of the U.S. The Regional Board Response to Comments dated July 1, 2009 identifies that this provision is not an Order requirement, and is simply a suggestion to use native species where feasible. However, the language in provision F.1.c seems to counter this position as it states clearly that the project must include management measures that include native landscaping. Furthermore the provision, as written, requires the whole project areas to be subject to the native plant requirement</p> <p>The County requests that provision F.1.c.(7) be deleted from the Tentative Order.</p>				
Response	<p>Section F.1.c states that "Discharges from each approved development project must be subject to the following management measures:" which includes Section F.1.c.(7), which states: "Where feasible, landscaping with native or low water species shall be preferred in areas that drain to the MS4 or to waters of the United States."</p> <p>The management measure is that, where feasible, landscaping with native or low water species shall be preferred. Thus, using native species is not required.</p>				
Comment No.	328	Commenter No.	49	Comment Subject	LID
Comment	<p>Alternative Standards (Section F.1.c.(8), Page 31)</p> <p>The principles provided in this section are very similar with the approach specified in the Santa Ana permit for the North County. In fact we had suggested similar modifications to Section F.1.d.(4)(d) (page 35-36).</p> <p>The County requests that the language from this alternative standard section be incorporated into section F.1.d.(4)(d).</p>				
Response	The Regional Board agrees and has made the change to the Tentative Order.				

Comment No.	329	Commenter No.	49	Comment Subject	SUSMP
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Comment Standard Stormwater Mitigation Plans (SSMPs) (Section F.1.d, Page 31-32)

Section F.1.d. requires each Permittee to implement an updated local SSMP within twelve months of adoption of the Order. This is a change from the language in the June 18th Errata Sheet, where two years was provided to update the local SSMP. The Regional Board Response to Comments dated July 1, 2009 identifies that "The Tentative Order has been revised to allow up to two years to develop the updated SSMP in conjunction with the hydromodification management plan." The Tentative Order, however has not been revised to allow two years to develop and updated SSMP. This provision includes language that requires the inclusion of the hydromodification requirements in provision F.1.h in an updated local SSMP within one year of the adoption of the Order. The requirements in provision F.1.h include the development of an HMP within two years of adoption of the Order. The timeframe to update the local SSMPs in Provision F.1.d should be consistent with the time frame identified to develop the HMP in provision F.1.h.

The County requests that provision F.1.d be modified as follows:

Within 12 months of adoption of this Order, the Copermittees must submit an updated model SSMP, to the Regional Board's Executive Officer for a 30 day public review and comment period upon completion of the HMP as identified in section F.1.h. The Regional Board's Executive Officer has the discretion to determine the necessity of a public hearing. Within 180 days of determination that the Model SSMP is in compliance with this Permit's provisions, each Copermittee must update their own local SSMP, and amended ordinances consistent with the model SSMP, and shall submit both (local SSMP and amended ordinances) to the Regional Board. The Model SSMP must meet the requirements of section F. 1. d. of this Order and (1) reduce Priority Development Project discharges of storm water pollutants from MS4 to the MEP, (2) prevent Priority Development Project runoff discharges from the MS4 from causing or contributing to a violation of water quality standards, (3) manage increases in runoff discharge rates and durations from Priority Development Projects that are likely to cause increased erosion of stream beds and banks, silt pollution generation, or other impacts to beneficial uses and stream habitat due to increased erosive force and (4) implement the hydromodification requirements in section F.1.h.

Response The revised Tentative Order states that within 12 months of adoption the Copermittees must submit an updated Model SSMP. Within 180 days of determination that the Model SSMP is in compliance with the Permit's provisions, each Copermittee must update their own local SSMP. We agree with the commenter's concern regarding the timing of SSMP development and the HMP. Therefore language in F.1.d. has been revised to allow 2 years for SSMP submission.

Comment No.	330	Commenter No.	49	Comment Subject	SUSMP
Comment	<p>Section F.1.d.(2) defines Priority Development Project Categories. In an introduction to the listed categories, this section states that, where a new development project feature, such as a parking lot, falls into a Priority Development Project Category, the entire project footprint is subject to SUSMP requirements. As currently written this provision would require a new development that has a 5,000 square foot parking lot feature and 100,000 square feet of other land uses that are not Priority Development Project Categories, to provide treatment for the entire project (105,000 square feet). This requirement would unduly burden the landowner in this case with the cost of treating runoff from 105,000 square feet when only 5,000 square feet should be subject to SUSMP requirements and treatment controls. The need to treat runoff from a greatly increased land area will require an increase in the size of treatment controls, which will increase the volume of water treated without a likely commensurate increase in pollutant removal.</p> <p>The Fact Sheet fails to provide any information showing that development land uses that are not in the Priority Development Project Category contribute pollutants to the MS4 and are a threat to water quality. The Fact Sheet (page 125) states that this provision “is included in the Order because existing development inspections by Orange County municipalities show that facilities included in the Priority Development Project Categories routinely pose threats to water quality. This permit requirement will improve water quality and program efficiency by preventing future problems associated with partially treated runoff from redevelopment sites.” This explanation does not demonstrate any connection between development land uses that are not in the Priority Development Project Category and the observed “threats to water quality.”</p> <p>Since the Fact Sheet does not provide any technical information showing that land uses that are not Priority Development Project Categories are a significant source of pollutants and a threat to water quality, the County requests the introductory paragraph of Section F.1.d.(2) subjecting the entire project footprint to SUSMP requirements should be deleted from the permit.</p>				

Response	<p>This comment has been considered in previous response to comments. Please see the July 6, 2007, Response to Comments I, Response No. 28; and the July 1, 2009, Response to Comments IV, Response No. 103 and 104.</p> <p>In summary, the language in the introduction of Section D.1.d.2 of the Tentative Order regarding the inclusion of the entire project when at least one aspect of the project is categorized as a Priority Project is consistent with the Regional Board’s 2002 approval of the San Diego SUSMP. This is a particularly important requirement since municipalities have greater latitude during development to require pollution prevention than they have with existing development. Moreover, this is a reasonable requirement in that it limits confusion for property owners and ensures consistent implementation of SUSMP requirements. This section and related Finding have not been revised.</p>
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Comment No.	331	Commenter No.	49	Comment Subject	SUSMP
Comment	<p>Streets, Roads, Highways, and Freeways (Section F.1.d.(2)(g), Page 34)</p> <p>County comments regarding this provision were not addressed in the Regional Board Response to Comments dated July 1, 2009 and there is no mention of this provision in the Fact Sheet and so previous comments are resubmitted. Section F.1.d.(2)(g) includes as a Priority Development Project Category streets, roads, highways, and freeways including any paved surface of 5,000 square feet or greater that is used for transportation. Highways and freeways are not the jurisdiction of Permittees and fall under the jurisdiction of the California Department of Transportation, which is regulated by its own statewide stormwater permit.</p> <p>The County requests that the Provision be modified as follows:</p> <p>(i) Streets and roads, highways, and freeways. This category includes streets and roads any paved surface that is are 5,000 square feet or greater used for the transportation of automobiles, trucks, motorcycles, and other vehicles.</p>				
Response	<p>The inclusion of streets, roads, highways, and freeways as a priority development project was a requirement in the current Permit, Order No. 2002-0001, section F.1.b(2)(a).viii. The threshold only applies to streets, roads, highways, and freeways under the Copermittees jurisdiction. If the Copermittees do not have jurisdiction over any freeways, the threshold will not apply to freeway projects. Removal of the term, therefore, is not necessary. Although the Copermittees currently do not have any jurisdiction over highways or freeways, they may in the future have such jurisdiction, as is found in other California counties.</p>				

Comment

LID Site Design BMP Requirements (Section F.1.d.(4), Page 34-36)

In this provision the Order contains a combination of planning procedures, design principles, and design criteria. However, all these ideas are labeled as LID BMPs which makes for a confusing provision. The provision would greatly benefit by reorganizing it around planning procedures, design principles, and design criteria. Our redline mark-up was prepared with this reorganization in mind.

Section F.1.d.(4)(a)

This provision requires each PDP to perform an assessment of the potential for collection of storm water for on-site or off-site reuse opportunities. The Tentative Order is silent regarding how extensive the analysis should be and there is no supporting language in the Fact Sheet as to why this analysis should be done. This analysis should only be required when the project cannot meet the LID performance standard. The important effort in this section is to have the permittees require all PDP that cannot meet the LID standard perform an assessment of their efforts to comply with the LID performance standard. This effort would ultimately complement a request for a waiver should that option become necessary.

Section F.1.d.(4)(b) and Section F.1.d.(4)(d).

Similar to the discussion above, this provision characterizes LID planning principles as LID BMPs. These principles are consistent with the definition of LID and should be acknowledged and supported. However, the County would like to note that Section F.1.d.(4)(b)(ii) is inconsistent with the LID sizing criteria in Section F.1.d.(4)(d). In section F.1.d.(4)(b)(ii) the permit correctly notes that site conditions will limit the amount of runoff that can be infiltrated. However, in Section F.1.d.(4)(d) no such acknowledgement is noted and full retention, with no runoff, is required for the water quality capture storm. The permit attempts to mitigate this requirement with granting off ramps for sites not able to meet the retention requirement. However, the two sections should be consistent and section F.1.d.(4)(d) should be modified to reflect the definition of LID and the language found in F.1.d.(4)(b).

The County requests that Section F.1.d.(4) be modified as follows:

(4) Low Impact Development BMP Requirements

Each Copermittee must require each Priority Development Project to implement LID BMPs which will collectively minimize directly connected impervious areas, limit loss of existing infiltration capacity, and protect areas that provide important water quality benefits necessary to maintain riparian and aquatic biota, and/or are particularly susceptible to erosion and sediment loss.

(a) In selecting LID BMPs the Co-permittees shall develop plan review procedures that The following LID BMPs must be implemented:

(i) Require LID BMPs or make a finding of infeasibility for each Priority Development Project in accordance with the LID waiver program in Section F.1.d.(8);

(ii) incorporate formalized consideration, such as thorough checklists, ordinances, and/or other means, of LID BMPs into the plan review process for Priority Development Projects;

(iii) Ensure that the review of each Priority Development Project must include an assessment of potential collection of storm water for on-site or off-site reuse opportunities;

(iv) Ensure that the review of each Priority Development Project must include an assessment of techniques to infiltrate, filter, store, evaporate, or detain runoff close to the source of runoff; and

(v) Within 2 years after adoption of this Order, each Copermittee shall review its local codes, policies, and ordinances and identify barriers therein to implementation of LID BMPs. Following the identification of these barriers to LID implementation, where feasible, the Copermittee must take, by the end of the permit cycle, appropriate actions to remove such barriers.

(vi) Within 12 months of the adoption of this order, the principal permittee, in collaboration with the co-permittees, shall develop technically-based feasibility criteria to determine the feasibility of implementing LID BMPs including infiltration, harvest and reuse, evapotranspiration, and biofiltration. The criteria shall include a prioritized selection process for BMP implementation

(b) The following LID design principles where technically and economically feasible shall be implemented at all Priority Development Projects as required below:

(i) Post development hydrograph shall mimic predevelopment hydrographs.

(ii) Maintain or restore natural storage reservoirs and drainage corridors (including depressions, areas of permeable soils, swales, and ephemeral and intermittent streams).

(iii) Projects with landscaped or other pervious areas must, where feasible, drain runoff from impervious areas (rooftops, parking lots, sidewalks, walkways, patios, etc) into pervious areas prior to discharge to the MS4. The amount of runoff from impervious areas that is to drain pervious areas shall not exceed the total capacity of the project's pervious areas to infiltrate or treat runoff, taking into consideration the pervious areas' geologic and soil conditions, slope, and other pertinent factors.

(iv) Projects with landscaped or other pervious areas must, where feasible, properly design and construct the pervious areas to effectively receive and infiltrate or treat runoff from impervious areas, prior to discharge to the MS4. Soil compaction for these areas shall be minimized. The amount of the impervious areas that are to drain to pervious areas must be based upon the total size, soil conditions, slope, and other pertinent factors.

(v) Projects with low traffic areas and appropriate soil conditions must construct walkways, trails, overflow parking lots, alleys, or other low-traffic areas with permeable surfaces, such as pervious concrete, porous asphalt, unit pavers, and granular materials.

(c) To protect ground water resources any infiltration LID BMPs must comply with Section F.1.(c)(6).

(d) LID BMPs sizing criteria:

(i) LID BMPs shall be sized and designed to ensure onsite retention, of the volume of runoff produced from a 24-hour 85th percentile storm event, as determined from the County of Orange's 85th Percentile Precipitation Map ("design capture volume");

(ii) If onsite retention LID BMPs are technically infeasible biofiltration BMPs may treat any volume that is not retained onsite by the LID BMPs. The LID biofiltration BMPs must be designed for an appropriate surface loading rate to prevent erosion, scour and channeling within the BMP. Due to the flow through design of biofiltration BMPs, the total volume of the BMP, including pore spaces and prefilter detention volume is allowed to be no less than 0.75 times the design storm volume;

(iii) If it is shown to be technically infeasible to treat the remaining volume up to and including the design capture volume using LID BMPs (retention or biofiltration), the project may implement conventional treatment control BMPs in accordance with Section F.1.d.(6) below or must participate in the LID waiver program in Section F.1.d.(8).

(e) All LID BMPs shall be designed and implemented with measures to avoid the creation of nuisance or pollution associated with vectors, such as mosquitoes, rodents, and flies.

Response

Planning procedures, design principles and design criteria are considered management practices. The assessment for storm water reuse is necessary to ensure that a project proponent has examined all options at LID retention BMPs prior to entering the LID waiver program. The full capture of the design storm may be through infiltration, evapotranspiration or retention for reuse. Storm water capture for reuse would fulfill the LID capture criteria. If a project meets the LID performance standard through other methods, then the assessment for storm water reuse would not need to be conducted.

Section F.1.d.(4)(b)(ii) ensures that runoff directed to pervious areas, such as lawns or landscaping, are able to adequately handle the storm flows. The requirements in section F.1.d.(4)(b)(ii) work with section F.1.d.(4)(d). In other words, a project site must direct runoff from impervious areas to pervious areas; and a project site must size and design LID BMPs to ensure onsite retention of the design storm. Where pervious areas cannot handle the storm flows from impervious areas, other LID retention BMPs, such as infiltration trenches or rain gardens, must be implemented.

Comment No.	333	Commenter No.	49	Comment Subject	SUSMP
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Comment Treatment Control BMP Requirements (Section F.1.d.(6)(f) and (g), Page 38)

The Fact Sheet does not provide any technical basis for these provisions and the Regional Board Response to Comments dated July 1, 2009 refers to the Regional Board Response to Comments dated July 6, 2007. The Regional Board Response to Comments dated July 6, 2007 regarding this section does not provide any technical basis for these provisions. Furthermore in the Regional Board Response to Comments dated December 12, 2007 the Regional Board states "The Regional Board agrees that there is not a federal prohibition on placing pollution control practices within waters of the U.S." Since the previous comments on this issue were not adequately addressed in the Regional Board's Response to Comments, the comments are being resubmitted.

Section F.1.d.(6)(f) require treatment control BMPs be implemented prior to discharging into waters of the U.S. and provision F.1.d.(6)(g) prohibits the construction of treatment controls within waters of the U.S. or waters of the State. These provisions taken together limit the use of regional BMP and watershed-based approaches such as the Irvine Ranch Water District Natural Wetland System Project or Aliso Creek Water SUPER project. Such projects should be encouraged and not prohibited by the Order.

The Tentative Order encourages a renewed focus on the 'watershed approach' but the proposed restriction on regional BMPs is antithetical to a watershed approach. The USEPA in its National Management Measures Guidance to Control Nonpoint Source Pollution from Urban Areas, Management Measure 5: New Development Runoff Treatment dated November 2005 (page 5-38) states that "regional ponds are an important component of a runoff management program." and that the costs and benefits of regional, or off-site, practices compared to on-site practices should be consider part of a comprehensive management program. The EPA guidance acknowledges that a regional approach can effectively be used for BMPs.

The County requests that provisions F.1.d.(6)(f) and (g) be combined and modified to enable regional approaches to move forward. Our suggested language reflects this concept. (f) Be implemented close to pollutant sources, and prior to discharging into waters of the U.S. and not be constructed within a waters of the U.S. or waters of the State unless the BMP obtains coverage under a Section 404 permit.

Response Again, the commenter misconstrues the Regional Board's past response to comments by only quoting the first sentence of the response. Please see response to Comment no. 310.

Comment No.	334	Commenter No.	49	Comment Subject	LID
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Comment LID BMP Waiver Program (Section F.1.d.(7), Page 38-40)

On July 15, 2009 the Permittees met with the staff of the Regional Water Board to discuss, among many issues, the LID Waiver Program. One of the critical elements of that discussion was how to establish a pollutant credit system that is consistent with the water quality program. The fundamental principle that was agreed upon in that discussion was that regardless of which BMPs (LID based or treatment control based) is chosen for a site that the net impact from pollutant loadings be equal. Thus for a site that implements LID BMP for full retention of the water quality capture storm or implements a conventional BMP that captures the same pollutant loading the two are viewed equal in reducing pollutants. As an example and for the sake of comparison, an LID BMP designed to retain the 85% storm (i.e. the water quality capture storm) removes 85% of the pollutant load on an annual basis is equivalent to a conventional BMP if the conventional BMP can be designed to remove 85% of the annual pollutant load (in this case the conventional BMP would have to design to treat a larger storm than the water quality capture storm). In this situation the conventional BMP would be judged to be equivalent to the conventional BMP and the PDP would not be subject to additional mitigation measures. It is our understanding that the current draft Order allows this type of pollutant credit system to be established.

If this is not the case then the County requests that the Tentative Order be modified to support the principle.

Response The Regional Board staff agrees with the comment.

Comment No.	335	Commenter No.	49	Comment Subject	SUSMP
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Comment Treatment Control BMP Maintenance Tracking (Section F.1.f.(3), Page 42-43)

This provision identifies that each Copermitee must verify that post-construction BMPs are operating effectively. In provision F.1.f(3)(c)(i) there appears to be conflicting statements. The first statement of this provision seems to imply annual verification of SSMPs while the second statement implies verification of BMPs once every four years. The provision is confusing and should be re-written or deleted. The Fact Sheet and the Regional Board Response to Comments dated July 1, 2009 does not effectively identify why 90 percent of approved and inventoried final public and private SSMPs must be verified annually. The finding in the Fact Sheet that "90 percent is a reasonable annual target" obviously does not take into account the significant amount of resources needed to complete these inspections. The North Orange County MS4 Permit provides an adequate provision related to inspection of structural treatment controls and inclusion of similar language would provided consistency between the two permits.

The County requests that Section F.1.f.(3) be deleted and replaced with the following language:

Within 12 months of adoption of this order and annually thereafter, all public agency structural treatment control BMPs, and at least 25% of priority development project structural treatment control BMPs, shall be inspected prior to the rainy season. All structural treatment control BMPs shall be inspected within every four year period. The permittees shall ensure that the BMPs are operating and are maintained properly and all control measures are working effectively to remove pollutants in runoff from the site. All inspections shall be documented and kept as permittee records. The permittees may accept inspections conducted and certified by state licensed professional engineers in lieu of permittee inspections.

Response The provision requires 90 percent of BMPs be verified annually. Theoretically, a Copermitee may choose to verify the same BMPs every year, leaving 10 percent of the BMPs to never have been verified. The second sentence ensures that all of the BMPs are verified every four years, in that way this ensures that the remaining 10 percent will be verified at least once during those four years. We assume that the Copermitees would not be verifying 100 percent of the BMPs in the fourth year but rotating which BMPs are verified each year.

The Copermitees 2007 DAMP proposes to verify 90 percent of WQMPs (including structural and non-structural BMPs) by inspection, self-certifications, surveys or other means. The Regional Board agrees and finds that 90 percent is a reasonable annual target given the ease of self-certifications and surveys.

Comment No.	336	Commenter No.		Comment Subject	
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Comment

Response Transcription error. Please reuse this number.

Comment No.	337	Commenter No.	49	Comment Subject	Hydromod
Comment	Requirements for Hydromodification and Downstream Erosion (Section F.1.h, Pages 44-48)				
<p>Section F.1.h.(1)(b) discusses requirements for the HMP, and identifies the range of runoff flow rates and durations that must compensate for the loss of sediment supply due to the development. Areas of a development, outside of natural stream courses, produce fine grain sediments in a naturally occurring state. This material is known as wash load because it often moves through the river system in suspension without being present in the river bed in significant quantities (Colby, 1957). Wash load consists of particles so small that they are essentially absent on the stream bed (Ritter, 1995)9. Decreased wash load does not cause erosion, because it is transported well below capacity (ASCE, 2008). Natural stream courses within a development do contribute to bed load of a downstream receiving water as the stream course bed material is composed of larger particle sizes. The provision should be changed to reflect that compensation for sediment loss is due to the affected natural stream courses within a development.</p> <p>The waiver for PDPs that discharge to concrete-lined or significantly hardened channel should be included as hydromodification requirements are not appropriate for cahnnels that are designed to accept increased flows from upstream development as the potential for erosion is minimal or not present.</p> <p>The County requests that provision F.1.h.(1)(b) be modified as follows:</p> <p>(b) Utilize continuous simulation of the entire rainfall record (or other analytical method proposed by the Copermittees and deemed acceptable by the Regional Board) to identify a range of runoff flows for which priority Development Project post-project runoff flow rates and durations shall not exceed pre-development (naturally occurring) runoff flow rates and durations by more than 10 percent, where the increased flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses. In addition, the identified range of runoff flow rates and durations must compensate for the loss of sediment supply due to affected natural stream courses within the development.</p>					

Response	<p>The commenter states that sediment loss is due to the affected natural stream courses within a development, and that the text of section F.1.h.(1)(b) should be changed to reflect that. The Regional Board agrees that sediment loss is due to the affected natural stream courses within a development. This is because once development occurs, course sediment that was once available to erode naturally from a landscape and aggregate into streams providing bed and bank replenishment is no longer available. Once developed, this natural sediment supply is entombed beneath concrete and asphalt, contributing to erosion of downstream receiving waters by preventing bed and bank replenishment. The Regional Board disagrees that the proposed changes regarding sediment loss improve the clarity of the text.</p> <p>The Regional Board disagrees with the suggestion to remove the qualification "naturally occurring" from the description of pre-development runoff flow rates. As stated in Finding D.2.g., the goal of the hydromodification requirements are to prevent or further prevent hydromodification impacts on downstream watercourses and eventually restore natural flow regimes. Only by using the "naturally occurring" pre-development runoff flow rates will the goal of restoring natural flow regimes be achievable. Natural flow regimes are necessary to protect downstream receiving waters.</p> <p>The commenter also suggests deleting language pertaining to the identification of the range of flow rates that must be controlled, including the removal of the description of the lower boundary of flows. The Regional Board disagrees with these proposed changes, as describing the lower boundary of the range of flows is necessary for Copermittees to understand the expectations of the requirements.</p>
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Comment Section F.1.h.(2) identifies that the HMP must include a suite of management measures to be used on PDPs to protect and restore downstream beneficial uses. As noted in our comments for Finding D.2.g. downstream restoration to its natural state is not always possible in highly urbanized areas and could lead to catastrophic impacts from flooding.

The County requests that provision F.1.h.(2) be modified as follows:

(2) In addition to the hydrologic control measures that must be implemented per section F.1.h.(1)(c), the HMP must include a suite of management measures to be used on Priority Development Projects to protect and restore downstream beneficial uses and prevent or further prevent adverse physical changes to downstream channels. The measures must be based on a prioritized consideration of the following elements in this order:

Response The Regional Board recognizes that it is not always possible to restore creek segments to their natural states because of concern for flood control. For this reason, section F of the Tentative Order does not contain requirements for the Copermittees to restore creeks.

The requirements set forth in section F.1.h do not necessarily apply to concrete lined channels that are hardened all the way from the point of discharge to ocean waters, enclosed bays, or water storage reservoirs and lakes (section F.1.h.(3)(b)). The Copermittees have the discretion to waive the requirements in these situations. If, however, there is a portion of a creek that is not concrete lined all the way from the point of discharge to the ocean, then the beneficial uses of this portion of the creek must be protected and restored. The management measures described in the HMP will aid in protecting and restoring the beneficial uses of any soft-bottomed creek segments occurring downstream of PDPs. The intent of the HMP requirements are to protect and restore the beneficial uses of soft-bottomed creek segments; however, there are no requirements to restore or rehabilitate concrete lined channels.

Although not a requirement, the Regional Board supports efforts to restore and rehabilitate degraded creek segments. In some instances, this entails removing concrete and restoring natural flow regimes. For this reason, section F.1.h.(1)(b) contains language regarding characterizing the erosive flows for concrete lined channels as if they were soft-bottomed creeks. This standard is useful because if concrete lined channels are restored to their full physical, biological and chemical integrity, then the HMP already describes the maximum flow that this creek can sustain before erosion and degradation of beneficial uses occurs. As stated earlier, if a creek is concrete lined from the point of discharge of the PDP all the way to the ocean, enclosed bay, or water storage reservoir, the project can be exempt from the requirements of section F.1.h.

Comment

Section F.1.h.(3) identifies where hydromodification requirements are not required at the Copermittees discretion. The waiver for PDPs that discharge to concrete-lined or significantly hardened channels should be included as hydromodification requirements are not appropriate for channels that are designed to accept increased flows from upstream development as the potential for erosion is minimal or not present. The comments for Finding D.2.g. are reemphasized for this provision as restoration is not always feasible. Furthermore the Fact Sheet and the Regional Board Response to Comments dated July 1, 2009 do not provide adequate technical basis for removing the waiver. The burden should not be on a PDP to identify if a downstream receiving water can be restored, rather that is the responsibility of the Regional Board. Further more it is very important that the exemptions to HMPs be consistent between north and south Orange County otherwise we have consistency and equitable issue that exposes the permittees to undue legal exposure.

The County requests that provision F.1.h.(3) be modified as follows:

(3) Section F.1.h. does not apply to Priority Development Projects where the project:

- (a) Discharges storm water runoff into underground storm drains discharging directly to bays or the ocean; or
- (b) Discharges storm water runoff into conveyance channels that are engineered, concrete lined, or are significantly hardened, and are regularly maintained to ensure flow capacity.
- (c) Site infiltrates at least the runoff from a two-year storm event. The permittees may request for a variance from these criteria, based on studies conducted by the Storm Water Monitoring Coalition, Southern California Coastal Water Research Project, or other regional studies. Requests for consideration of any variances should be submitted to the Executive Officer.
- (d) The volume and the time of concentration of storm water runoff for the post development condition do not significantly exceed those of the predevelopment condition for a two year frequency storm event (a difference of 5% or less is considered insignificant). This may be achieved through site design and source control BMPs.

Response

The Regional Board recognizes that creek restoration is not always feasible, and that hydromodification requirements are not appropriate for channels designed to accept increased flows (concrete lined). As such, section F.1.h of the Tentative Order does not contain any requirements for creek restoration.

Contrary to this comment, the revised section F did not remove the waiver of hydromodification management requirements for concrete-lined channels. Section F.1.h(3)(b) states that Copermittees have the discretion to waive the requirements for discharges of storm water runoff into conveyance channels whose bed and bank are concrete lined all the way from the point of discharge to ocean waters, enclosed bays, or water storage reservoirs. Furthermore, section F.1.h of the Tentative Order does not require the PDP or Copermittee to identify if a downstream receiving water can be restored. In cases where there is a soft-bottomed portion of a creek that is located downstream from the point of discharge of a PDP, however, then the requirements are needed to protect and restore the beneficial uses of this soft-bottomed creek segment.

The Regional Board disagrees with the commenter's suggestions for revised language regarding the exemptions. In terms of consistency with Order No. R8-2009-0030, the Copermittees can avoid consistency and equitable issues if they choose to adopt the more stringent requirements of the Tentative Order as the regional standard. The commenter suggests exempting projects that discharge into hardened channels that are maintained, yet this approach offers no protection to creek segments that are soft-bottomed, located downstream of hardened channels. The commenter further suggests exemptions from PDPs that infiltrate the runoff from a 2-year storm event, or volume or time of concentration of the discharge does not significantly exceed that of the 2-year storm event. Yet, much of the work done by erosive force occurs from storms larger than the 2-year event (SCVURPPP, 2005). As such, the suggestions from the commenter are not acceptable as they do not protect and restore the beneficial uses of receiving waters to the MEP. The Regional Board recommends that the Copermittees review hydromodification management plans in other parts of the State in developing the regional HMP, as the requirements are similar.

Comment No.	340	Commenter No.	49	Comment Subject	Hydromod
Comment	<p>Section F.1.h.(4)(a) requires within 2 years of adoption of the Order the Copermittees develop a draft HMP. The timeframe for development of HMPs for each watershed is too short to ensure an optimized program. Interim criteria assures that there will not be unregulated development in the interim. A minimum of three years, which was the length of time to develop criteria identified in the previous Tentative Order, should be allowed for their development.</p> <p>The County requests that provision F.1.h.(4)(a) be modified as follows:</p> <p>(a) Within 3 years of adoption of the Order, the Copermittees shall submit to some watersheds within south Orange County already have comprehensive watershed he County requests that the following provision be added to Section F.1.h. as follows: the Regional Board a draft HMP that has been reviewed by the public, including the analysis that identifies the appropriate limiting range of flow rates per section F.1.h(1)(b).</p>				
Response	<p>The commenter incorrectly states that HMPs for each watershed are required. Section F.1.h of the Tentative Order requires the Copermittees to collaborate to develop one HMP that serves all of Southern Orange County.</p> <p>The language in the Tentative Order allows the Copermittees 2 years to develop the first draft of the HMP. The Regional Board anticipates that the Copermittees will develop HMPs similar to others available in the State: Contra Costa County, Santa Clara County, and San Diego County. Given the available and newly developed resources related to this subject, extra time to develop the HMP is not warranted.</p>				

Comment No.	341	Commenter No.	49	Comment Subject	Hydromod
Comment	<p>Some watersheds within south Orange County already have comprehensive watershed plans that address hydromodification impacts. These watershed plans where appropriate can substitute for HMPs.</p> <p>The County requests that the following provision be added to Section F.1.h. as follows:</p> <p>(6) HMP Substitution. In watersheds where a comprehensive watershed plan has been developed and addresses hydromodification impacts consistent with this Order, the Copermittees may petition the Executive Officer to substitute the watershed plan for the HMP for that specific watershed.</p>				
Response	<p>See Response to Comment 119 dated July 1, 2009.</p>				

Comment No.	342	Commenter No.	49	Comment Subject	Hydromod
Comment	<p>Section F.1.h.(5) identifies interim hydromodification criteria and identifies those PDPs where the interim hydromodification criteria does not apply. A waiver of the interim hydromodification requirements should also be provided for PDPs per the proposed language for Section F.1.h.(3) identified above.</p> <p>The County requests that Section F.1.h.(5) be modified as follows:</p> <p>Within one year of adoption of this Order, each Copermittee must ensure that all Priority Development Projects are implementing the following criteria by comparing the predevelopment and post-project flow rates and durations using a continuous simulation hydrologic model such as USEPA's Hydrograph Simulation Program—Fortran (HSPF):</p> <p>(a) For flow rates from 10 percent of the 2-year storm event to the 5 year storm event, the post-project peak flows shall not exceed pre-development peak flows.</p> <p>(b) For flow rates from the 5 year storm event to the 10 year storm event, the post project peak flows may exceed pre-development flows by up to 10 percent for a 1-year frequency interval.</p> <p>The interim hydromodification criteria do not apply to Priority Development Projects that meet the conditions identified in Section F.1.h.(3).</p> <p>Within one year of adoption of this Order, each Copermittee must submit a signed, certification statement to the Regional Board verifying implementation of the interim hydromodification criteria.</p>				
Response	<p>The Regional Board disagrees with the proposed language regarding the exemptions from hydromodification management requirements for the reasons discussed in the response to Comments Nos. 337 (regarding the need to include "naturally occurring" to describe the pre-development condition) and 339 (regarding the rationale for the exemptions from the requirements).</p>				

Comment Although not directly addressed within the Tentative Order, the Permittees take issue with the requirement that they must pay a significant fee for the municipal stormwater permit, which covers their construction responsibilities and are also required to pay an additional fee when they submit an NOI to obtain coverage under the Statewide Construction General Permit.

In the Response to Comments IV, Regional Board staff indicate that "the Regional Board does not have the discretion to combine, reduce, or waive fees for waste discharge requirements". However, the County understands that there is some discretion and that this discretion could be consistent with the process that is established within Order No. R8-2009-0030.

Section XV of Order R8-2009-00030 (page 65 and 66) states:

1 This order authorizes the discharge of storm water runoff from construction projects that may result in land disturbance of one (1) acre or more (or less than one acre, if it is part of a larger common plan of development or sale which is one acre or more) that are under ownership and/or direct responsibility of any of the permittees. All permittee construction activities shall be in accordance with DAMP Sections 7 and 8.

2 All construction activities shall be in compliance with the latest version of State's General Permit for Storm Water Discharges Associated with Construction Activities except that an NOI need not be filed with the State Board.

3 Prior to commencement of construction activities, the permittees shall notify the Executive Officer of the Regional Board concerning the proposed construction project. Upon completion of the construction project, the Executive Officer shall be notified of the completion of the project.

4. The permittees shall develop and implement a storm water pollution prevention plan (SWPPP) and a monitoring program that is specific for the construction project greater than one acre, prior to the commencement of any of the construction activities, except for routine maintenance activities. The SWPPP shall be kept at the construction site and released to the public and/or Regional Board staff upon request.

5. The SWPPP (and any other plans and programs required under the General Permit) and the monitoring program for the construction projects shall be consistent with the requirements of the latest version of the State's General Construction Permit.

6. The permittees shall give advance notice to the Executive Officer of the Regional Board concerning any planned changes in the construction activity, which may result in non-compliance with the latest version of the State's General Construction Permit.

Based on the above language the municipalities convey the information that is necessary to the Santa Ana Region, but they do not have to file a formal NOI under the State Construction General permit or pay the permit fee since they have already paid the municipal stormwater program permit fee.

The County requests that language similar to Order R8-2009-0030 be included within the permit so that the municipal stormwater permit fees cover all municipal activities including construction and that they not be held liable for additional fees when submitting NOI-based information.

Response Federal regulations and guidance clearly establish a system of dual regulation by both the municipalities and the NPDES permitting authority (in this case the State) for industrial and construction sites that are subject to NPDES permits. The regulations do not provide any discretion to the permitting authority to waive the NPDES permit requirements for construction sites in areas covered by a MS4 permit. To our knowledge, the Region 8 MS4 permit is the only permit throughout California that waives enrollment in the construction general permit. This action appears contrary to federal law.

Comment No.	344	Commenter No.	49	Comment Subject	Construction
Comment	<p>BMP Implementation (Section F.2.d, Page 50)</p> <p>The Response to Comments IV misunderstood the request in the previous comment letter, therefore the comment is resubmitted.</p> <p>Section F.2.d.(1)(a)(ii) requires the development and implementation of a site-specific stormwater management plan, however this is inconsistent with Section F.2.c.2.</p> <p>The County requests the following change to F.2.d.(1)(a)(ii)</p> <p>(ii) Development and implementation of a site-specific stormwater management plan runoff management plan (or equivalent construction BMP plan such as an erosion and sediment control plan);</p>				
Response	<p>An erosion and sediment control plan is not considered equivalent to a site-specific stormwater management plan, because construction sites are also a source of non-visible pollutants such as metals and nutrients. To the extent that a storm water pollution prevention plan required by the Statewide Construction General Permit meets the requirements of the local jurisdictions codes and ordinances; such a plan may be considered equivalent. Keep in mind that local codes and ordinances can be more specific and stringent than those requirements found in the construction general permit. This requirement to develop a site-specific stormwater management plan also applies to sites less than one acre that are not covered by the Statewide Construction General Permit.</p>				

Comment No.	345	Commenter No.	49	Comment Subject	Construction
Comment	<p>BMP Implementation (Section F.2.d, Page 51-52)</p> <p>Since the County's comments on this issue, the State Water Board has reissued the Statewide Construction General Permit. Section F.2.d.(1)(c)(i) (Page 51-52) states that the Permittees must require implementation of advanced treatment for sediment at construction sites that are determined to be an exceptional threat to water quality.</p> <p>The Statewide Construction General permit adopted by the State Water Board on September 2, 2009, identifies Active Treatment Systems (ATS) as advanced sediment treatment technology. ATS prevents or reduces the release of fine particles of sediment (silts and clays) by employ chemical coagulation, chemical flocculation or electrocoagulation to aid the reduction of turbidity caused by fine suspended sediments.</p> <p>The recently adopted Construction General Permit also lays out a risk-based approach to permit requirements whereby the minimum requirements of the permit (e.g., BMPs, monitoring, and reporting) progressively increase as the risk level increases. Higher risk sites are also subject to numeric action levels and numeric effluent limitations for turbidity and pH.</p> <p>The Construction General Permit identifies ATS as an available technology that may be employed on construction sites, but does not mandate the use of ATS. The Construction General Permit acknowledges that ATS is an emerging technology in California, and establishes conditions (e.g. operation and monitoring requirements) for its use.</p> <p>Given that the Construction General Permit has established a risk approach whereby the highest risk construction projects will be subject to more stringent BMPs, rigorous monitoring, and compliance with numeric action levels and numeric effluent limitations, the County requests that the provisions requiring the use of ATS be deleted from this permit and that the selection of BMPs for construction operations, especially ATS be done under the aegis of the Statewide Construction General Permit.</p>				
Response	<p>The ATS requirements in the Tentative order are identical to the ATS requirements in the San Diego MS4 Permit adopted on January 24, 2007. As such, the authors of the construction general permit, that was only recently adopted, were well aware of these existing requirements for ATS. No changes are made in response to this comment.</p> <p>Please also see response to Comment no. 202.</p>				

Comment No.	346	Commenter No.	49	Comment Subject	Construction
Comment	<p data-bbox="203 997 1079 1039">Construction Reporting of Non-compliant Sites (Section F.2.g.(2), Page 54)</p> <p data-bbox="203 1627 1567 1690">The County appreciates that the Regional Board staff clarified the intent of this provision regarding the need and use of the data being requested by the Permittees (see Response to Comments IV comment #128).</p> <p data-bbox="203 1711 1567 1837">However, the provision also states that the data be submitted from the Permittees to the Regional Board “prior to the commencement of the wet season” which is typically September and then further states “Information may be provided as part of the JRMP annual report” (which is November). Thus, the timeframe for submittal of the information needs to be clarified.</p> <p data-bbox="203 1858 1567 1984">Since F.2.g.(1) already requires that the Permittees notify the Board when the Permittee “issues a stop work order or other high level enforcement to a construction site” and the Permittees must follow the notification requirements in Attachment B, the County requests that the JRMP annual report be the mechanism for conveying the information so that the information is not submitted twice.</p> <p data-bbox="203 2005 771 2047">The County requests the following modifications:</p> <p data-bbox="203 2068 1567 2100">(2) Each Copermittee shall annually notify the Regional Board, of all construction sites with alleged violations. Information may be provided as part of the JRMP annual report. Information provided shall include, but not be limited to, the following:</p> <ul data-bbox="203 2152 998 2100" style="list-style-type: none"> (a) WDID number if enrolled under the General Construction Permit; (b) Site Location, including address; (c) Current violations or suspected violations. 				
Response	<p data-bbox="203 1879 1567 2047">At the least, the Copermittees need to notify the Regional Board prior to the commencement of the wet season. Submission prior to the rainy season allows the Regional Board to coordinate inspections in a timely manner. Per Section K, the Copermittees may propose an alternate schedule. If the Copermittees propose a schedule where the JRMP annual reports are submitted prior to the commencement of the rainy season; then the notification of sites with alleged violations may be done as part of the JRMP annual report. Directive F.2.g.(2) has been corrected.</p>				

Comment Flood Control Structures (Section F.3.a.(4)(c), Page 56)

Section F.3.a.(4)(c) requires the Permittees to evaluate existing flood control devices to identify those that are causing or contributing to a condition of pollution, identify measures to reduce or eliminate the structure's effect on pollution, and evaluate the feasibility of retrofitting the structure. While some minor changes were made, the intent of the previously submitted comments has not been addressed.

The federal regulations [40 CFR, Part 122.26(d)(2)(vi)(A)(4)] focus on evaluating flood control devices and determining if retrofitting the device is feasible. The regulations state:

(4) A description of procedures to assure that flood management projects assess the impacts on the water quality of receiving water bodies and that existing structural flood control devices have been evaluated to determine if retrofitting the device to provide additional pollutant removal from stormwater is feasible.

The County requests that the language be modified so that it is aligned with the current stormwater permit, recognizes the work that has been completed to date, is consistent with the intent of the federal regulations, is consistent with the justification within the Fact Sheet, and is more consistent with Provision XIV.10. in Order No. R8-2009-0030. The proposed language modification is as follows:

(4) BMP Implementation for Flood Control Structures

(c) Each Copermittee who owns or operates flood control devices/facilities must continue to evaluate its existing flood control devices/facilities, and identify opportunities and the feasibility of configuring and/or reconfiguring channel segments/structural devices to function as pollution control devices to protect beneficial uses.

The inventory and evaluation must be completed by and submitted to the Regional Board in the 2nd year JRMP Annual Report.

Response The comment regarding flood control structures was considered in previous response to comments. Please see the Fact Sheet discussion for section F.3.a.(4)(c); the July 6, 2007, Response to Comments I, Response No. 42; the December 12, 2007, Response to Comments II, Response No. 26; the February 13, 2008, Response to Comments III, Comment No. 26; and the July 1, 2009, Response to Comments IV, Response No. 129.

In summary, the Tentative Order's requirements to evaluate retrofitting existing flood control devices are consistent with the intent of the federal regulations. The federal regulations call for flood management projects to assess the impacts on the water quality of receiving water bodies. In order to conduct such an assessment, the Copermittees will have to evaluate and identify those flood control devices that are causing or contributing to a condition of pollution. In order to evaluate feasibility of retrofitting flood control projects, they must first identify proposed measures to reduce or eliminate the structure's effect on pollution.

Comment No.	348	Commenter No.	49	Comment Subject	Existing Development
Comment	<p>Infiltration from Sanitary Sewer to MS4 (Section F.3.a.(7), Page 57-58)</p> <p>There continue to be several concerns with this section of the Tentative Order as outlined below:</p> <p>First - Although (7)(a) is consistent with the current permit (Order No. R9-2002-0001), the Permittees submit that the provisions regarding sanitary sewer maintenance are more applicable to sanitary sewer agencies, not stormwater agencies. It is fundamentally inappropriate to include sanitary sewer maintenance requirements in a stormwater permit even where the two systems may be operated by the Permittee. Where similar maintenance requirements are included in the wastewater treatment plant or collection system permit, these provisions are an unnecessary duplication of other regulatory programs.</p> <p>In addition, it is an inappropriate and ineffective use of public money to try to “prevent and eliminate infiltration of seepage from sewers to MS4s”. How are the permittees supposed to know where the infiltration is occurring throughout the hundreds of miles of storm drains so that the efforts can be focused to those areas? How are the permittees supposed to prevent infiltration in the storm drain system without sliplining the entire system? Although it may seem like this is something that the permittees can simply do through “routine preventative maintenance” this simply isn’t the case. Instead, the owner/operator of sewer system must have the primary responsibility to prevent exfiltration/leaks from occurring in the first place rather than relying on the recipient of the leaks to manage the problem.</p> <p>Second - On a similar issue, the State Board stayed a provision in the existing permit finding that “the regulation of sanitary sewer overflows by municipal storm water entities, while other public entities are already charged with that responsibility in separate NPDES permits, may result in significant confusion and unnecessary control activities.” [emphasis added] (WQ 2002-0014 at p.8).</p> <p>It is unclear why the Board staff are not conforming with this Stay from the previous permit. In addition, this portion of the comment was not addressed within the Response to Comments IV.</p> <p>The County requests that part (a) of the provision (7) should be deleted from the Tentative Order.</p>				
Response	<p>The comments regarding sanitary sewer infiltration and spill response have been extensively considered in previous response to comments. Please see the July 6, 2007 Response to Comments I, Response Nos 44, & 50; the December 12, 2007, Response to Comments II No. 28; the July 1, 2009, Response to Comments IV, Response No. 130 & 180.</p>				

Comment No.	349	Commenter No.	49	Comment Subject	Existing Development
Comment	<p>While the Permittees agree that stormwater agencies must also address aspects of sanitary sewer incursions into the MS4s, the provisions in (7)(b) are aspects of other portions of the stormwater program and should be moved to those sections of the Tentative Order.</p> <p>The County requests the following proposed changes:</p> <ol style="list-style-type: none"> i. Adequate plan checking for construction and new development – incorporate in the Construction and New Development programs ii. Incident response training for municipal employees that identify sanitary sewer spills – incorporate in the Illegal Discharges/Illicit Connections (ID/IC) program. iii. Code enforcement inspections – delete, this is covered by other programs iv. MS4 maintenance and inspections – incorporate in the Municipal program, provision D.3.a(6). v. Interagency coordination with sewer agencies – incorporate in the ID/IC program. vi. Proper education of municipal staff and contractors conducting field operations on the MS4 or municipal sanitary sewer (if applicable) – incorporate in the Municipal program. 				
Response	<p>This comment has previously been addressed please see the July 1, 2009 Response to Comments IV, Response No. 251.</p>				

Comment Mobile Businesses (Section F.3.b(3)(a), Page 62)

Although the Response to Comments IV addresses the County's previously submitted comments, we respectfully disagree with Board staff that the new permit section "is not a significant change from the existing Order" and that our proposed recommendation of a pilot program focused on one or two categories of mobile business would be "a lessening of the requirement and considered backsliding". In fact, the latter statement is not supported by the structure and description of the new section of the permit which states that the Permittees must develop the following (i.e. this is a new program that is not currently in existence pursuant to the previous Order):

- "a program to reduce the discharge of storm water pollutants from mobile businesses to the MEP"
- "minimum standards and BMPs"
- "an enforcement strategy"
- "an outreach and education strategy"

In our previous comment letter we noted the difficulties associated with developing this program, concerns which were mirrored in the Fact Sheet. For the reasons previously noted and acknowledged by the Regional Board, we request that the requirement for this program be changed to the development of a pilot program for the mobile business category. The pilot program would allow the Permittees to work together on a regional basis to develop an appropriate framework for addressing mobile business and determine whether the program is effective prior to expending a significant amount of resources on multiple categories of mobile businesses.

In addition, this would be consistent with the approach taken in the Santa Ana Region pursuant to Order No. R8-2009-0030 – Section X.8. (page 45) which states:

"Within 12 months of adoption of this order, the permittees shall develop a mobile business pilot program. The pilot program shall address one category of mobile business from the following list: mobile auto washing/detailing; equipment washing/cleaning; carpet, drape and furniture cleaning; mobile high pressure or steam cleaning. The pilot program shall include at least two notifications of the individual businesses operating within the County regarding the minimum source control and pollution prevention measures that the business must implement. The pilot program shall include outreach materials for the business and an enforcement strategy to address mobile businesses. The permittees shall also develop and distribute the BMP Fact Sheets for the selected mobile businesses. At a minimum, the mobile business Fact Sheets should include: laws and regulations dealing with urban runoff and discharges to storm drains; appropriate BMPs and proper procedure for disposing of wastes generated."

The County requests that the Board modify this section of the permit to identify that a program will be developed as a pilot program focusing on one category of mobile businesses.

Response The Regional Board stands by their response in the July 1, 2009, Response to Comments IV, No. 29.

To elaborate, the previous permit, R9-2002-0001, section F.3.c, requires the Copermitttees to:

- "reduce pollutants in runoff", section F.3.c
- "designate a set of minimum BMPs", section F.3.c.(3)
- "enforce its storm water ordinance for all commercial sites and sources", Section F.3.c.(5)
- "develop an education component to address commercial communities", Section F.4.b

In comparison to the previous order, the commercial source identification inventory is identical regarding mobile businesses except for the addition of mobile pet services, and the Regional Board has not received comments contrary to their inclusion.

Comment Inspection of Industrial and Commercial Sites/Sources (Section F.3.b(4)(b), Page 63)

The County appreciates that the Regional Board staff clarified the intent of this provision regarding the need and use of the data being requested by the Permittees. However, the provision also states that the data be submitted from the Permittees to the Regional Board “prior to the commencement of the wet season” which is typically September and then further states “Information may be provided as part of the JRMP annual report” (which is November). Thus, the timeframe for submittal of the information needs to be clarified.

Since the Permittees already notify the Board when there are compliance issues at an industrial site/facility subject to the General Industrial Permit and the Permittees must follow the notification requirements in Attachment B, the County recommends that the JRMP annual report be the mechanism for conveying the information so that the information is not submitted twice.

The County requests the following modifications:

(2) Each Copermittee shall annually notify the Regional Board, prior to the commencement of the wet season, of all Industrial sites and Industrial Facilities subject to the General Industrial Permit or other individual NPDES permit with alleged violations. Information may be provided as part of the JRMP annual report.

Response At the least, the Copermittees need to notify the Regional Board prior to the commencement of the wet season. Submission prior to the rainy season allows the Regional Board to coordinate inspections in a timely manner. Per Section K, the Copermittees may propose an alternate schedule. If the Copermittees propose a schedule where the JRMP annual reports are submitted prior to the commencement of the rainy season; then the notification of sites with alleged violations may be done as part of the JRMP annual report. Directive F.3.b.(4)(b) has been corrected.

Comment Retrofit Existing Development (Section F.3.d, Pages 68-70)

This provision requires that each Permittee must implement a retrofitting program for existing developments (i.e. municipal, industrial, commercial, residential). These requirements present a significant change and present a substantial burden to the municipal stormwater program by requiring a host of engineering studies, capital improvements, land acquisition, etc.) This requirement is also inconsistent with Order R8-2009-0030.

Currently, new development requirements are imposed as conditions of approval for new projects and projects that are voluntarily undergoing redevelopment. A thorough legal review is required to determine whether municipalities have the authority to compel land development requirements absent a voluntary land development application and if such authorities can be developed given other legal constraints.

The Permittees do not concur with the statement of the Regional Board staff in the fact sheet that “Retrofitting existing development is practicable for a municipality...” A systematic evaluation of the technical and legal opportunities and constraints of a requirement to require retrofitting, especially of private landowners, is necessary to determine whether or not such a requirement is practicable. The evaluation must precede the permit provision to mandate MS4s require retrofitting of existing development.

These provisions of the permit represents an entire new approach to existing development that places an unknown significant burden on the Permittees and ultimately to property owners in the south Orange County area. It is concerning to the County that this provision sets up a process that goes well beyond the Federal regulations, especially regarding potential efforts on private property.

In addition, the provision sets up a requirement that will likely require the Permittees to address most, if not all, of the areas within the geographic area regulated under this permit, which simply is not feasible. The Permittees are required to inventory a multitude of candidate areas, prioritize them and then proceed with projects in those areas where retrofitting is feasible. In addition, provision d.6. further states that, “where constraints on retrofitting preclude effective BMP deployment...the Copermittee may propose a regional mitigation project”, which then means that additional projects will have to be undertaken – not just those that are prioritized as “highly feasible”.

The County requests that this unprecedented requirement be eliminated from the permit.

Response The comment regarding retrofitting has been considered in the previous response to comments. Please see the Fact Sheet discussion on retrofitting; and the July 1, 2009, Response to Comments IV, Response Nos. 46, 136, 161, and 162.

In summary, the Tentative Order’s requirements for retrofitting existing development is practicable for a municipality through a systematic evaluation, prioritization and implementation plan focused on impaired water bodies, pollutants of concern, areas of downstream hydromodification, feasibility and effective communication and cooperation with private property owners. The Tentative Order’s requirement realized the legal limitations that the Copermittees have in requiring retrofitting on privately held land. Therefore, the Tentative Order requires the Copermittees to cooperate with private landowners in implementing retrofitting opportunities.

Comment Watershed Urban Runoff Management Program (Section G, Page 74)

The County appreciates the modification to the WURMP section to provide for the flexibility that is necessary within a watershed management program.

The County requests that the WURMP Workplan be expanded to include the following so that the watershed work plans are comprehensive and address water quality in a more holistic manner:

- Municipal retrofit provision;
- Hydromodification;
- Water supply; and
- Habitat

Since it is not always necessary to “model” to demonstrate water quality improvements in the receiving waters, the County requests that provision G.2.e. be modified to allow for modeling and/or monitoring as necessary.

Response It is unnecessary to specifically reference or include those sections in the Watershed Workplan requirement. All jurisdictional components could be integrated into the watershed workplans depending on the specific pollutants of concern in the watershed. By not specifying specific components within the watershed workplan, the Tentative Order is actually more flexible for the Copermittees to determine BMPs and strategies to address pollutants of concern. The modeling will be necessary to assist the Copermittees in assessing the effectiveness of the BMPs, selecting BMPs for deployment, and prioritizing their resource expenditures.

Comment

This provision is supported by Finding E.11 which identifies that adopted TMDL WLAs will be incorporated as numeric effluent limits for specific pollutants and watersheds.

As noted previously, the Permittees are concerned that it appears that Regional Board staff plan to incorporate WLAs as numeric effluent limits in the MS4 permit without consideration of other options or as to how the TMDL may be written, which might include:

- Requiring implementation of specific BMPs in the permit;
- Providing a recommended menu of potential BMPs in the TMDL, implementation plan, or the permit for sources to evaluate and select;
- Referencing BMP performance standards in the TMDL, implementation plan, or the permit;
- Recommending the selection of BMPs and developing benchmark values or performance measures; and
- Requiring the review of existing BMPs and selecting additional BMPs to achieve progress.

The USEPA draft handbook TMDLs to Stormwater Permit lists the above options and notes that:

“There are no guidelines for determining which approach is most appropriate to use. It is likely that a variety of factors, including type of source, type of permit, and availability of resources, will influence which approach makes the most sense.”

However, it does not appear that the Regional Board has considered the variety of factors in determining that numeric effluent limitations are most appropriate method of incorporating the WLAs for all pollutants in all watersheds into the MS4 stormwater permit.

The County requests that the following language, which is from the adopted Ventura County MS4 Stormwater Permit (R4-09-0057 Page 95) be incorporated into this section within the introduction to clarify how the WLAs will be attained:

The Permittees shall attain the Waste Load Allocations by implementing BMPs in accordance with the TMDL Technical Report, Implementation Plan, or as identified as a result of TMDL special studies specified in the Basin Plan Amendment.

The Permittees shall comply with the Waste Load Allocations, consistent with the assumptions and requirements of the Waste Load Allocations documented in the Implementation Plans, including compliance schedules, associated with the State adoption and approval of the TMDL at compliance monitoring points established in the TMDL Monitoring Program (40 CFR 122.44(d)(1)(vii)(B)).

Response

The Regional Board has considered all options when considering how best to incorporate the TMDL into the Tentative Order. The Copermitees are given great flexibility in implementing BMPs capable of meeting the Waste Load Allocation Reductions, Final Allocations and Numeric Targets that come directly from the adopted TMDL. The USEPA approves of this approach as is evident by their letter of September 28, 2009 that supports adoption of the Tentative Order. No change has been made in response to this comment.

This comment has been previously submitted (albeit in a slightly different format). Please see response to Comment no. 144 from the July 1, 2009, Response to Comments IV. Please also see response to Comment nos. 59 and 72 from the July 1, 2009, Response to Comments IV.

Comment No.	355	Commenter No.	49	Comment Subject	General
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Comment Section J. of the Tentative Order requires the Permittees to assess the effectiveness of their JURMP, identify necessary program modifications, and report that information to the Regional Water Board on annual basis. Section J.1.a. identifies specific water quality-based objectives for 303(d) listed water bodies, environmentally sensitive areas (ESAs), and the major program components.

Although the concept and intent of the provision is understood and supported by the Permittees, the specificity and inclusion of the required water quality-based objectives and focus on the 303(d) listed water bodies and ESAs is misplaced and has not been developed within the context of the California Stormwater Quality Association (CASQA) Guidance or through the State's Storm Water Quality Task Force which was established pursuant to AB 739 to develop a comprehensive guidance document for evaluating and measuring the effectiveness of Municipal Storm Water Management Program (Guidance Document). Although the Guidance Document has not been finalized, it builds off of the CASQA Guidance Document concepts. In addition, this section is not consistent with Order R8-2009-0030.

As written, this section of the Tentative Order is not consistent with the CASQA Guidance Document and does not provide flexibility for the Permittees to develop objectives and an overall strategy for the effectiveness assessment and will result in resources being expended without achieving the intended goal.

Since the Permittees have already developed and implemented a program effectiveness assessment framework and programmatic and environmental performance metrics and have committed to developing metric definitions and guidance to improve the efficacy of the assessments in the ROWD, the provision should be modified to allow the Permittees to continue to use the approach that they have been using for several years.

The County requests that this provision be replaced with the following text: The annual report shall include an overall program assessment. The permittees may use the "Municipal Stormwater Program Effectiveness Assessment Guidance" developed by the California Stormwater Quality Association in May 2007 as guidance for assessing program activities at the various outcome levels. The assessment should include each program element required under this order, the expected outcome and the measures used to assess the outcome. The permittees may propose any other methodology for program assessment using measurable targeted outcomes.

Response This comment has been submitted and responded to twice previously. Please see Comment No. 145 in the July 1, 2009, Response to Comments IV and Comment No. 56, Response to Comments on Tentative Order No. R9-2007-0002, July 6, 2007.

In regards to consistency, please see Comment no. 373 . Please also see Comment No. 24 in the July 1, 2009, Response to Comments IV.

Comment No.	356	Commenter No.	49	Comment Subject	General
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Comment Section G.7. requires that the Permittees submit the Aliso Creek WURMP annual report by March 1 of each year. Since the Watershed Action Plan Annual Report for the Aliso Creek Watershed has historically been submitted in November of each year and has been based on the fiscal year like the other WURMP reports, it is unclear why Board staff are requiring this change. As such, the Aliso Creek WURMP submittal is now inconsistent with the other WURMP submittals both in the date for submittal and the time period for which the report covers. The County would prefer that the Aliso Creek WURMP annual report submittal date be aligned with the other WURMP submittals.

The County requests that the new language incorporated as a part of Section K. on page 84 also be included in the introduction to Section G.7. so that the reporting schedules are consistent.

The Copermittees may propose alternate reporting criteria and schedules, as part of their updated JRMP, for the Executive Officer's acceptance.

Response The language under Section K applies to all reporting criteria and schedules in the Tentative Order, not just for JRMP requirements. Any proposed criteria and suggested schedules should be included in the updated JRMP.

Comment No.	357	Commenter No.	49	Comment Subject	Monitoring
Comment	To enable staff, monitoring, and analytical resources for new monitoring program requirements to be acquired and integrated into current efforts, it is requested that implementation of new requirements should be specified in Attachment E to begin 12 months from the date of permit adoption.				
Response	The earliest monitoring required under the Tentative Order does not begin until October 01, 2010 (see E.III.B). Multiple facets of the monitoring (e.g. mass emissions and non-storm water) are continuations of monitoring programs under R9-2002-001. Furthermore, there are multiple extended time frames for other monitoring programs, such as the sediment toxicity special study. The Regional Board contends this is an ample time frame, as not all new monitoring requirements take effect October 01, 2010.				
Comment No.	358	Commenter No.	49	Comment Subject	Monitoring
Comment	<p>The 6-hour holding time for samples of indicator bacteria limits the length of time that sampling teams can spend in the field and consequently does not allow sampling of some episodic events. For example, a typical day of bioassessment monitoring at three locations requires 8 hours in the field for PHAB assessment and collection of benthic macroinvertebrate, water quality, and toxicity testing samples. Also, mass emissions monitoring of stormwater runoff can occur on weekends and holidays when contract laboratory services are not available. Additionally, monitoring bacteriological quality of stormwater at mass emissions site will not useful information considering access to flood control channels is prohibited during periods of stormwater runoff and the mass emissions monitoring sites are generally great distances upstream of the coastal receiving waters.</p> <p>The County requests that the requirement to conduct monitoring of bacteriological quality at bioassessment sites and during stormwater events at mass emissions sites be removed.</p>				
Response	Please see Comment no. 318 in the July 1, 2009, Response to Comments IV. The request for exemption of bacteriological sampling during bioassessment sampling was accepted in the July 01, 2009 response to comments. This has been clarified in Attachment E.				
Comment No.	359	Commenter No.	49	Comment Subject	Monitoring
Comment	<p>Monitoring for oil and grease concentration will not detect lighter petroleum fractions such as gasoline and diesel. Oil and grease has been detected in 13 of 900 samples in the Dry Weather Reconnaissance Program since 2003.</p> <p>The County requests that the requirement to collect a grab sample for oil and grease during stormwater runoff monitoring be limited to Mass Emissions and Ambient Coastal Receiving Water sites.</p>				
Response	Under Attachment E, the only required storm water sampling for oil and grease is for Mass Emissions and Ambient Coastal Receiving Water Monitoring sites.				
Comment No.	360	Commenter No.	49	Comment Subject	Monitoring
Comment	<p>Section E.II.B.1.b requires measurement of hardness in the receiving waters during composite stormwater sampling of the MS4 major outfalls. Since the hardness of the receiving waters can fluctuate considerably during a storm, a composite sampling of the receiving water would be the most appropriate method of determining the water hardness. This sampling of the receiving water however would require an extra automatic sampler.</p> <p>The County requests that if the total metal concentration of the composite sample from the major outfall exceeds the SAL, comparison will be made to the CTR CMC adjusted to a hardness value calculated from the Mass Emissions Database. The representative hardness value from each watershed area will be calculated as the median of the timeweighted hardness values of all storms monitored (2000-2008 reporting years) in the mass emissions program within the respective watershed area. The current mass emission monitoring protocol includes collection of 3-5 composite samples during a 4-day period after the onset of a storm. In order to more accurately characterize receiving water hardness during the first 24 hours (MS4 Major Outfall monitoring protocol) only the first two composite samples (1-hour first flush + second composite) of each storm would be used to calculate the time-weighted average concentration.</p>				
Response	<p>Attachment E of the Tentative Order currently does not prescribe the exact sampling methodology, and only states that a grab sample may be utilized.</p> <p>The Regional Board appreciates the suggestion to use historic mass emissions data, but this is more appropriate to propose in the Planned Monitoring Program, due September 1, 2010 (see Attachment E.III.A.1) under the Tentative Order. Since an exceedance of an SAL is to be combined with other information when the Copermitees consider iterative actions, the use of a median hardness value should not be a problem.</p>				

Comment No.	361	Commenter No.	49	Comment Subject	Monitoring
Comment	<p>Section E.II.C.b.(3) states that effluent samples must also include analysis for chloride, sulfate, and total dissolved solids. Although these constituents are listed in the Basin Plan they were removed from the lists of NELs that were in prior iterations of the permit.</p> <p>The County requests the removal of these three constituents from the Non-stormwater monitoring suite.</p>				
Response	<p>Chloride, sulfate and total dissolved solids have been identified as pollutants of concern, and may be found in illicit discharges and/or connections to the MS4. These pollutants were removed from the initial list of NELs as more information, including monitoring, was found to be required in order to evaluate the need for effluent limitations. The commenter provides no reason for their removal from IC/ID monitoring. Thus, no change has been made.</p>				
Comment No.	362	Commenter No.	49	Comment Subject	Monitoring
Comment	<p>Section F.4.e.(2)(c) of the Program Provisions states that: "Within two business days of receiving analytical laboratory results that exceed action levels, the Co-Permittees must either initiate an investigation to identify the source of the discharge or document the rationale for why the discharge does not pose a threat to water quality and does not need further investigation." The two-day response is an unrealistic expectation considering the weekly volume of data received from the laboratories, the time required to enter the data into the Co-Permittee database, and the data review process.</p> <p>The County requests the establishment of a protocol that specifies that within five business days of receiving analytical laboratory results that exceed action levels the Co-Permittee responsible for the watershed from which the discharge emanated will be notified. Within 2 business days after notification Co-Permittee will either initiate the an investigation to identify the source of the discharge or document the rationale for why the discharge does not pose a threat to water quality and does not need further investigation.</p>				
Response	<p>Please see response to Comment no. 260.</p> <p>The Regional Board has changed the required response criteria from 2 business days to 5 business days.</p>				
Comment No.	363	Commenter No.	49	Comment Subject	Monitoring
Comment	<p>The requirement that the Planned Monitoring Program be submitted September 1st of every year, beginning on September 1, 2009, does not allow adequate time for analysis of the monitoring data from the prior year as it is affected by management actions undertaken throughout the MS4, subject of the annual Performance Effectiveness Assessment.</p> <p>The County requests that consideration be given to an annual meeting after submittal of the Annual Report to discuss the content of the report and any changes to the monitoring program or suggestions for special studies. This approach will promote a more collaborative relationship between the Permittees and Board staff and may help streamline the renewal of future permits.</p>				
Response	<p>The Regional Board has already agreed that this is a good idea. Please see Comment nos. 326, 267 and 183 in the July 1, 2009, Response to Comments IV.</p>				
Comment No.	364	Commenter No.	49	Comment Subject	Monitoring
Comment	<p>The requirement that the Receiving Waters and Urban Runoff Monitoring Annual Report be submitted October 1st of every year, beginning on October 1, 2010, does not provide adequate time for relevant analysis of the monitoring data collected in the 12-month period immediately prior to the proposed reporting date. Previous annual reports were submitted on November 15th of each year and assessed the results of monitoring activities conducted in the 12-month period ending 4½ months prior to the reporting date.</p> <p>The County requests that the Receiving Waters and Urban Runoff Monitoring Programs Annual Report continue to be submitted in conjunction with the Unified Annual Report and Performance Effectiveness Assessments.</p>				
Response	<p>Please see Comment no. 183 in the July 1, 2009, Response to Comments IV.</p>				

Comment No.	365	Commenter No.	50	Comment Subject	LID
Comment	<p>We appreciate the Board's recognition that properly engineered LID filtration BMPs are available to a project developer to meet the LID performance standard. The Tentative Order language states that "due to the flow through design of biofiltration BMPs, the total volume of the BMP, including pore spaces and prefilter detention volume is allowed to be no less than 0.75 times the design storm volume."</p> <p>At a minimum, we ask that this section be revised to require that the biofiltration BMPs be designed to retain no less than 75% of the portion of the design storm that is not retained on site. We believe the intent of the Board is to allow biofiltration (or better stated, filtration LID BMPs) BMPs to be used to handle all or a portion of the design storm volume when it is shown through infeasibility that onsite retention BMPs alone cannot handle the total design storm volume. Sizing each and every biofiltration BMP to handle up to 0.75 of the total design storm volume is unnecessary and expensive.</p>				
Response	<p>The Regional Board agrees that the intent of the Tentative Order's requirement is that the total prefilter volume be 75 percent of the portion of the design storm that is treated by the biofiltration BMP. But please understand that the overall filtration design of the biofiltration unit must be for the whole design storm. The 75 percent allowance is for the prefilter detention volume.</p>				

Comment No.	366	Commenter No.	50	Comment Subject	Hydromod
Comment	<p>The hydromodification control waivers contained in this subsection should expressly include waivers for projects that do not increase the potential for hydromodification impacts over the existing site conditions, or that discharge to a receiving water that is not susceptible to hydromodification impacts. Suggested edits are as follows:</p> <p>Waivers may also be implemented for the following projects that do not increase the potential for hydromodification impacts over the existing site conditions:</p> <p>(A) Projects within a natural watershed where a geomorphically-based watershed study has been prepared that establishes that the potential for hydromodification impacts is not present.</p> <p>(B) Significant redevelopment projects that do not do not increase impervious area or decrease the infiltration capacity of pervious areas compared to the pre-project conditions.</p> <p>(C) Projects that discharge directly or via a storm drain to a substantially hardened channel, sump, a lake, area under tidal influence, or other receiving water that is not susceptible to hydromodification impacts.</p>				
Response	<p>Please see the response to Comment No. 122.</p>				

Comment No.	367	Commenter No.	51	Comment Subject	LID
Comment	<p>Our comments focus on the development and implementation of effective Low-Impact Development ("LID") utilizing progressive standards and reviews in order to ensure the integrity of the latest MS4 permit. Coastkeeper has consistently supported the inclusion and implementation of LID principles throughout the development of MS4 permits in Orange County and the Inland Empire. LID provides an environmentally preferred avenue for the reduction of harmful pollutants from the waterways of southern California as well as providing for groundwater recharge and a reduction in our region's reliance on imported water. In as much as we support the incorporation of LID principles into the south Orange County MS4 permit, we are also dedicated towards the adoption of a permit which accurately reflects the various LID best management practices ("BMPs") in a way which maximizes their utility.</p> <p>Chief among our concerns is this permit's pervasive reliance on "biofiltration" without including a working definition of the term or providing verifiable standards of which biofiltration BMPs must satisfy. Rather than provide clarity the permit instead reinforces ambiguity by providing a potentially unworkably vague term which does not guarantee onsite retention of pollutants. If biofiltration is adopted, then there should be additional guidance on the Regional Board's definition of biofiltration. Additionally, the Regional Board should ensure proper oversight of any proposed biofiltration device to guarantee that it is properly sized and designed.</p>				
Response	<p>The Tentative Order includes a definition of biofiltration in Attachment C and has included design criteria in section F.1.d(4)(c)(ii).</p>				

Comment No.	368	Commenter No.	51	Comment Subject	LID
Comment	Coastkeeper agrees with the Regional Board that structural, proprietary, and/or engineered biofiltration devices should be permitted where appropriate. However, the Regional Board should hold those biofiltration devices to equivalent water quality standards and require proper monitoring to prove their initial and continued effectiveness as pollution control devices. For example, a four to five year postconstruction monitoring regimen with at least annual reporting which includes data on wet and dry seasons would be an appropriate mechanism for analyzing biofiltration effectiveness for major developments.				
Response	<p>The Regional Board maintains that bio-filtration is part of a comprehensive LID program. Effective bio-filtration provides pollutant removal and energy dissipation. Biological removal of pollutants can even be an improvement over simply keeping pollutants on-site until rainfall over the design-storm criteria washes pollutants into receiving waters. Removal of pollutants and prevention of downstream hydromodification ensures any discharge to be low impact. The USEPA's Green Infrastructure website includes filtration as a Low Impact Development technique; http://cfpub.epa.gov/npdes/greeninfrastructure/information.cfm#glossary. In addition, the U.S. Department of Housing and Urban Development's report titled "The Practice of Low Impact Development," (July 2003, H-21314CA) incorporates filtration techniques. The County of San Diego's LID manual also utilizes bio-filtration as an acceptable LID practice.</p> <p>In the future as the science and knowledge of storm water treatment evolves, filtration may not be a suitable LID practice to meet the maximum extent practicable standard. For this permit iteration, LID BMPs that capture the design storm for reuse, infiltration or evapotranspiration are preferred over bio-filtration techniques. The draft permit provides design-criteria for "LID bio-filtration BMPs" in section F.1.4.d.ii and requires demonstration that retention LID BMPs are technically infeasible prior to implementing bio-filtration BMPs.</p>				

Comment No.	369	Commenter No.	51	Comment Subject	LID
Comment	Finally, Coastkeeper encourages the Regional Board to view the utilization of biofiltration as a "trigger" for LID offsite programs. As stated earlier, the use of biofiltration does not guarantee that pollutants are retained onsite and therefore the adoption of additional programs to address pollution should be included in a comprehensive approach to combat the discharge of harmful pollutants into the waters of Orange County. Possible offsite programs are discussed in the permit concerning the LID waiver program and include "green streets projects, existing development retrofit projects, retrofit incentive programs, regional BMPs and stream restoration."				
Response	Please see the response to Comment No. 368.				

Comment No.	370	Commenter No.	51	Comment Subject	LID
Comment	In conclusion, Coastkeeper appreciates the effort the Regional Board and its staff have put towards developing an effective MS4 permit for south Orange County which effectively and efficiently addresses the environmental concerns of the watershed in a transparent and comprehensive approach. We look forward to a constructive relationship with the Regional Board and hope our comments will assist in the development of a thoughtful and progressive permit.				
Response	comment noted.				

Comment

Section F.1.d.(4)(d)(ii) allows LID biofiltration BMPs to treat any volume that is not retained onsite by the LID BMPs, if onsite retention LID BMPs are technically infeasible. Section F.1.d.(4)(d)(iii) permits conventional treatment controls if it is shown to be technically infeasible to treat the remaining volume up to and including the design capture volume using LID BMPs (retention or biofiltration), and importantly, if the project participates in the LID waiver program in Section F.1.d.(8).

A critical failure of this section is that the use of biofiltration does not implicate the Waiver Program – a project using biofiltration would still be in compliance with the LID requirements. Although biofiltration is a legitimate and often effective technique to clean stormwater, it is simply not as effective as onsite recapture. Capture onsite ensures that absolutely zero pollution leaves the site via stormwater. By definition, any other technique, including biofiltration, is less effective since pollution could be released.

Additionally, biofiltration remains poorly defined in the permit. As such, it is a subjective term and could be abused. Simply allowing stormwater to pass over a lawn could meet the standard, a practice that would not meet the intent or goals of preventing downstream pollution.

Even if implemented properly, biofiltration will not be completely effective. It is unacceptable to imply an equal substitution of biofiltration for onsite retention when the two processes do not produce equal results.

If onsite retention is truly infeasible, and biofiltration is appropriate, the project should be governed by the Waiver Program, which would require the project to implement a mitigation project and payment into an in-lieu funding program. See Section F.1.d.(7). As part of the Waiver Program, a project would be allowed to implement either biofiltration or treatment control BMPs with off-site mitigation. This still encourages developers to use a biofiltration system after retention as biofiltration is often much less expensive than conventional controls, but prevents the loophole of equating onsite retention and biofiltration.

Response

The Regional Board maintains that bio-filtration is part of a comprehensive LID program. Effective bio-filtration provides pollutant removal and energy dissipation. Biological removal of pollutants can even be an improvement over simply keeping pollutants on-site until rainfall over the design-storm criteria washes pollutants into receiving waters. Removal of pollutants and prevention of downstream hydromodification ensures any discharge to be low impact. The USEPA's Green Infrastructure website includes filtration as a Low Impact Development technique; <http://cfpub.epa.gov/npdes/greeninfrastructure/information.cfm#glossary>. In addition, the U.S. Department of Housing and Urban Development's report titled "The Practice of Low Impact Development," (July 2003, H-21314CA) incorporates filtration techniques. The County of San Diego's LID manual also utilizes bio-filtration as an acceptable LID practice.

In the future as the science and knowledge of storm water treatment evolves, filtration may not be a suitable LID practice to meet the maximum extent practicable standard. For this permit iteration, LID BMPs that capture the design storm for reuse, infiltration or evapotranspiration are preferred over bio-filtration techniques. The draft permit provides design-criteria for "LID bio-filtration BMPs" in section F.1.4.d.ii and requires demonstration that retention LID BMPs are technically infeasible prior to implementing bio-filtration BMPs. The requirements for LID have been written to provide the Copermittees consistency with the provisions of the Santa Ana Regional Board's North Orange County MS4 permit.

The Tentative Order includes a definition of biofiltration in Attachment C and has included design criteria in section F.1.d(4)(c)(ii).

Comment No.	372	Commenter No.	52	Comment Subject	SUSMP
Comment	<p>The Tentative Order currently allows large-scale watershed based projects to go straight to biofiltration without first proving technical infeasibility. See Revised Tentative Order No. R9-2009-0002 at F.1.c.(8). Section F.1.c.(8) states “Any volume that is not retained by the LID BMPs, up to the design capture volume, must be treated using LID biofiltration.” If “any volume” not retained by the LID BMPs can immediately be treated using biofiltration, without any proof of technical infeasibility, then a developer could avoid any retention efforts and simply use biofiltration.</p> <p>By contrast, Priority Developments “require LID BMPs or make a finding of infeasibility for each Priority Development Project in accordance with the LID waiver program in Section F.1.d.(8).”</p> <p>There is no justification for treating large-scale watershed based projects differently. Both Priority Developments and large-scale watershed based projects have the potential to cause a great deal of damage if the lack of treatment techniques allows run-off. Section F.1.d.(2)(e) includes Environmentally Sensitive Areas (“ESA”) under the definition of a Priority Development Project. Because of their proximity to ESAs, any discharge from these Priority Developments would be especially damaging to the environment. These projects are similar to the large-scale watershed based projects, which are defined as a development project greater than 100 acres in total project size or smaller than 100 acres in size yet part of a larger common plan of development over 100 acres, that has been prepared using watershed and/or sub-watershed based water quality, hydrologic, and fluvial geomorphic planning principles that implement regional LID BMPs. Because of their size, any discharge from these projects has the same high potential as Priority Developments to cause damage.</p> <p>Because large-scale watershed based projects are similar to Priority Developments in that there is an increased risk of damage from run-off, Section F.1.c.(8) should be changed to include a finding of infeasibility before biofiltration is permitted, identical to the language governing Priority Developments in Section F.1.d.(4)(a)(i).</p>				
Response	<p>The Regional Board thanks you for the comment. The language in the tentative Order has been revised accordingly. Please also see response to Comment No. 273.</p>				

Comment The City of Mission Viejo continues to express its concerns with the lack of permitting consistency with the North Orange County MS4 Permit (Order R8-2009-0030). We believe the lack of permitting consistency will lead to confusion by private developers, businesses, and residents over storm water regulatory requirements. Specifically, the land development standards for water quality protection should be uniform on a countywide basis to lend credibility to our efforts to manage urban runoff and to sustain the obvious cost effectiveness of a single and coordinated County-wide NPDES Program in Orange County. Therefore, we support the County's comments and suggested language improvements on the Tentative Order to ensure that it is uniform with the North Orange County MS4 Permit.

Response To the extent economic information was submitted, the Regional Board staff considered economic considerations in developing elements of the Tentative Order, but the Regional Board is not required to conduct a cost-benefit analysis. Please also see response to Comment no. 259.

As stated in the response to Comment No. 24 in the July 1, 2009, Response to Comments IV, the Regional Board is sensitive to the Copermittee's concerns of consistency and has sought to write the draft Tentative Order to both protect Water Quality and to assist the County and those affected Cities to develop a single program. First and foremost, the draft Tentative Order is consistent with the Clean Water Act, Code of Federal Regulations and USEPA guidance. These federal regulations are the driving force behind the requirement for the MS4 permit and this reissuance. To reach consistency with the federal regulations, several changes are in the draft Tentative Order, namely, the removal of the term "urban runoff," prohibition of over-irrigation discharges, and the numeric effluent limitations for dry weather non-storm water discharges. In addition, the draft Tentative Order must comply with the anti-backsliding requirements found in 40 CFR 122.44(l): "[W]hen a permit is renewed or reissued, interim effluent limitations, standards or conditions must be at least as stringent as the final effluent limitations, standards, or conditions in the previous permit."

It is important to note the draft Tentative Order has to be consistent with the San Diego Regional Board's Basin Plan, TMDLs for the San Diego Region, and take into account 303(d) listed water bodies receiving discharges upon reissuance. The Basin Plan defines the unique water quality objectives and beneficial uses in Southern California that the draft Tentative Order is seeking to protect and restore. Southern Orange County has Warm and Cold habitat beneficial uses, whereas in Northern Orange County receiving waters have not been identified as having those same beneficial uses. Water quality standards may differ between regions, and NPDES permits are required to protect these standards.

The Regional Board also has to be concerned about consistency with other MS4 permits issued by the San Diego Regional Board. The Regional Board has three separate MS4 permits to write and enforce. To have a fair and consistent enforcement policy implemented by the Regional Board, the MS4 permits issued by the Regional Board need to be consistent. The difficulty for Regional Board staff to understand, review reports and adequately enforce inconsistent MS4 permits puts an unnecessary strain on the Regional Board's limited resources.

The criteria for consistency cannot be a hindrance to improvements in the science and regulation of water quality. Some might argue that to be truly consistent would be a return to the regulations and water quality observed in 1990 when the first NPDES permit was issued for MS4 discharges. USEPA guidance supports this progressive increase in regulation as water quality science and knowledge advances. For example, in its "Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits" (61 FR 43761), USEPA states, "In cases where adequate information exists to develop more specific conditions or limitations to meet water quality standards, these conditions or limitations are to be incorporated into storm water permits, as necessary and appropriate."

Even with these constraints on consistency, the draft Tentative Order is reasonable consistent with the Santa Ana Regional Board's North Orange County MS4 permit, especially in regard to the requirements for Low Impact Development at Priority Development Projects. While being consistent, this draft Tentative Order is also implementing the USEPA's policy on watershed permitting. At this point in time, adopting an identical permit to that in a separate watershed could be construed to be in violation of USEPA's stated policy on implementing NPDES permitting activities on a watershed basis.

Additionally, the commenter is concerned regarding confusion by private developers, businesses and residents regarding regulatory requirements. The Regional Board, in past response to comments, has acknowledged the Copermittees success in implementing educational BMPs regarding non-storm water and storm water regulations. It is expected the Copermittees will continue these successful efforts under the re-issued permit.

Comment No.	374	Commenter No.	53	Comment Subject	NEL
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Comment The City of Mission Viejo continues to object to the inclusion of Numeric Effluent Limits (NELs) in the Tentative Order, but appreciates the Board staffs attempt to make the previously proposed Municipal Action Levels (MALs) more palpable by offering the use of Storm Water Action Levels (SWALs). Our main argument to the imposition of NELs are:

- The insertion of NELs is inconsistent with the State Water Board's Blue Ribbon panel report on the feasibility of numeric effluent limits.
- The finding by the Regional Board staff that non-stormwater discharges are not subject to the maximum extent practicable standard and therefore subject to water quality based effluent limits is not supported by law. Clean Water Act section 402(P) (3) (B) (ii) clearly states that discharges from municipal storm sewers shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewer. We argue that the section does not require a full prohibition but rather an effective prohibition. The City agrees with the County in that the technology based standard for non-stormwater discharges is "effectively prohibit" just as "maximum extent practicable" is the technology based standard for stormwater discharges.
- The use of numeric limits for non-stormwater discharges is premature and bypasses the Bacteria I TMDL for San Diego Region Beaches and Creeks process. It is likely that some of our non-stormwater discharges will exceed the NEL but have no effect on the receiving water quality or beneficial uses. But under the proposed Order, the City may be obligated to expend considerable resources without a reciprocal water quality benefit. This is poor public policy and use of public funds.

Response Please see Regional Board Counsel Memorandum dated November 05, 2009.
Please also see responses to Comment nos. 317 and 391.

Comment No.	375	Commenter No.	53	Comment Subject	Overirrigation
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Comment The prescribed prohibition on irrigation runoff also needs to be very carefully considered. The City believes this outright prohibition would erode general public support for the City's and County's Storm Water Program. We believe implementation of the prohibition would risk eroding general public support for a Program that is successfully fostering a stewardship ethic in residential environments. For example, cities may be faced with issuing citations to a homeowner for irrigation runoff; whereas, the neighbor next door is free to wash his car in his driveway under the current Tentative Order exemption for residential car washing. There is also concern that the provision would force the expenditure of scarce resources on an issue that is already being addressed by water districts dealing with water conservation imperatives. We ask that Section B, Non-Storm Water Discharges, be modified to include landscape irrigation, irrigation water, and lawn watering in Section B.2.

Response The comment regarding the prohibition on overirrigation practices was addressed in the previous response to comments. The comment does not raise any new issues from the previous comments.

Please see the discussion in the Fact Sheet for findings C.14 and C.15; and the July 1, 2009, Response to Comments IV, Response Nos. 28, 52, 76, and 159. Please also see comments Nos. 84, and 264 in this Response to Comments. No changes have been made in response to this comment.

In summary, over irrigation is a non-storm water discharge required by federal regulations to be prohibited where identified to be a source of pollutants. The Regional Board disagrees that removing the exemption for irrigation-related discharges from the non-storm water prohibition will erode the public from fostering and stewarding their residential environments. Several citizens at recent public meetings have voiced their support for this action. As public agencies, the Copermittees must be aware and address their public's concerns and the Copermittees are expected to use appropriate discretion through their education and enforcement mechanisms to alleviate those public concerns. As long as the Copermittees have a program in place to effectively prohibit over-irrigation runoff from entering the MS4, they are likely to be in compliance with this Tentative Order. Coordination with the water districts is an acceptable and preferred method of compliance.

Comment Page 73, Part F.4.f., of the Tentative Order states:

"Each Copermittee must implement management measures and procedures to prevent, respond to, contain and clean up all sewage and other spills that may discharge into its MS4 from any source (including private laterals and failing septic systems.) Copermittees must coordinate with spill response teams, must prevent entry of spills into the MS4 and contamination of surface water, ground water and soil. Each Copermittee must coordinate spill prevention, containment and response activities throughout all appropriate departments, programs and agencies so that maximum water quality protection is available at all times."

We continue to object to the inclusion of this provision. The revision of "implement management measures and procedures" being introduced by the Tentative Order to preface the required actions the cities must undertake still leaves the cities responsible for responding to sewage spills. We suggested other language in our May 15, 2009 comment letter that is more appropriate.

As we have previously stated, the City does not own or operate its own sewage system. All of the sewer systems in Mission Viejo are owned, operated, and maintained by water districts. These agencies have their own separate NPDES Permit. The City does not have the equipment or expertise to manage a sewage spill of any size, and its staff is not adequately trained to respond to potential spills. All of the water districts in Mission Viejo already respond to sewer spills (including sewer spills from private laterals). Furthermore, this provision is duplicative in the sense that the Regional Board is seeking to make the Permittees responsible for a task already delegated to the water districts. By making the City responsible for sewer spills, there is a high risk of creating confusion in determining who will respond to a spill (water district or City), who is responsible for the associated cost and reporting, etc.

The "implement management measures and procedures" phase does not negate the previous State Water Resources Control Board Order issuing a stay on this same issue in the prior generation of the NPDES Permit. After extensive hearings and briefing on the matter, the State Board issued Order WQO 2002-0014 on August 15, 2002, granting a stay as to this provision. In that Order, the State Board held:

"The record shows that three separate water districts operate these sewers within Mission Viejo, and are regulated by a sanitary sewer NPDES permit issued by the Regional Board. Mission Viejo alleged that the duplication of effort that would ensue by having Mission Viejo also be responsible for preventing and responding to sanitary sewage spills could lead to delayed responses as agencies try to determine jurisdiction and primary responsibility. Orange County's cost table for the upcoming year estimated total copermittee costs of \$56,512 to implement this requirement. While these costs, by themselves do not constitute substantial harm, we find that the duplicative nature of the costs, combined with potential response delay and confusion, do." (State Board Order WQO 2002-0014, p. 6.)

In deciding to grant a stay as to this provision, the State Board concluded:

"The regulation of sanitary sewer overflows by municipal storm water entities, while other public entities are already charged with that responsibility in separate NPDES permits, may result in significant confusion and unnecessary control activities. For example, the Permit appears to assign primary spill prevention and response coordination authority to the copermittees. While the federal regulations clearly assign some spill prevention and response duties to the copermittees, we find that the extent of these duties is a substantial question of law and fact." [State Board Order WQO 2002-0014, p. 8. (emphasis added.)]

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

We once again, as an alternative, offer that the Regional Board consider adopting language similar to that contained in State Board Order No. 2006-0003 titled: "Statewide General Waste Discharge Requirements for Sanitary Sewer Systems" ("Order"). This Order applies solely to municipalities and other public entities that own or operate sanitary sewer systems greater than one mile in length that collect and/or convey untreated or partially treated wastewater. Adopting this caveat would not only serve to accomplish the primary goals behind the provision, but would also ensure Statewide consistency among Water Board regulations.

Response The Regional Board fully understands that some Copermittees may not own, operate or manage sewer systems.

This comment has been addressed during the prior two response to comments, and the response is still applicable. The comments regarding sanitary sewer infiltration and spill response have been extensively considered in previous response to comments. Please see the July 6, 2007 Response to Comments I, Response Nos 44, & 50; the December 12, 2007, Response to Comments II No. 28; the July 1, 2009, Response to Comments IV, Response No. 130 & 180.

In summary, when the State Water Board stayed the sewage provision from Regional Board Order No. R9-2002-01, it found that the costs of the requirement did not constitute harm, but agreed that harm could ensue from potential response delay and confusion (Order WQO 2002-0014). Subsequently, the Copermittees and the local sewer agencies have developed mature relationships regarding sewage spill response. As a result, the concerns expressed by the State Water Board are no longer warranted. For instance, the Copermittees have developed and implemented procedures for spill response and sewage spill response. The Model Sewage Spill Response Procedure is outlined in the Copermittees' Proposed 2007 Drainage Area Management Plan (DAMP). According to the 2007 DAMP, regardless of where the spill originates, if the spill has entered or may enter the storm drain system, the Copermittees respond to assist with the cleanup and remediation of the area.

Section D.3.a.7 of the Tentative Order includes requirements for measures that must be taken to prevent sewage spills. Examples of measures being implemented by Copermittees include inspections of fats, oils, and grease management at restaurants. Other preventative measures can be implemented during routine planning efforts for new development and redevelopment projects. Similarly, building permit inspections should be used to verify the integrity of the sanitary and storm sewer infrastructure and ensure that cross-connections between the two are avoided.

Comment No.	377	Commenter No.	54	Comment Subject	General
Comment	<p>As stated in previous correspondence, the City is subject to the jurisdiction of both the San Diego and Santa Ana Regional Water Quality Control Boards. Significant differences in the large municipal stormwater permits issued by either jurisdiction causes the City to incur unnecessary administrative costs. Moreover, disparities between the Santa Ana and San Diego permits are likely to cause confusion among the public, and discourage public acceptance and participation in clean water efforts. During the July 1, 2009, workshop, the SDRWQCB expressed concern about this cost burden, and stated a desire to have the Draft Permit be consistent where possible. Nonetheless, the Draft Permit remains basically unchanged from the draft considered at the July 1 workshop.</p> <p>Consistency among stormwater permits implicates the larger issue of compliance with the MEP standard. It is not feasible for stormwater permits with significantly different requirements to be mandated by the same, federal standard. Such permits may be consistent with a baseline MEP standard, however major deviations from one another demonstrate that the baseline has been exceeded. While the SDRWQCB may have the authority to exceed the MEP standard under the appropriate circumstances, as described more fully below, this requires compliance with applicable state laws, including but not limited to the California Constitution's prohibition on unfunded state mandates.</p> <p>This concern was also raised by the SDRWQCB members during the July 1, 2009 workshop on the Draft Permit. At that time, the SDRWQCB directed Regional Board staff to prepare a chart comparing the Draft Permit to the North Orange County permit, and explaining why it is different. As of September 28, 2009, the deadline for submitting written comments on the Draft Permit, that document has not been made public. Moreover, the Draft Permit is not any more consistent with other the other Southern California stormwater permits than it was at the July 1, 2009 Workshop. The following table provides a comparison of key permit requirements, and whether they are included in other regional permits (North Orange County, Ventura County, and San Diego County Permits).</p> <p>The Draft Permit and the Fact Sheet do not address why these requirements are different. The distinctions are especially meaningful for the North Orange permit and San Diego County permit. These permits govern areas geographically similar to South Orange County, yet do not impose many of the stringent requirements included in the Draft Permit. The City therefore requests that the SDRWQCB revise the Draft Permit to make it consistent with the North Orange and San Diego County permits on these issues.</p>				
Response	<p>We agree that Regional Board members directed Regional Board staff to prepare a comparison of the Tentative Order to the North Orange County permit. However, the commenter implies that this direction was required to be completed and sent out for public comment. That is incorrect, as the Regional Board members requested the comparison be made for Board consideration.</p> <p>The comment regarding unfunded mandates has been extensively considered in all previous response to comments. The comment does not raise any new issues from the previous comments. The State's water quality protection requirements within the Tentative Order are authorized by Federal Law, and are not unfunded mandates. The Fact Sheet and Response to comments Nos. 155 and 165 in the July 1, 2009, Response to Comments IV; Comment No. 5 in the July 6, 2007, Response to Comments I; Comment Nos. 1 and 9 in the December 12, 2007, Response to Comments II; Comment No. 1, 2, and 3 in the February 13, 2008 Response to Comments III; all provide discussions of these issues.</p> <p>In regards to consistency between the San Diego and Santa Ana Regional Board, please see Comment no. 24 in the July 1, 2009, Response to Comments IV. Additionally, the commenter states that the Tentative Order is inconsistent with both the Santa Ana Order and San Diego County Order (R9-2007-001). The Regional Board contends that the Tentative Order builds upon the San Diego County Order, including the efforts and experiences by Regional Board staff and Copermittees under R9-2007-001. Please also see Comment no. 61 in the July 1, 2009, Response to Comments IV. Please also see response to Comment No. 373.</p>				

Comment

The Draft Permit will increase costs for the City. Attached as Exhibit B is a chart that was filed with the County of San Diego's Test Claim challenging the San Diego County Permit as an unfunded state mandate. That chart lists how much each permittee is expected to spend on permit-related programs alleged to be unfunded state mandates. Similar programs have the potential to cost the City millions of dollars. For instance, in San Diego County, development of a Hydromodification Management Plan cost the Permittees \$1.5 million over two years. Countywide, costs associated with each of the challenged programs were estimated at over \$66 million in new unfunded program costs. Similar costs are likely in South Orange County, and in fact could be higher as a result of the large number of new programs in the Draft Permit that were not included in the San Diego County permit.

The SDRWQCB may have the discretion to impose some of the programs in the Draft Permit. However, imposing requirements more stringent than that required by the Clean Water Act and its implementing regulations triggers applicable state law requirements. (See *City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613.) For waste discharge requirements that exceed the requirements of federal law, California law requires consideration 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 in the region.
- (f) The need to develop and use recycled water. (Cal. Water Code § 13241.)

Of the above listed factors, the economic considerations can be the most difficult to navigate. In *City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, the California Supreme Court held that where an NPDES Permit exceeds the requirements of federal law, the Regional Boards are required to consider the "economic" impacts on dischargers. The Supreme Court defined the economic impact as the "discharger's cost of compliance." (Id. at 618, 625.) To date, the SDRWQCB has maintained that the entire Draft Permit is federally mandated, and thus consideration of the factors listed in Water Code section 13241, including the economic impacts to the Permittees, is not required.

As a result, the SDRWQCB has failed to fully consider the economic costs associated with the Draft Permit. The Fact Sheet includes a cursory discussion of costs associated with Large MS4 permits in general, but it does not analyze the cost of compliance for dischargers under the Draft Permit. As stated above, compliance with the Draft Permit's new requirements will run into the millions of dollars. Before the SDRWQCB imposes this obligation on the City, it needs to consider the direct economic costs placed on the City and the other permittees. The purpose of Water Code section 13241 is to ensure that the public has an opportunity to have an honest, open discussion about the ramifications, costs, and benefits of those permit requirements that exceed federal law. Sidestepping these considerations not only violates Section 13241, but more importantly denies the public this opportunity.

Lastly, pursuant to Article XIII B, Section 6 of the California Constitution, any NPDES requirements that are not explicitly required by federal law must be funded by the state. (*County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898, 915-916.) Where, as here, a federal program provides discretion to the State agency to impose a local program on a municipality, such as a TMDL, the municipality is entitled to reimbursement from the state. (See *Hayes v. Commission on State Mandates* (1992) II Cal. App.4th 1564, 1570.) Numerous programs in the Draft Permit exceed the requirements of federal law and thus represent state mandates. Pursuant to Article XIII B, Section 6 of the California Constitution, the City is entitled to reimbursement for the cost of implementing these programs.

Response

The comment regarding unfunded mandates has been extensively considered in all previous response to comments. The comment does not raise any new issues from the previous comments.

The Fact Sheet and Response to comments Nos. 155 and 165 in the July 1, 2009, Response to Comments IV; Comment No. 5 in the July 6, 2007, Response to Comments I; Comment Nos. 1 and 9 in the December 12, 2007, Response to Comments II; Comment No. 1, 2, and 3; in the February 13, 2008 Response to Comments III; all provide discussions of these issues.

The Table in Exhibit B of the comment letter is highly questionable. The table includes basic performances tasks undertaken by any City regardless of when or if they have an NPDES permit. For example, costs are accounted for street sweeping and conveyance system cleaning. In addition, the table accounts for costs that are very specifically required by federal regulations such as watershed programs, effectiveness assessment, education, and MS4 cleaning. Finally, the table includes costs initiated by the Lead Permittee or requested by the Copermittees such as Working Body support and Regional management programs. The Tentative Order's hydromodification plan requirements are similar to the MS4 permit for San Diego County. Therefore, the Orange County Copermittees are expected to reduce costs in developing their hydromodification plan by building on the efforts of the San Diego County Copermittees.

In summary, the State's water quality protection requirements within the Tentative Order are authorized by Federal Law, and are not unfunded mandates.

Comment

The Draft Permit's Numeric Effluent Limit ("NEL") requirements are fundamentally flawed and should be removed. The numbers assigned to each NEL do not reflect existing conditions in the South Orange County watersheds, nor do they reflect the limits of current technology to locate, analyze, and treat discharges that are causing NEL exceedances. To further this point, a County assessment indicates that the NELs are not even achievable at reference sites unaffected by urban influences. Moreover, the rationale relied upon for imposing the NELs is based on a flawed interpretation of the Clean Water Act. The Draft Permit's findings related to the need to require NELS are therefore factually untrue and fail to bridge the analytical gap between the Draft Permit's requirements and conditions in the South Orange County region.

The Clean Water Act requires MS4 permits to effectively prohibit non-stormwater discharges into the MS4, and holds all discharges from the MS4 are subject to the maximum extent practicable (MEP) standard. (33 USC § 1342(p)(3)(B).) Clean Water Act section 402(p)(B) states:

Municipal discharge. Permits for discharges from municipal storm sewers-

(i) may be issued on a system- or jurisdiction-wide basis;

(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control

techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.

(33 USC § 1342(p)(3)(B) [emphasis added].)

Thus the Clean Water Act does not impose a separate standard on the discharge of nonstormwater from the MS4. The discharge of any pollutant from the MS4 is subject to the MEP standard. The Draft Permit ignores this plain language of the Clean Water Act. It differentiates between discharges of stormwater and non-stormwater from the MS4, and attempts to justify imposition of NELs on the grounds that the Clean Water Act imposes different compliance standards on discharges of each. As demonstrated by the plain language of the act, the Clean Water Act does not distinguish between stormwater and non-stormwater when regulating discharges from an MS4. (33 USC § 1342(p)(3)(B)(iii).) The MEP standard expressly applies to discharges of pollutants from the MS4.

Application of the MEP standard to discharges from the MS4 is important in the instant case because it speaks to the appropriateness of including NELs in the Draft Permit. Both the State Water Resources Control Board (SWRCB), and US EPA have stated on numerous occasions that an iterative, BMP-based process should be employed to implement MS4 permits. Indeed, the SWRCB explicitly recognized this in Order WQ 2001-15, when it directed the SDRWQCB to revise the 2001 San Diego County Permit to clarify that the MEP standard applies to discharges from the MS4.

The permit must be clarified so that the reference to the iterative process for achieving compliance applies not only to the receiving water limitation, but also to the discharge prohibitions that require compliance with water quality standards. The permit should also be revised so that it requires that MEP be achieved for discharges "from" the municipal sewer system.

(SWRCB Order WQ 2001-15, pages 9-10, 17.)

If the Draft Permit is going to require compliance with NELs in an MS4 permit, the SDRWQCB needs to directly address why those authorities mandating an iterative, BMP based approach to municipal stormwater are not applicable. Side stepping the issue by claiming that the approach is mandated by federal law denies the public an opportunity to have an honest, open discussion about the ramifications, costs, and benefits of imposing NELs on the Permittees.

In addition to the flawed rationale, the actual numeric limits established for the NELs are overly conservative, and in some cases essentially guarantee that the Permittees will violate the Draft Permit's NEL requirements. For instance, for discharges of certain criteria pollutants, "inland surface waters, enclosed bays, and estuaries have conservatively been allotted a mixing zone and dilution credit of zero. As such, any discharge of these priority pollutants is likely to impact the receiving water, regardless of the quantity or rate of discharge." (Fact Sheet, p 112.) As a result, the NEL for these discharge points has been set at the water quality objective for the receiving water. (Fact Sheet, p 113.) There is no basis for imposing this discharge standard on the City and the other Permittees. The SDRWQCB's action in imposing such a standard is arbitrary and not reflective of current technological limits.

Response Please see Regional Board Counsel Memorandum dated November 05, 2009.
Please see responses to Comment nos. 181 and 319.

Comment No.	380	Commenter No.	54	Comment Subject	NEL
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Comment The Draft Permit needs to be revised to include a clear, meaningful exclusion for discharges caused by natural sources or third parties over which the City has little or no control. In its present form, the Draft Permit does not provide a safe harbor for discharge violations caused by natural sources or third party entities. This is best demonstrated by the Draft Permit's NEL requirements. The Draft Permit will impose the following NEL requirements on the City:

Compliance with numeric limitations does not excuse compliance with the nonstormwater discharge prohibition in Section B.I. Compliance with NELs provides an assessment of the effectiveness of the prohibition of non-stormwater discharges and of the appropriateness of exempted non-stormwater discharges.

Compliance with Section C of this Order requires that an exceedance of an NEL must result in one of the following outcomes:

- a. Copermittees investigate the source of the exceedance and determine that it is natural (non-anthropogenically influenced) in origin and conveyance. The findings are to be conveyed to the Regional Board for review and acceptance.
- b. Copermittees investigate the source of the exceedance and determine that the source is an illicit discharge or connection. The Copermittees are to eliminate the discharge to their MS4 and report the findings, including any enforcement action(s) taken, to the Regional Board. Those seeking to continue such a discharge must become subject to a separate NPDES permit.
- c. Copermittees investigate the source of the exceedance and determine that the source is an exempted non-stormwater discharge. The Copermittees shall investigate the appropriateness of the discharge continuing to be exempt and report the findings to the Regional Board.

The Draft Permit's NEL requirements do not provide an exemption for exceedances caused by natural sources or discharges from third parties beyond the City's jurisdiction. As a result, pursuant to Water Code section 13385, the City could still be held liable for NEL violations even if it complied with all of the listed remedial measures, and even if the violation was caused by a natural source or a source beyond the City's authority to control.

Response Please see Comments nos. 44 and 159 in the July 1, 2009, Response to Comments IV.

It is important to note that the Tentative Order does not regulate discharges outside of the Copermittees jurisdiction. Once pollutants have entered the MS4, however, the Permittee is responsible for that discharge from their MS4. Please also see Finding D.4.c.

Please also see Comment no. 82 in the July 1, 2009, Response to Comments IV.

Comment No.	381	Commenter No.	54	Comment Subject	Urban Runoff
Comment	<p>As drafted, the Draft Permit does not limit the impact Section 13385's mandatory minimum penalty requirements. In fact, since the term "Urban" has been removed from the text the Draft Permit, the Draft Permit appears to attempt to hold the City directly responsible for discharges from natural sources, agricultural sources, and other third party entities over which the City has little to no control. Draft Permit Finding D.3. is emblematic of this problem:</p> <p>As operators of the MS4s, the Copermittees cannot passively receive and discharge pollutants from third parties. By providing free and open access to an MS4 that conveys discharges to waters of the U.S., the operator essentially accepts responsibility for discharges into the MS4 that it does not prohibit or control.</p> <p>The City has no authority to refuse to accept discharges from other jurisdictions or entities. California law applies a "rule of reason" to flood control issues that requires cities to accept surface water flows from neighboring property owners. (Locklin v. City of Lafayette (1994) 7 CalAth 327, 349.) Thus the City cannot refuse to accept drainage from adjacent jurisdictions. The City likewise lacks authority over the conduct of state and local agencies within its jurisdiction. These entities are exempt from many conditions in the Draft Permit. (See Cal. Gov. Code § 53091; see also Hall v. Taft (1956) 47 Cal.2d 177 [holding that when the State engages in sovereign activities it is not subject to local regulations unless the California Constitution says it is, or the legislature has consented to it].)</p> <p>The Draft Permit's attempt to hold the City responsible for such discharges is especially frustrating given that many of the entities implicated by this requirement are required to obtain their own NPDES permits, and thus should be regulated directly by the SDRWQCB. The SDRWQCB's failure to regulate discharges from these entities should not be imputed to the City. The SDRWQCB's attempt to regulate such entities through the Draft Permit is therefore arbitrary, capricious, and without justification.</p>				

Response	<p>These issues have been fully considered previously.</p> <p>The Regional Board has removed the term "urban runoff" as it is more consistent with the federal regulation (40 CFR 122.26). Response to Comment No. 47 in the July 1, 2009, Response to Comments IV, provides discussion of this issue. No changes have been made in response to this comment.</p> <p>The Regional Board has followed federal guidance regarding third party discharges into the Copermittees' MS4s. Responses No. 2 and No. 7 in the July 7, 2007, Response to Comments I, provide discussions of these issues. No changes have been made in response to this comment.</p>
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Comment No.	382	Commenter No.	54	Comment Subject	SAL
Comment	<p>The Draft Permit's Stormwater Action Levels ("SALs") are unnecessary, exceed the requirements of federal law, and should be removed. The Draft Permit's SAL provisions represent a major increase in monitoring and reporting requirements for the City. Compliance with the SAL requirements will significantly increase the City's monitoring costs without a defined benefit to water quality. The Clean Water Act and its implementing regulations do not require the SDRWQCB to impose SALs in large MS4 permits, and the SDRWQCB has not demonstrated that SALs are necessary at this time. For that reason, the City requests that the SDRWQCB remove the SALs from the Draft Permit.</p>				
Response	<p>In regards to monitoring, the Tentative Order has provided the Copermittees flexibility in determining the level of monitoring under the SALs.</p> <p>Please see response to Comment no. 33 in the July 1, 2009, Response to Comments IV.</p>				

Comment No.	383	Commenter No.	54	Comment Subject	Overirrigation
Comment	<p>The Draft Permit has eliminated irrigation water as an exempt discharge. The federal stormwater regulations include a list of categories of "exempt" non-stormwater discharges or flows. (40 CFR 122.26(d)(2)(iv)(B)(1).) The City must address these discharges or flows when they have been identified by the City as sources of pollutants to waters of the U.S. (Id.) Where individual sources of discharge are identified they are to be addressed on an individual basis.</p> <p>Irrigation runoff may act as a conveyance of pollutants in some instances, however, it is not a conveyance of pollutants in all cases. Additionally, many of the pollutants that may be conveyed by irrigation overflows are naturally occurring, are regulated by the State under different permits or programs, or are diffuse and uncontrollable by the Permittees. Enforcing discharges of potable irrigation water from residential homes will therefore be very difficult. Residents without a significant water quality background are unlikely to agree that potable irrigation water is a pollutant. This will discourage public acceptance and participation in the water quality program, a program whose foundation is outreach and public education.</p> <p>It is also important to recognize that over irrigation is being addressed as a water conservation issue. The City, the other Permittees, and water districts throughout the region are working toward limiting excessive irrigation (and irrigation runoff) through numerous water conservation programs and ordinances. Reduction of irrigation runoff will therefore be achieved through other means, and does not need to be regulated in the Draft Permit. Regulation as a water conservation issue has the added benefit of public acceptance and participation in conservation programs. This will allow irrigation overflows to be regulated without undermining public support for the City's water quality program. The City therefore requests that the exemption for landscape irrigation be restored.</p>				

Response	<p>The comment regarding the prohibition on overirrigation practices was addressed in the previous response to comments. The comment does not raise any new issues from the previous comments.</p> <p>Please see the discussion in the Fact Sheet for findings C.14 and C.15; and the July 1, 2009, Response to Comments IV, Response Nos. 28, 52, 76, and 159. Please also see comments Nos. 84, and 264 in this Response to Comments. No changes have been made in response to this comment.</p> <p>In summary, over irrigation is a non-storm water discharge required by federal regulations to be prohibited where identified to be a source of pollutants. As long as the Copermittees have a program in place to effectively prohibit over-irrigation runoff from entering the MS4, they are likely to be in compliance with this Tentative Order. Coordination with the water districts is an acceptable and preferred method of compliance.</p>
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Comment No.	384	Commenter No.	54	Comment Subject	LID
Comment	<p>The City appreciates the SDRWQCB's efforts to revise the Draft Permit's Low Impact Development requirements to make them more similar to those in the North Orange County Permit. However, the City objects to the mitigation and fee requirements that the Draft Permit will impose on projects that cannot retain and treat stormwater on site. The Draft Permit has a stated preference for LID BMPs that treat stormwater on site. It is possible to require these development techniques where feasible, however such BMPs will not be feasible for all projects. There is no rationale basis for requiring these projects to pay a penalty when they can deploy other traditional BMPs that will treat stormwater to levels that are equivalent or better than the LID and retention requirements currently espoused by the Draft Permit. For that reason, the City requests that the Draft Permit be revised to remove this penalty.</p>				
Response	<p>The Clean Water Act requires that pollutants in storm water discharges are reduced to the maximum extent practicable (MEP). Current runoff management, knowledge, practices and technology consider the use of LID BMPs as meeting the storm water MEP standard. Therefore, the storm water treatment controls must also be designed to meet this same level of pollutant reduction to be considered MEP.</p> <p>The Regional Board realizes the difficulty in design and implementation of treatment controls to be able to reduce pollutants to the same standard as LID retention BMPs. Therefore, the Tentative Order allows project proponents to design conventional treatment controls at least up to the design storm as long as mitigation or in-lieu fees, which compensate for the pollutant load that would otherwise be retained by LID BMPs, are also implemented. A project proponent may choose to design their treatment controls to treat storm flows greater than the design storm that, in effect, would provide an equal pollutant removal as LID retention BMPs. In that case, mitigation would not be needed.</p>				

Comment No.	385	Commenter No.	54	Comment Subject	Retrofitting
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Comment Section F.3.d of the Draft Permit will require the City to develop a plan to retrofit existing development within its jurisdiction. The City has land use authority to impose requirements on new development as a condition of development, but lacks comparable authority to require property owners to retrofit existing development. The Draft Permit ignores this lack of authority and includes requirements to identify, inventory and prioritize existing developments that are potential sources of pollutants. (Draft Permit, section F.3.d(1)-(6).

The Draft Permit will require the City to identify existing development candidates, evaluate and rank the candidate sites to prioritize them for retrofitting, cooperate with landowners of priority sites and encourage them to retrofit their properties, and track and inspect all sites that do complete retrofitting. This will require the City to invest a significant amount of time and resources developing and implementing this program. The City's lack of authority to impose retrofit requirements on existing development means there will be no corresponding benefit to water quality. For that reason, the Draft Permit's retrofit requirements should be removed.

Response The comment regarding retrofitting has been considered in the previous response to comments. Please see the Fact Sheet discussion on retrofitting; and the July 1, 2009, Response to Comments IV, Response Nos. 46, 136, 161, and 162.

In summary, the Tentative Order's requirements for retrofitting existing development is practicable for a municipality through a systematic evaluation, prioritization and implementation plan focused on impaired water bodies, pollutants of concern, areas of downstream hydromodification, feasibility and effective communication and cooperation with private property owners. The Tentative Order's requirement realized the legal limitations that the Copermittees have in requiring retrofitting on privately held land. Therefore, the Tentative Order requires the Copermittees to cooperate with private landowners in implementing retrofitting opportunities.

Comment No.	386	Commenter No.	54	Comment Subject	General
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Comment Section J.4 of the Draft Permit will require the City to develop a Work Plan to address high priority water quality programs in an iterative manner. This requirement is duplicative, of other existing programs and is wholly unnecessary. At least four other planning level documents cover these issues. The City uses the Drainage Area Management Plan as the principal policy and guidance document; each jurisdiction also has a related Local Implementation Plan; the South Orange County area uses an Integrated Regional Water Management Plan; the watersheds are assessed and managed with a Watershed Action Plan; and the Aliso Creek Watershed has its own Watershed Runoff Management Plan. There is no reason to add yet another bureaucratic layer to the Draft Permit. This requirement will only increase costs without providing a corresponding benefit to water quality.

Response The Drainage Area Management Plan is not jurisdiction specific; nor is it a requirement of the Tentative Order; and it is not an enforceable document. The Integrated Regional Water Management Plan is also not a requirement of the Tentative Order. The Jurisdictional work plan closes the loop on implementation, monitoring, and effectiveness assessment. The work plan is the strategy by which the effectiveness assessment is used to prioritize the implementation of the Copermittee's storm water program. The work plan requirement in the JRMP section has been added to ensure Copermittees are allocating resources and efforts to address priority problems and pollutants identified in the watershed analysis. This section has been added to ensure Copermittees use the annual assessment to adjust and tailor their JRMP programs. The work plan is specifically designed for the Copermittees to prioritize their limited resources on water quality problems and on efforts that improve water quality. By planning and adapting, the Copermittees will be able to use their resources more effectively and not waste time and effort on actions that do not improve water quality. Other plans that meet the requirements of the Jurisdictional Work plan may be used to demonstrate compliance with this directive.

Comment No.	387	Commenter No.	55	Comment Subject	NEL
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Comment Water quality improvement has been the top priority strategic goal for the City of Dana Point this during past Permit Cycle. Dana Point and our fellow South Orange County Cities have been making great strides in Water Quality Improvement some of which we expressed in our Power Point presentation on July 1st. The San Diego Region's Draft 2008 303(d) listing proposal, released this August, proposes to delist or not list 28 of 42 locations covering the entire South Orange County coastline for the cities of Laguna Beach, Dana Point, and San Clemente. This is proof of our ongoing success in reducing current listings and using the iterative BMP approach for MEP, and non point sources without fines for compliance.

Yet as we turn our attention to better addressing dry weather flows in this new Permit Cycle, Staff has developed a new approach; mandatory minimum fines for Numeric Effluent Limits (NEL's). No other California NPDES Regional Permit has this regulatory bludgeon. There are multiple problems with this approach, seven of which we discuss below.

Response While the Regional Board acknowledges that certain 303(d) listed waters are proposed to be delisted, the Draft 305(b) and 303(d) Report shows that existing controls on discharges from the MS4 remain inadequate to protect water quality standards. For the San Juan hydrologic unit the 2006 303(d) list includes 17 waterbodies and 25 pollutant waterbody combinations. For 2008, the Draft 303(d) Report includes 33 waterbodies and 75 waterbody pollutant combinations.

Please see Regional Board Counsel Memorandum dated November 05, 2009.

Please also see Comment no. 82 in the July 1, 2009, Response to Comments IV.

Please also note that other State and Regional Board NPDES Regional Permits do contain narrative and/or numeric effluent limitations.

Comment No.	388	Commenter No.	55	Comment Subject	NEL
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Comment First, the Board has no flexibility in making reasonable decisions with this NEL proposal. Witness the July 1, 2009, Board Meeting when the Board's hands were tied, according to Staff, in fining SOCW A and SCWD \$204,000 for what we believe the board recognized was a permit language violation, not a water quality violation at the ocean discharge point.

Response Please see Comment no. 82 in the July 1, 2009, Response to Comments IV.

Comment No.	389	Commenter No.	55	Comment Subject	unfunded mandate
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Comment Second, inclusion of NEL's is the top priority concern with the draft permit for the County and the Co-Permittees. It really makes the Permit untenable and invites litigation. Similar concerns exist with the inclusion of language indicating that Permittees must strictly comply with waste load allocations in a TMDL, and strictly meet Stormwater Action Levels. Strict compliance with any of these numeric limits is not "reasonably achievable" as required by the California Water Code. Nor has there been any attempt to analyze the "economic" impacts of these requirements, as required under the Water Code. Please see our attached legal comments, responding to the discussion at the July I Board.

Response Non-storm water discharges are not storm water and must be effectively prohibited. As such, they are not subject to the MEP standard. They are appropriately regulated under CWA section 402, which allows the imposition of NELs. The Copermittees have ample time and method discretion to meet the Wasteload Allocation Reductions, Final Allocations and Numeric Targets. These allocations and targets are chosen because they are designed to protect Water Quality Standards, which is the goal of a TMDL. Please note that Storm water Action Levels are not numeric effluent limitations, and are a part of the iterative process.

The comment regarding the Regional Board's compliance with California Water Code §13263, 13241, and 13000 and the consideration of balancing factors has been extensively considered in previous response to comments. Please see the Fact Sheet; July 6, 2007, Response To Comments I, Response No. 5; December 12, 2007, Response To Comments II, Response Nos. 1 and 9; February 13, 2008, Response to Comments, Response No 3.

To the extent economic information was submitted, the Regional Board staff considered economic considerations in developing elements of the Tentative Order, but the Regional Board is not required to conduct a cost-benefit analysis. No changes have been made in response to this comment.

Comment No.	390	Commenter No.	55	Comment Subject	NEL
Comment	Third, the potential costs of mandatory minimum fines, and their impacts could be astronomical. The State Board is contemplating a standard non-compliance fine of \$2 per gallon per day for violations. As an example, Salt Creek dry weather flow is 300,000 to 600,000 gallons per day. This is just one medium sized outflow and fines could exceed one million-dollars a day. Per the proposed NEL criteria, we believe that Salt Creek will be in exceedance of NEL's from Day 1 of the new Permit for the Total Nitrogen standard. Nitrogen is abundantly found in the natural environment from air and decaying vegetation. Staff says that proof of natural occurrence will be accepted by RWQCB Staff as compliance. But what constitutes proof? How much study and cost justification will be acceptable? Will a Standard of Proof be litigated by a third party and will unfair fines be imposed by mandate?				
Response	Non-storm water numeric effluent limitation exceedance investigations will be handled on a case-by-case basis. Please see Comment no. 82 in the July 1, 2009, Response to Comments IV regarding MMPs.				

Comment No.	391	Commenter No.	55	Comment Subject	NEL
Comment	Fourth, the NEL standards proposed by Staff are unattainable in some cases, even in naturally occurring and pristine creeks, indicator bacteria is an example. Indicator bacteria has been studied by expert scientists at SCCWRP and has been found to be at levels which may exceed the NEL s in reference watersheds - the watersheds that represent the untouched/undeveloped areas of the County. Why is bacteria included as an NEL when we already have TMDL's for bacteria that the Board has approved? The TMDL recognizes this complex non-point source will probably take 10 years to control in huge watersheds like San Juan Creek which drains a 13.5 square mile area, yet the NEL requires compliance as soon as the permit is in effect.				
Response	Please see response to comment no. 317. Please also see Comment no. 83 in the July 1, 2009, Response to Comments IV. 303(d) listing of a receiving water as impaired is done because the existing controls on discharges to that waterbody has been found to be insufficient to protect Beneficial Uses. The 303(d) listing or subsequent TMDL does not prevent additional controls, including water quality-based effluent limitations, being implemented in NPDES permits.				

Comment No.	392	Commenter No.	55	Comment Subject	NEL
Comment	Fifth, dry weather flow is more characteristic of non-point source than point source flow. Every single property has the potential to over-irrigate and the source varies each day of the week. MS4 36" diameter pipes requiring monitoring each drain hundreds, and in many cases, more than 1000 properties each. The MEP standard for stormwater, which includes non rain water runoff, recognizes the practical unreasonableness of tracking down and treating every storm drain back to every watershed source to eliminate every pollutant immediately.				
Response	Please see Regional Board Counsel Memorandum dated November 05, 2009.				

Comment No.	393	Commenter No.	55	Comment Subject	NEL
Comment	Sixth, the detailed Permit language is flawed - for example in determining if the dry water flow is natural (non-anthropogenic), it requires permittees must determine it is from a natural influence in both "origin and conveyance". Since the MS4 is generally manmade pipe (the conveyance) this is generally an impossible standard to meet on its face.				
Response	The Regional Board contends that MS4 may receive natural flows which, upon entry into the MS4, are modified within the MS4 system. This includes, but is not limited to, the concentration of pollutants, addition of anthropogenic non-storm water discharges, and modified location of discharge. Please also see response to Comment no. 394.				

Comment No.	394	Commenter No.	55	Comment Subject	NEL
Comment	Seventh, Coastal bluff groundwater contributes heavily to South Orange County dry weather runoff. A confounding problem is that much of our dry weather flow is made up of groundwater. Our groundwater is known for having constituents such as Iron, Manganese, Nitrates, etc. Although the Permit language purports to "accept" natural constituents, again what is the standard of proof? This can be particularly difficult and costly to study and may be unable to yield completely definitive answers - again leading to potential third party litigation and potential fines.				
Response	Please see Comment no. 82 in the July 1, 2009, Response to Comments IV. Section C.3 of the Order includes language which states the Tentative Order does not regulate natural sources and conveyances of constituents. Though source investigation can be difficult, it is already required under the current Order. The Regional Board will handle each investigation and subsequent finding(s) on a case-by-case basis.				

Comment No.	395	Commenter No.	55	Comment Subject	NEL
Comment	<p>In summary, regarding NEL's, we currently we have a successful program that meets the intent of the NEL's. Orange County's dry weather monitoring program to identify and then address controllable pollutants is well recognized for the investigative information it provides, and Permittees are required to address pollutant discoveries. Please further consider the County's proposed program as an effective alternative to the NEL's. Let's explore and evaluate reasonable standards, natural sources and positive effects of reducing irrigation runoff during this cycle together.</p> <p>We are three months into the Fiscal Year and looking at how we can trim another 5% off of our operating budget due to declining revenues. The magnitude of the added costs for this Permit are addressed in the County's letter and are of significant concern. Please heed the facts stated therein as no economic analysis has been prepared or considered by Board Staff to date, in spite of the requirement under California Law to do so. Further, no cost consideration based changes have been made since the July 1 Board Meeting, despite Board Member inquiries, as well as the Board's expressed concern with imposing unfunded mandates on the Permittees.</p> <p>Please reconsider the issues of consistent regulations with the North Orange County Santa Ana Region Permit as no consistency related changes to the tentative draft have been made since the July 1 Board Meeting, despite Board inquiries.</p>				
Response	<p>Please see Regional Board Counsel Memorandum dated November 05, 2009.</p> <p>The comment regarding unfunded mandates has been extensively considered in all previous response to comments. The comment does not raise any new issues from the previous comments. The State's water quality protection requirements within the Tentative Order are authorized by Federal Law, and are not unfunded mandates.</p> <p>The Fact Sheet and Response to comments Nos. 155 and 165 in the July 1, 2009, Response to Comments IV; Comment No. 5 in the July 6, 2007, Response to Comments I; Comment Nos. 1 and 9 in the December 12, 2007, Response to Comments II; Comment No. 1, 2, and 3 in the February 13, 2008 Response to Comments III; all provide discussions of these issues. No changes were made in response to this comment.</p>				

Comment No.	396	Commenter No.	55	Comment Subject	unfunded mandate
Comment	As you can see from the attached legal comments, as well as the comments submitted by the County of Orange, there continues to be fundamental disagreement on the propriety of including NEL's, SALs and TMDLs in the Permit, particularly without the Regional Board first complying with the requirements of California Water Code sections 13241 and 13000. Further, there continues to be a significant difference of opinion on the legality of the Regional Board Staff's new permit requirement which would force the City to prohibit all "dry weather" runoff, specifically including "landscape irrigation," "irrigation waters," and "lawn waters," from entering the City storm drain system. Not only does the City believe that this requirement goes far beyond what is required by federal law, as evidenced by the fact that these discharges are allowed to be discharged into the storm drain system under the current permit, but in addition, it is apparent that the Regional Board Staff is attempting to impose this mandate on the City without first complying with the requirements of California Water Code sections 13241 and 13000.				
Response	<p>The comment regarding unfunded mandates has been extensively considered in all previous response to comments. The comment does not raise any new issues from the previous comments.</p> <p>The Fact Sheet and Response to comments Nos. 155 and 165 in the July 1, 2009, Response to Comments IV; Comment No. 5 in the July 6, 2007, Response to Comments I; Comment Nos. 1 and 9 in the December 12, 2007, Response to Comments II; Comment No. 1, 2, and 3; in the February 13, 2008 Response to Comments III; all provide discussions of these issues.</p> <p>In summary, the State's water quality protection requirements within the Tentative Order are authorized by Federal Law, and are not unfunded mandates. No changes have been made in response to this comment.</p> <p>The comment regarding the Regional Board's compliance with California Water Code §13263, 13241, and 13000 and the consideration of balancing factors has been extensively considered in previous response to comments.</p> <p>Please see the Fact Sheet; July 6, 2007, Response To Comments I, Response No. 5; December 12, 2007, Response To Comments II, Response Nos. 1 and 9; February 13, 2008, Response to Comments, Response No 3.</p> <p>To the extent economic information was submitted, the Regional Board staff considered economic considerations in developing elements of the Tentative Order, but the Regional Board is not required to conduct a cost-benefit analysis. No changes have been made in response to this comment.</p>				

Comment No.	397	Commenter No.	55	Comment Subject	unfunded mandate
Comment	Finally, because the imposition of NEL's, SALs, and WLAs from TMDLs are all new mandated limits that are not required under federal law, and similarly because a prohibition on dry weather and irrigation waters from entering the MS4 is a new mandate not required by federal law, as are the new LID and retrofitting and related requirements, none of these requirements may lawfully be imposed without the Regional Board first providing funding as required under the California Constitution for such mandates. For example, the retrofitting provisions in the Permit specifically require the City to "develop and implement a retrofitting program." This is a new program being mandated on the City, but without the State first providing funding as required by the California Constitution.				
Response	<p>The comment regarding unfunded mandates has been extensively considered in all previous response to comments. The comment does not raise any new issues from the previous comments.</p> <p>The Fact Sheet and Response to comments Nos. 155 and 165 in the July 1, 2009, Response to Comments IV; Comment No. 5 in the July 6, 2007, Response to Comments I; Comment Nos. 1 and 9 in the December 12, 2007, Response to Comments II; Comment No. 1, 2, and 3; in the February 13, 2008 Response to Comments III; all provide discussions of these issues.</p> <p>In summary, the State's water quality protection requirements within the Tentative Order are authorized by Federal Law, and are not unfunded mandates. No changes have been made in response to this comment.</p>				

Comment

THE MEP STANDARD UNDER THE CLEAN WATER ACT APPLIES TO ALL "DISCHARGES OF POLLUTANTS" FROM THE MS4, REGARDLESS OF WHETHER THE POLLUTANTS IN THE DISCHARGE ARISE FROM "STORM" WATER" OR ALLEGED "NON-STORMWATER."

The federal Clean Water Act ("CWA" or "Act") expressly applies the Maximum Extent Practicable ("MEP") Standard to all "pollutants" discharged "from" the Municipal Separate Storm Sewer System ("MS4"), whether the discharges are classified as "non-stormwater" or "stormwater." Although "non-stormwater" is required to be "effectively prohibited" from entering "into" the MS4, the CWA does not treat discharges "from" the MS4 any differently if the "pollutants" in issue arose as a result of a "stormwater" versus an alleged "non-stormwater" discharge. (33 U.S.C. § 1342(p)(3)(B)(iii).)

As such, if "dry weather" is improperly classified as "non-stormwater," such a classification should not in any way change how the "pollutants" in the discharge are to be addressed. Instead, under the CWA, regardless of the nature of the discharge, i.e., be it "stormwater" or alleged "non-stormwater," the MEP standard continues to apply. Moreover, the MEP Standard is the only standard required under the CWA to be applied to discharges from a City's MS4, and no numeric limits are required by the Act, regardless of whether the original sources of the discharge is non-stormwater.

The language in the Act requires municipalities to "require controls to reduce the discharge of pollutants to the maximum extent practicable." (Id.) The Act then applies the MEP Standard to the "discharge of pollutants" from the MS4, not to the discharge of "stormwater" or "non-stormwater" from the MS4. As such, the State Board's attempted classification of "dry weather" as "non-stormwater," for example, has no relevance to the issue of the types of "controls" required under the Act to address the "pollutants" in issue.

Section 1342(p)(3)(B) of the Act entitled "Municipal Discharge" provides, in its entirety, as follows:

Permits for discharges from municipal storm sewers -

- (i) may be issued on a system- or jurisdictional- wide basis;
- (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and
- (iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants. (33 U.S.C. § 1342(p)(3)(B), emphasis added.)

This language in the CWA has consistently been interpreted as requiring an application of the MEP Standard to municipal discharges, rather than an application of a standard requiring strict compliance with numeric limits. Specifically, federal law only requires strict compliance with numeric effluent limits by industrial dischargers, but not by municipal dischargers. As the Ninth Circuit in *Defenders of Wildlife v. Brown* ("Defenders") (9th Cir. 1999) 191 F.3d 1159 found, "Congress required municipal storm-sewer dischargers 'to reduce the discharge of pollutants to the maximum extent practicable' finding that the Clean Water Act was 'not merely silent' regarding requiring 'municipal' dischargers to strictly comply with numeric limits, but in fact found that the requirement for traditional industrial waste dischargers to strictly comply with the limits was 'replaced' with an alternative requirement, i.e., 'that municipal storm-sewer dischargers 'reduce the discharge of pollutants to the maximum extent practicable ... in such circumstances, the statute unambiguously demonstrates that Congress did not require municipal storm-sewer discharges to comply strictly with 33 U.S.c. § 1311(b)(J)(C). (Id. At 1165; emphasis added.)

Similarly, in *Building Industry Association of San Diego County v. State Water Resources Control Board* ("BIA") (2004) 124 Cal.App.4th 866, there as well the Appellate Court, relying upon the Ninth Circuit's holding in *Defenders*, agreed that "with respect to municipal stormwater discharges, Congress clarified that the EPA has the authority to fashion NPDES permit requirements to meet water quality standards without specific numeric effluent limits and instead to impose 'controls to reduce the discharge of pollutants to the maximum extent practicable.'" (Id. at 874, emphasis added.) The Court of Appeal in the BIA Case explained the reasoning for Congress' different treatment of Stormwater dischargers versus industrial waste dischargers when it stated that:

Congress added the NPDES storm sewer requirements to strengthen the Clean Water Act and making its mandate correspond to the practical realities of municipal storm sewer regulation. As numerous commentators pointed out, although Congress was reacting to the physical differences between municipal storm water runoff and other pollutant discharges that made the 1972 legislation's blanket effluent limitations approach impractical and administratively burdensome, the primary points of the legislation was to address these administrative problems while giving the administrative bodies the tools to meet the fundamental goals of the Clean Water Act in the context

of stormwater pollution. (Id. at 884, emphasis added.)

The Draft Permit, by attempting to impose a series of numeric effluent limits on municipal dischargers, goes beyond what was required by Congress with the 1987 Amendments to the CW A, and treats municipal dischargers in precisely the same manner as industrial waste dischargers. Because the Draft Permit imposes a standard of strict compliance with numeric limits on municipalities, it goes beyond the requirements mandated by the CW A, and as such, plainly triggers the need to comply with Water Code sections 13000 and 13241. Moreover, and as also discussed below, such a significant shift in policy is directly contrary to well-established State Board and US EPA policy.

In State Board Order No. 91-04, the State Board addressed the propriety of the 1990 Municipal NPDES Permit for Los Angeles County, and particularly whether such permit, in order to be consistent with applicable State and federal law, was required to have included "numeric effluent limitations." In addition to the State Board's interchangeable use of the terms "storm water" and "urban runoff" when discussing the applicable standard to be applied under the CW A (see discussion below), the State Board confirmed that the MEP standard applies to the "discharge of pollutants" from the MS4, and made no mention of the need to apply a different standard if the "discharge of pollutants" arose from alleged "non-stormwater" rather than "storm water." To the contrary, the State Board recognized the MEP standard applied to "pollutants in runoff," irrespective of the source of the pollutants, finding as follows:

We find here also that the approach of the Regional Board, requiring the dischargers to implement a program of best management practices which will reduce pollutants in runoff, prohibiting non-storm water discharges, is appropriate and proper. We base our conclusion on the difficulty of establishing numeric effluent limitations which have a rational basis, the lack of technology available to treat storm water discharges at the end of the pipe, the huge expense such treatment would entail, and the level of pollutant reduction which we anticipate from the Regional Board's regulatory program. (State Board Order No. 91-04, p. 16-17, emph. added.)

This State Board Order, and others as discussed below, all show that although there are two requirements imposed upon municipalities under the CW A, one requiring that municipalities effectively prohibit "non-stormwater" "into" the MS4, and a second requiring municipalities to "reduce the discharge of pollutants to the maximum extent practicable," that the MEP standard applies to "pollutants in runoff" coming out of the MS4 system, regardless of whether such discharges are storm water or non-stormwater. The only difference in the requirements to be imposed upon the municipalities between stormwater and non-stormwater, involves the need for municipalities to "effectively prohibit non-stormwater discharges into the" MS4.

In addition, it is the present policy of the State of California not to use strict numeric limits as a means by which to implement the MEP standard under the Act. Instead, it is State policy to apply the MEP standard through an iterative BMP process, and not through the use of strict numeric discharge limitations. This policy is reflected in numerous State Board orders and other legal documentation from the State Board. (See, e.g., State Board Order No. 91-04, p. 14 ["There are no numeric objectives or numeric effluent limits required at this time, either in the Basin Plan or any statewide plan that apply to storm water discharges." p. 14]; State Board Order No. 96-13, p. 6 ["federal laws does not require the [San Francisco Reg. Bd] to dictate the specific controls."]; State Board Order No. 98-01, p. 12 ["Stormwater permits must achieve compliance with water quality standards, but they may do so by requiring implementation of BMPs in lieu of numeric water quality-based effluent limitations."]; State Board Order No. 2001-11, p. 3 ["In prior Orders this Board has explained the need for the municipal storm water programs and the emphasis on BMPs in lieu of numeric effluent limitations. '1; State Board Order No. 2001-15, p. 8 ["While we continue to address water quality standards in municipal storm water permits, we also continue to believe that the iterative approach, which focuses on timely improvements of BMPs, is appropriate. ']; State Board Order No. 2006-12, p. 17 ["Federal regulations do not require numeric effluent limitations for discharges of stormwater"]; Stormwater Quality Panel Recommendations to The California State Water Resources Control Board - The Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm water Associated with Municipal, Industrial and Construction Activities, June 19, 2006, p.8 ["It is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs and in particular urban dischargers."]; and an April 18, 2008 letter from the State Board's Chief Counsel to the Commission on State Mandates, p. 6 ["Most NPDES Permits are largely comprised of numeric limitations for pollutants . . . Storm water permits, on the other hand, usually require dischargers to implement BMPs."].)

Moreover, as to TMDLs, the WLAs within a TMDL are similarly not required under the CW A to be strictly complied with by municipal dischargers. This conclusion was confirmed by U.S. EPA itself in an official November 22, 2002 EPA Guidance Memorandum, entitled "Establishing Total Maximum Daily Load (TMDL) Waste Load Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on those WLAs." In this official Guidance Memorandum, EPA explained that for NPDES Permits regulating municipal storm water discharges, any water quality based effluent limit for such discharges, should be "in the form of BMPs and that numeric limits will be

used only in rare instances." (EPA Guidance Memo p. 6, emphasis added.) The EPA recommended that "for NPDES-regulated municipal... dischargers effluent limits should be expressed as best management practices (BMPs), rather than as numeric effluent limits." (Id. at p. 4.) EPA went on to expressly recognize the difficulties in regulating stormwater discharges, explaining its policy as follows:

EPA's policy recognizes that because storm water discharges are due to storm events that are highly variable in frequency and duration and are not easily characterized, only in rare cases will it be feasible or appropriate to establish numeric limits for municipal and small construction storm water discharges. The variability in the system and minimal data generally available make it difficult to determine with precision or certainty actual and projected loadings for individual dischargers or groups of dischargers. Therefore, EPA believes that in these situations, permit limits typically can be expressed as BMPs, and that numeric limits will be used only in rare instances. (EPA Guidance Memo, p. 4.)

Because EPA has expressly found, particularly when it comes to the incorporation of a TMDL into a Municipal NPDES Permit, "that numeric limits will be used only in rare instances," and because in this case there is no evidence this Permit is a "rare instance" that would justify the inclusion of numeric limits, any incorporation of the subject TMDLs, or any other numeric limits, into the Municipal NPDES Permit in issue should be limited to the inclusion of MEP-complaint BMPs, and not "numeric limits." In short, neither State or federal law, nor State or federal policy, provide for the incorporation of strict numeric limits into a Municipal NPDES Permit. In fact, they provide for the contrary, and recognize that numeric limits should only be incorporated into a municipal NPDES Permit in "rare instances," with the State Board's Numeric Effluent Limits Panel concluding going so far as to conclude that "it is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs and in particular urban dischargers." (Numeric Limits Permit Report, p. 8.)

Response The Regional Board disagrees with the commenter's interpretation of the Clean Water Act. Please see Regional Board Counsel Memorandum dated November 05, 2009.

Comment No.	399	Commenter No.	55	Comment Subject	Legal
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Comment The Draft Permit contains a number of provisions requiring strict compliance with Numeric Effluent Limitations ("NELs") for dry weather runoff, Stormwater Action Levels ("SALs") for wet weather runoff, and waste load allocations ("WLAs") and other numeric limits for both, pursuant to adopted and to be adopted Total Maximum Daily Loads ("TMDLs"). It also contains new requirements when compared to the existing municipal NPDES Permit that, in effect, require the Permittees to prohibit all "dry weather" discharges from entering the MS4, except for identified exempted discharges. Moreover, the prohibition on the discharge of dry weather discharges into the MS4 now specifically includes "Landscape Irrigation," "Irrigation Waters," and "Lawn Waters," all of which are exempted discharges in the existing Municipal NPDES Permit for South Orange County. Similarly, the Draft Permit seeks to impose a number of provisions known as "low impact development" ("LID") requirements, including new Standard Stormwater Mitigation Plan ("SSMP") requirements, along with Retrofitting and new Hydromodification requirements. None of the aforementioned proposed Draft Permit terms, however, appear to have been developed in accordance with Water Code sections 13241 and 13000.

Moreover, the NELs, SALs, and TMDL requirements, as well as the new dry weather prohibition requirement and the new LID, Retrofitting, Hydromodification and related requirements, are all new permit terms which are not required under the CW A or under any of the regulations thereunder. As such, these are requirements which can only be imposed once the Regional Board complies with the requirements under the Porter-Cologne Act, specifically including Water Code sections 13241 and 13000.

Response Please note that the SALs are not "effluent limitations" as defined in 40 CFR 122.2 and the commenter is incorrect in the statement that there is "strict compliance" required for SALs. SALs are action levels to be utilized in the iterative process for storm water discharges from the MS4.

Please see Regional Board Counsel Memorandum dated November 05, 2009.

Please also see Comment nos. 39 and 277 in the July 1, 2009, Response to Comments IV. The commenter states that the Tentative Order "contains new requirements when compared to the existing municipal NPDES Permit that, in effect, require the Permittees to prohibit all "dry weather" discharges from entering the MS4." As stated in Comment no. 39 in the July 1, 2009, Response to Comments IV, for the last 19 years NPDES storm water permits for Southern Orange County have required Copermitees to prohibit non-storm water discharges. Thus, the commenter is incorrect in stating this is a new requirement. The requirements complained of do not exceed federal law and the Regional Board is not required to conduct an analysis under Water Code section 13241 or 13000. Nonetheless, the Regional Board has considered all economic information provided.

Comment No.	400	Commenter No.	55	Comment Subject	Legal
Comment	<p>Section C.5. of the Draft Permit requires each co-permittee to "obtain the non-stormwater dry weather numeric limitations" set forth therein, including NELs for bacteria, nitrogen, phosphorus, and others, and including NELs for metals based on the California Toxics Rule ("CTR"). There are also separate NELs for dry weather runoff for the Dana Point Harbor and saline lagoon/estuaries, as well as for discharges to the surf zone.</p> <p>The Draft Permit also establishes various SALs, and provides that the "failure to appropriately consider and react to SAL exceedences in an iterative manner creates a presumption that the co-permittees have not complied with the MEP standard." (Draft Permit, D.1.)</p> <p>In addition, Section I of the Draft Permit entitled "Total Maximum Daily Loads" requires strict compliance with the waste load allocations ("WLAs") set forth in the Baby Beach bacteria TMDL, and also provides that the WLAs "of fully approved and adopted TMDLs are incorporated as Water Quality Based Effluent Limitations on a pollutant by pollutant, watershed by watershed basis." For Baby Beach, the Draft Permit requires that the WLAs "are to be met in Baby Beach receiving waters by the end of the year 2019" and that "the numeric targets are to be met once 100 percent of the WLA reductions have been achieved."</p> <p>Accordingly, the Draft Permit seeks to impose strict numeric effluent limits on both dry weather and wet weather discharges, either in the form of NELs for dry weather discharges, SALs for wet weather discharges, or TMDLs for both. However, as discussed in prior comments and further elaborated on herein, the CW A plainly only imposes a "maximum extent practicable" standard on all discharges "from" a municipalities' separate storm sewer system ("MS4").</p> <p>Because no aspect of the CW A, whether for dry weather or wet weather runoff, requires municipalities to strictly comply with numeric limits, but only requires compliance with the MEP Standard, all aspects of the California Porter-Cologne Act, Water Code section 13000, et seq., must be complied with, including, but not limited to, conducting an analysis of the factors set forth under Water Code section 13241, as well as of the policies and factors in section 13000. Yet, there is no indication anywhere in the record that such a 13241/13000 analysis has ever been conducted for any of the proposed NELs, SALs, or WLAs (from TMDLs), nor are there any findings anywhere in the Draft Permit indicating compliance with Water Code sections 13241 and 13000.</p>				
Response	<p>Please note that the SALs are not "effluent limitations" as defined in 40 CFR 122.2.</p> <p>Please see Regional Board Counsel Memorandum dated November 05, 2009.</p>				

Comment

The Draft Permit also attempts to mandate that the Permittees prohibit the discharge of all dry weather discharges from entering the MS4, by redefining all such discharges as "non-storm water" discharges. Specifically, the Draft Permit deletes from the list of exempted discharges any "Landscape Irrigation," "Irrigation Water," and "Lawn Waters." Deleting these previously exempted categories of discharges from entering the MS4, is an attempt to impose additional requirements upon the Permittees that are not mandated by the CW A, and as such, is an attempt to impose non-federal mandates without the Regional Board having first conducted the analysis required under Water Code sections 13241 and 13000.

As discussed further herein, and in other legal comments being submitted on behalf of the County of Orange, the definition of the term "stormwater" includes "surface runoff" and "drainage," and as such, the discharge of all dry weather runoff including Landscape Irrigation, Irrigation Water and Lawn Waters, cannot properly be classified as "non-stormwater," and, thus should not be categorically prohibited from entering the MS4. Accordingly, section 13241 (b)(3)(B)(ii) of the CW A requiring that Permittees effectively prohibit the discharge of "non-stormwater" into the MS4, has no application to the discharge of non-point source Landscape Irrigation, Irrigation Waters or Lawn Waters. For example, the federal regulations define an "illicit" discharge as a discharge that is not composed entirely of "stormwater" except for discharges allowed pursuant to an NPDES Permit and discharges resulting from fire fighting activities. (40 CFR § 122.26(b)(2).) Because the term "stormwater," as discussed below, plainly includes surface runoff and drainage in addition to precipitation (discussed below), all such Landscape Irrigation, Irrigation Waters and Lawn Waters cannot correctly be classified as an "illicit" discharge, and the CW A plainly does not require that the Permittees prohibit such discharges from entering the MS4. If the CWA did so require, then of course the Regional Board would have included such a prohibition in prior Municipal NPDES Permits.

Response

Please see Regional Board Counsel Memorandum dated November 05, 2009.

Interestingly, the commenter makes the argument that dry weather discharges are not "non-storm water discharges" and are in fact considered storm water. As outlined in the Regional Board Counsel Memorandum dated November 05, 2009, the Regional Board finds this assessment to be incorrect. Furthermore, the Regional Board finds the commenter's arguments to be contradictory, as the comment states:

"the discharge of all dry weather runoff including Landscape Irrigation, Irrigation Water and Lawn Waters, cannot properly be classified as "non-stormwater," and, thus should not be categorically prohibited from entering the MS4."

In previous comments, the commenter claims that all discharges from the MS4 are subject to the MEP standard, including non-storm water discharges. However, the commenter clearly states above that all dry weather runoff into the MS4 cannot be classified as non-storm water as it is storm water. This is contradictory as there would then be no non-storm water discharges, since they are all storm water, and there thus would be nothing required to be prohibited per 402(p) of the CWA. Furthermore, there would then be no non-storm water discharges from the MS4.

Moreover, the federal regulations exempt certain enumerated categories of non-storm water discharges" unless they are identified as sources of pollutants. Deletion of categories identified as sources of pollutants is required by federal law.

Comment No.	402	Commenter No.	55	Comment Subject	Legal
Comment	<p>The LID requirements and the related new SSMP, Retrofitting and Hydromodification requirements are similarly not mandated under the CW A. As such, these provisions can only be imposed after the Regional Board has first complied with the requirements of Water Code sections 13241 and 13000, as well as all other applicable requirements under California law.</p>				
Response	<p>The comment regarding unfunded mandates has been extensively considered in all previous response to comments. The comment does not raise any new issues from the previous comments. The Fact Sheet and Response to comments Nos. 155 and 165 in the July 1, 2009, Response to Comments IV; Comment No. 5 in the July 6, 2007, Response to Comments I; Comment Nos. 1 and 9 in the December 12, 2007, Response to Comments II; Comment No. 1, 2, and 3; in the February 13, 2008 Response to Comments III; all provide discussions of these issues.</p> <p>In summary, the State's water quality protection requirements within the Tentative Order are authorized by Federal Law, and are not unfunded mandates. No changes have been made in response to this comment.</p> <p>The comment regarding the Regional Board's compliance with California Water Code §13263, 13241, and 13000 and the consideration of balancing factors has been extensively considered in previous response to comments. Please see the Fact Sheet; July 6, 2007, Response to Comments I, Response No. 5; December 12, 2007, Response to Comments II, Response Nos. 1 and 9; February 13, 2008, Response to Comments, Response No 3.</p> <p>To the extent economic information was submitted, the Regional Board staff considered economic considerations in developing elements of the Tentative Order, but the Regional Board is not required to conduct a cost-benefit analysis. No changes have been made in response to this comment.</p>				

Comment

As discussed above, in *BIA San Diego County v. State Board*, supra, 124 Cal.App.4th 866, 874, the Court held that under the CWA, Congress distinguished between industrial and storm water discharges and clarified that with respect to municipal storm water discharges, "the EPA has the authority to fashion NPDES Permit requirements to meet storm water quality standards without specific numeric effluent limits" Accordingly, any attempt to proceed at this time and impose a permit term that requires strict compliance with any numeric limit, is a requirement that clearly goes beyond what is mandated under federal law.

In addition, clearly federal law does not require that municipalities prohibit the discharge of "Landscape Irrigation," "Irrigation Waters" or "Lawn Waters" from entering the MS4 or from treating all dry weather discharge as non-stormwater. If this were, in fact, a requirement under the CW A, such a prohibition would have been included in prior Municipal NPDES permits issued by the Regional Board. Because the definition of "stormwater," "surface runoff" and "drainage," in addition to "storm water" runoff and "snow melt," as discussed below, includes all landscape runoff and other dry weather runoff, it cannot properly be defined as "nonstormwater" under the CWA.

Furthermore, there is nothing in the CW A or the federal regulations, or otherwise, that would suggest that such discharges are to be classified as "illicit" discharges, or to otherwise be prohibited from entering the MS4. The fact that these discharges were previously consistently permitted in prior Municipal NPDES Permits issued by this Regional Board, is confirmation of the fact that the CWA does not require such a prohibition of these types of discharges from entering the MS4. Accordingly, any attempt at this time to force the Permittees to prohibit the discharge of all dry weather runoff, including but not limited to, Landscape Irrigation, Irrigation Waters or Lawn Waters, from entering the MS4, is a new requirement that goes beyond the requirements of the CW A, and is thus a new requirement that can only be imposed after the Regional Board has first complied with all aspects of the Porter-Cologne Act, specifically including, but not limited to, Water Code sections 13241 and 13000.

In addition, the new LID and related new SSMP, Retrofitting and Hydromodification requirements in the Draft Permit, are all provisions that are not required under any provision of the CW A or the regulations thereunder. As such, compliance with Water Code sections 13000 and 13241 is necessary before any such new permit terms can be imposed upon the Permittees.

Under the California Supreme Court's holding in *City of Burbank v. State Water Resources Control Board* (2005) 35 Ca1.4th 613, a regional board must consider the factors set forth in Water Code sections 13000 and 13241 when adopting an NPDES Permit, unless consideration of those factors "would justify including restrictions that do not comply with federal law." (Id.. at 627.) According to the Supreme Court in Burbank, "Section 13263 directs Regional Boards, when issuing waste discharger requirements, to take into account various factors including those set forth in Section 13241."

In Burbank, the California Supreme Court held that to the extent the NPDES Permit provisions in that case were not compelled by federal law, that the Boards were required to consider their "economic" impacts on the dischargers themselves, with the Court finding that the Water Boards must analyze the "dischargers cost of compliance." (Id .. at 618.) The Court specifically interpreted the need to consider "economics" as requiring the consideration of the "cost of compliance" on the cities involved in that case. (Id .. at 625 ["The plain language of Sections 13263 and 13241 indicates the Legislature's intent in 1969, when these statutes were enacted, that a regional board consider the costs of compliance when setting effluent limitations in a waste water discharge permit."].) And according to the California Supreme Court, the goal of the Porter-Cologne Act is to "attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible." (Id. at 618, citing Water Code § 13000.)

Accordingly, under the Burbank decision, Section 13241 compels the Boards to consider the following factors when developing NPDES Permit terms.

- (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 in the region.
- (f) The need to develop and use recycled water.

In *US. v. State Board* (1986) 182 Cal.App.3d 82, the State Board issued revised water quality standards for salinity control because of changed circumstances which revealed new information about the adverse affects of salinity on the Sacramento-San Joaquin Delta ("Delta"). (Id.. at 115.) In invalidating the revised standards, the Court recognized the importance of complying with the policies and factors set forth under both Water Code sections 13000 and

13241, and emphasized section 13241 's requirement of an analysis of "economics," finding:

In formulating a water quality control plan, the Board is invested with wide authority "to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible." (§ 13000.) In fulfilling its statutory imperative, the Board is required to "establish such water quality objectives ... as in its judgment will ensure the reasonable protection of beneficial uses ... " (§ 13241), a conceptual classification far-reaching in scope. (Id .. at 109-110, emphasis added.)

* * *

The Board's obligation is to attain the highest reasonable water quality "considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible." (§ 13000, italics added.) (Id. at 116.)

Justice Brown in her concurring opinion in Burbank also made several significant comments regarding the importance of considering "economics" in particular, and the Water Code section 13241 factors in general, before including numeric effluent limitations in an NPDES Permit. These comments are equally relevant today to the Regional Board's Draft Order:

Applying this federal-state statutory scheme, it appears that throughout this entire process, the Cities of Burbank and Los Angeles (Cities) were unable to have economic factors considered because the Los Angeles Regional Water Quality Control Board (Board) - the body responsible to enforce the statutory framework -failed to comply with its statutory mandate.

For example, as the trial court found, the Board did not consider costs of compliance when it initially established its basin plan, and hence the water quality standards. The Board thus failed to abide by the statutory requirements set forth in Water Code section 13241 in establishing its basin plan. Moreover, the Cities claim that the initial narrative standards were so vague as to make a serious economic analysis impracticable. Because the Board does not allow the Cities to raise their economic factors in the permit approval stage, they are effectively precluded from doing so. As a result, the Board appears to be playing a game of "gotcha" by allowing the Cities to raise economic considerations when it is not practical, but precluding them when they have the ability to do so. (Id. at 632, J. Brown, concurring; emphasis added.)

Justice Brown went on to find that:

Accordingly, the Board has failed its duty to allow public discussion - including economic considerations - at the required intervals when making its determination of proper water quality standards.

What is unclear is why this process should be viewed as a contest. State and local agencies are presumably on the same side. The costs will be paid by taxpayers and the Board should have as much interest as any other agency in fiscally responsible environmental solutions. (Id. at 632-33.)

The above-referenced statutory, regulatory and case authority all confirm not only that municipal dischargers are to be treated differently than industrial dischargers, but also that "numeric limits" may only be applied to municipal dischargers after the analysis under Sections 13241/13000 have been complied with. They also confirm that "[i]t is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs and in particular urban dischargers." (Numeric Limits Panel Report, p. 8.) Accordingly, strict compliance with any numeric limits in a municipal NPDES Permit cannot be required at this time, and to the extent a numeric limit is attempted to be incorporated into the Draft Permit and strictly enforced as such through a means other than through the use of MEP-complaint BMPs, then all applicable requirements of State law, specifically including the analysis required under Water Code sections 13241/13000, must be plainly met.

Moreover, the new proposed requirements in the Draft Permit mandating that the Permittees prohibit the discharge of "Landscape Irrigation," "Irrigation Waters" or "Lawn Waters," from entering the MS4, are not requirements found anywhere in the CWA, and are thus new permit requirements that can only be imposed after the Regional Board has first complied with the requirements of Water Code sections 13241 and 13000.

Finally, as none of the LID, SSMP, Retrofitting and Hydromodification requirements are requirements that are mandated under federal law, the above-referenced provisions of Water Code sections 13241 and 13000 must be met before any such permit terms can lawfully be imposed under California law.

Response Please see Regional Board Counsel Memorandum dated November 05, 2009.

The comment regarding the prohibition on overirrigation practices was addressed in the previous response to comments. The comment does not raise any new issues from the previous comments. Please see the discussion

in the Fact Sheet for findings C.14 and C.15; and the July 1, 2009, Response to Comments IV, Response Nos. 28, 52, 76, and 159. Please also see comments Nos. 84, and 264 in this Response to Comments. No changes have been made in response to this comment. In summary, over irrigation is a non-storm water discharge required by federal regulations to be prohibited where identified to be a source of pollutants.

The comment regarding unfunded mandates has been extensively considered in all previous response to comments. The comment does not raise any new issues from the previous comments. The Fact Sheet and Response to comments Nos. 155 and 165 in the July 1, 2009, Response to Comments IV; Comment No. 5 in the July 6, 2007, Response to Comments I; Comment Nos. 1 and 9 in the December 12, 2007, Response to Comments II; Comment No. 1, 2, and 3; in the February 13, 2008 Response to Comments III; all provide discussions of these issues. In summary, the State's water quality protection requirements within the Tentative Order are authorized by Federal Law, and are not unfunded mandates. No changes have been made in response to this comment.

The comment regarding the Regional Board's compliance with California Water Code §13263, 13241, and 13000 and the consideration of balancing factors has been extensively considered in previous response to comments. Please see the Fact Sheet; July 6, 2007, Response To Comments I, Response No. 5; December 12, 2007, Response To Comments II, Response Nos. 1 and 9; February 13, 2008, Response to Comments, Response No 3.

To the extent economic information was submitted, the Regional Board staff considered economic considerations in developing elements of the Tentative Order, but the Regional Board is not required to conduct a cost-benefit analysis. No changes have been made in response to this comment.

Comment

The Draft Permit improperly provides that: "Non-storm water (dry weather) discharge from the MS4 is not considered a storm water (wet weather) discharge and therefore is not subject to regulation under the Maximum Extent Practicable (MEP) standard from CW A 402(p)(3)(B)(iii), which is explicitly for 'municipal ... Stormwater Discharges (emphasis added)' from the MS4 Non-storm water discharges per CWA 402(p)(3)(B)(ii), are to be effectively prohibited." (Draft Permit, Finding C.14.) The Draft Order then proceeds to not only require that the co-permittees prohibit all "non-storm water" discharges into the MS4, including prohibiting any dry weather runoff from entering the MS4 unless otherwise expressly permitted under the Permit, but also to impose strict numeric effluent limitations, i. e., NELs upon all such dry weather discharges.

Yet, the assertion that "dry weather" is something other than "storm water" is inaccurate and is directly controverted by the very regulations cited in the Draft Order. In addition, this purported finding that the term "storm water" does not include "dry weather," i.e., "urban runoff," was already been rejected by the Orange County Superior Court in that case entitled *City of Arcadia v. State Board, OCSC Case No. 06CC02974, Fourth Appellate District Case No. G041545* (hereafter the "Arcadia Case"). This fact that the definition of "stormwater" includes "urban runoff," was also recently admitted to by the State Board and the Los Angeles Regional Board in the Arcadia Case, as well as by the NRDC, the Santa Monica Baykeeper and Heal the Bay. As such, any attempt to redefine the term "stormwater" to exclude "dry weather," is contrary to law and should be rejected.

First, it is clear from the plain language of the regulations that the term "Stormwater" includes all forms of "urban runoff" in addition to precipitation events. Specifically, section 122.26(b)(13) reads as follows: "Storm water means storm water runoff, snow melt runoff, and surface runoff and drainage." (40 C.F.R. § 122.26(b)(13); italics in original, bolding and underlining added.) This definition starts with the inclusion of "storm water" and "snow melt runoff," and is then further expanded to include not only "storm water" and "snow melt runoff," but also "surface runoff" and "drainage."

The Regional Board's proposed interpretation of this definition is an attempt to read the terms "surface runoff" and "drainage" out of the regulations. Such an interpretation is contrary to the plain language of the regulation itself, and is contrary to law. (See e.g., *Astoria Federal Savings and Loan Ass'n v. Solimino* (1991) 501 U.S. 104, 112 ["[W]e construe statutes, where possible, so as to avoid rendering superfluous any parts thereof."]; *City of San Jose v. Superior Court* (1993) 5 Cal.4th 47, 55 ["We ordinarily reject interpretations that render particular terms of a statute as mere surplusage, instead giving every word some significance."]; *Ferraro v. Chadwick* (1990) 221 Cal.App.3d 86, 92 ["In construing the words of a statute ... an interpretation which would render terms surplusage should be avoided, and every word should be given some significance, leaving no part useless or devoid of meaning. "]; *Brewer v. Palel* (1993) 20 Cal.App.4th 1017, 1022 ["We are required to avoid an interpretation which renders any language of the regulation mere surplusage."; and *Hart v. ,McLucas* (9th Cir. 1979) 535 F.2d 516, 519 ["[I]n the construction of administrative regulations, as well as statutes, it is presumed that every phrase serves a legitimate purpose and, therefore, constructions which render regulatory provisions superfluous are to be avoided. '])

Second, beyond the plain language of the federal regulation, prior orders of the State Board confirm that the term "urban runoff" is included within the definition of "storm water." For example, in State Board Order No. 2001-15, the State Board regularly interchanges the terms "urban runoff" with "storm water," and discusses the "controls" to be imposed under the Clean Water Act as applying equally to both. In discussing the propriety of requiring strict compliance with water quality standards, and the applicability of the MEP standard in Order No. 2001-15, the State Board asserted as follows:

Urban runoff is causing and contributing to impacts on receiving waters throughout the state and impairing their beneficial uses. In order to protect beneficial uses and to achieve compliance with water quality objectives in our streams, rivers, lakes, and the ocean, we must look to controls on urban runoff. It is not enough simply to apply the technology-based standards of controlling discharges of pollutants to the MEP; where urban runoff is causing or contributing to exceedances of water quality standards, it is appropriate to require improvements to BMPs that address those exceedances.

While we will continue to address water quality standards in municipal storm water permits, we also continue to believe that the iterative approach, which focuses on timely improvements of BMPs, is appropriate. We will generally not require "strict compliance" with water quality standards through numeric effluent limits and we will continue to follow a iterative approach, which seeks compliance over time. The iterative approach is protective of water quality, but at the same time considers the difficulties of achieving full compliance through BMPs that must be enforced through large and medium municipal storm sewer systems. (See Order 2001-15, p. 7-8; emphasis added.)

Moreover, at the urging of the petitioner in Order No. 2001-15, the State Board went so far as to modify the "Discharge Prohibition A.2" language, which was challenged by the Building Industry Association of San Diego County ("BIA"), because such Discharge Prohibition was not subject to the iterative process. The State Board found as follows in this regard: "The difficulty with this language, however, is that it is not modified by the iterative process. To clarify that this prohibition also must be complied with through the iterative process, Receiving Water Limitation C.2 must state that it is also applicable to Discharge Prohibition A.2 Language clarifying that the iterative approach applies to that prohibition is also necessary." (State Board Order No. 2001-15, p. 9.)

The State Board further required that the Municipal NPDES permit challenged in that case be modified because the permit language was overly broad, as it sought to apply the MEP standard not only to discharges "from" MS4s, but also to discharges "into" MS4s, with the BIA claiming that it was inappropriate to require the treatment and control of discharges "prior to entry into the MS4," and with the State Board agreeing that such a regulation of discharges "into" the MS4 was inappropriate. [Id at 9 ["We find that the permit language is overly broad because it applies the MEP standard not only to discharges 'from' MS4s, but also to discharges 'into' MS4s."].)

In State Board Order No. 91-04 discussed above, the State Board specifically relied upon EPA's Stormwater Regulations, to find that: "Storm water discharges, by ultimately flowing through a point source to receiving waters, are by nature more akin to non-point sources as they flow from diffuse sources over land surfaces." (State Board Order No. 91-04, p. 13-14.) The State Board then relied upon EPA's Preamble to said Stormwater Regulations, and quoted the following from the Regulation:

For the purpose of [national assessments of water quality], urban runoff was considered to be a diffuse source for non-point source pollution. From a legal standpoint, however, most urban runoff is discharged through conveyances such as separate storm sewers or other conveyances which are point sources under the [Clean Water Act]. 55 Fed.Reg. 47991. (State Board Order No. 91-04, p. 14; emphasis added.)

The State Board went on to conclude that the lack of any numeric objectives or numeric effluent limits in the challenged permit: "will not in any way diminish the permit's enforceability or its ability to reduce pollutants in storm water discharges substantially In addition, the (Basin] Plan endorses the application of 'best management practices' rather than numeric limitations as a means of reducing the level of pollutants in storm water discharges." (Id at 14, emphasis added.) (Also see Storm Water Quality Panel Recommendations to the California State Water Resources Control Board - The Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial and Construction Activities, June 19, 2008, p. 1 ["MS4 permits require that the discharge of pollutants be reduced to the maximum extent practicable (MEP)"], and p. 8 ["It is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs and in particular urban dischargers."]; State Board Order No. 98-01, p. 12 ["Storm water permits must achieve compliance with water quality standards, but they may do so by requiring implementation of BMPs in lieu of numeric water quality-based effluent limits."]; and State Board Order No. 2001-11, p. 3 ["In prior Orders this Board has explained the need for the municipal storm water programs and the emphasis on BMPs in lieu of numeric effluent limitations."].)

Third, in the Arcadia Case, in its Decision, Judgment and Writ of Mandate, the Superior Court found that the term "stormwater" was defined in the federal regulations to include not only "stormwater" but also "urban runoff." (See, Decision, Exhibit "1" hereto, p. 1 ["... the Standards apply to storm water [i.e., storm water and urban runoff]."]; Exhibit "2," Judgment in the Arcadia Case, p. 2, fn 2, [citing to 40 C.F.R. § 122.26(b)(13) and finding that: "Federal law defines 'storm water' to include urban runoff, i.e., 'surface runoff and drainage'."]; and Exhibit "3," Writ of Mandate in the Arcadia Case, p. 2, n. 2 ["Federal law defines 'storm water' to include urban runoff, i.e., 'surface runoff and drainage.'"].)

It is further important to note that this interpretation of the term "storm water" as including "urban runoff," by the Superior Court in the Arcadia Case, has not been challenged on appeal by the State or Los Angeles Regional Boards, and in fact, has been agreed to by both of these Boards, as well as by the Intervenor environmental organizations. Specifically, in the State and Regional Boards' Opening Appellate Brief in the Arcadia Case, they agreed that the term "Stormwater" is to include "urban runoff," where they stated as follows:

"Storm water," when discharged from a conveyance or pipe (such as a sewer system) is a "point source" discharge, but stormwater emanates from diffuse sources, including surface run-off following rain events (hence "storm water") and urban run-off. (See Exhibit "4" hereto, which is a true and correct copy of the cited portion from the Boards' Opening Appellate Brief in the Arcadia Case; emphasis added.)

Thus, both the State and the Los Angeles Regional Boards have acknowledged that the term "stormwater" includes not only "stormwater" runoff from "rain events," but also other discharges from a storm sewer conveyance system, specifically including "urban runoff." (Id.)

This definition of the term "Stormwater" as including "urban runoff," has also been accepted by the NRDC, the Santa Monica Baykeeper, and Heal the Bay (collectively, "Intervenors"). In the Intervenor's Opening Brief in the Arcadia Case, said Intervenors admit as follows:

For ease of reference, throughout this brief, the terms "urban runoff" and "stormwater" are used interchangeably to refer generally to the discharges from the municipal Dischargers' storm sewer systems. The definition of "stormwater" includes "storm water runoff, snow melt runoff, and surface runoff and drainage." (40 C.F.R. § 122.26(b)(13).) (See Exhibit "5," hereto, which is a true and correct copy of the cited portion of the Intervenors' Opening Appellate Brief in the Arcadia Case; emphasis added.)

In sum, in light of the plain language of the federal regulation defining the term "stormwater" to include "urban runoff," i.e., "surface runoff" and "drainage" in addition to "storm water" and "snow melt," and given the findings of the Superior Court in the Arcadia Case, as well as the admissions by the State and Regional Boards and the Intervenors in that case, it is clear that the term "stormwater" as defined in the federal regulations, includes "dry weather" runoff.

In short, the definition of "stormwater" plainly includes dry-weather runoff, i.e., "surface runoff and drainage," and as such, there is no basis to treat "dry-weather runoff" any differently under the CWA, e.g., to apply numeric effluent limits rather than the MEP Standard to dry weather runoff, or to require that municipalities prohibit all non-point source "Landscape Irrigation," "Irrigation Waters," "Lawn Waters," and other similar discharges, from entering the MS4.

Response

Please see Regional Board Counsel Memorandum dated November 05, 2009, for discussion of the definition of and authority to regulate non-storm water discharges from MS4s. In addition, the commenter refers to the ruling in the Cities of Arcadia, et al., v. State Water Resources Control Board (Super. Ct. Orange County, 2007, No. 06CC02974) (Arcadia II) to support its interpretation that storm water under federal law includes all urban runoff. Further, the commenter claims that this interpretation has been agreed to by both the State and Los Angeles Regional Water Boards. The commenter fails to note that Arcadia II only considered the definition of storm water and urban runoff in the context of precipitation related surface runoff and drainage. The issues before the court did not include "non-storm water" discharges. Thus, the commenter's references are taken out of context and do not support any change in the Regional Board's interpretation of the definition of storm water as related to precipitation events.

Comment No.	405	Commenter No.	55	Comment Subject	unfunded mandate
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Comment

Any requirements that goes beyond what is otherwise required under federal law, e.g., forcing the municipalities to strictly comply with numeric limits, as opposed to requiring compliance through the use of MEP-complaint BMPs, and any other accompanying mandates that go beyond the requirements of federal law, such as requiring municipalities to prohibit the discharge of Landscape Irrigation or other similar dry weather runoff from entering the MS4, or the new LID, SSMP, Retrofitting, and Hydromodification and related requirements, can only be imposed where adequate funds have first been provided to the municipalities to comply with such mandates. For example, Section F.3 of the Permit seeks to force the Permittees to "develop and implement a retrofitting program." Yet, this new mandated "restoration program" the Regional Board is attempting to force the Permittees to carry out, is not being funded by the State. Rather, the Draft Permit leaves it to the Municipal Permittees to fund this and many other new "programs" imposed by the Draft Permit."

Article XIII B, Section 6 of the California Constitution prohibits the Legislature or any State agency from shifting the financial responsibility of carrying out governmental functions to local governmental entities. Article XIII B, Section 6 provides, in relevant part, as follows:

Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local governments for the cost of such program or increased level of service

This reimbursement requirement provides permanent protection for taxpayers from excessive taxation and requires discipline in tax spending at both state and local levels. (County of Fresno v. State (1991) 53 Cal.3d 482, 487.) Enacted as a part of Proposition 4 in 1979, it "was intended to preclude the state/rom shifting financial responsibility to local entities that were ill equipped to handle the task." (Id.)

Accordingly, because the Regional Board is proposing to require strict compliance with numeric limits, a requirement that exceeds the MEP Standard set forth in federal law; is requiring municipalities to prohibit dry weather runoff including irrigation waters from entering their storm drain system, another requirement not found in the CWA; and is imposing new LID, SSMP, Retrofitting and Hydromodification requirements, none of which are required under the CW A; all such requirements are plainly new unfunded State mandates which may only be imposed where necessary funding has first been made available to the Permittees.

The incorporation of new permit requirements that are not mandated by federal law, and that go unfunded by the State, plainly violate Article XIII B, Section 6 of the California Constitution. (See County of Los Angeles v. Commission on State Mandates (2007) 150 Cal.App.4th 898, 914 ["We are not convinced that the obligations imposed by a permit issued by a Regional Water Board necessarily constitute federal mandates under all circumstances."].)

Response

The comment regarding unfunded mandates has been extensively considered in all previous response to comments. The comment does not raise any new issues from the previous comments.

The Fact Sheet and Response to comments Nos. 155 and 165 in the July 1, 2009, Response to Comments IV; Comment No. 5 in the July 6, 2007, Response to Comments I; Comment Nos. 1 and 9 in the December 12, 2007, Response to Comments II; Comment No. 1, 2, and 3; in the February 13, 2008 Response to Comments III; all provide discussions of these issues.

In summary, the State's water quality protection requirements within the Tentative Order are authorized by Federal Law, and are not unfunded mandates. No changes have been made in response to this comment.

Comment

Under Section C. of the Draft Permit imposing numeric effluent limitations for dry weather runoff, the municipalities are required to implement certain monitoring programs to assure compliance with the NELs. Also, under Section D. of the Draft Permit involving the SALs, again the Regional Board is proposing to impose various monitoring obligations on the municipalities as a means of requiring compliance with such SALs. Other portions of the Draft Permit, some of which were discussed in prior comments, similarly seek to impose monitoring and reporting obligations upon the permittees. Yet, under the Porter-Cologne Act, no monitoring and/or reporting requirements may be imposed upon local agencies, without the Boards first conducting a "cost benefit" analysis. To begin with, Water Code section 13225(c) provides as follows:

Each Regional Board, with respect to its region, shall, do all of the following:

(c) Require as necessary any state or local government to investigate and report on any technical factors involved in water quality control or to obtain and submit analyses of water; provided that the burden, including costs, of such reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained therefrom. (Water Code § 13225(c).)

Similarly, Water Code Section 13267(b) provides, in relevant part, as follows:

* * *

(b)(1). In conducting an investigation specified in subdivision (a), the regional board may require that any person who has discharged

... or who proposes to discharge, waste within its region ... shall furnish, under penalty of perjury, technical or monitoring program reports which the regional board requires. The burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports. In requiring those reports, the regional board shall provide the person with a written explanation with regard to the need for the reports, and shall identify the evidence that supports requiring that person to provide the reports. (Water Code § 13267(b).)

With the Draft Permit, although the Porter-Cologne Act expressly requires the Regional Board in this context to conduct a cost benefit analysis, and specifically requires that the Regional Board provide the Permittees with a "written explanation with regard to the need for the reports" and "identify the evidence that supports requiring the person to provide the reports," there are no purported findings anywhere in the Draft Permit showing that any such cost benefit analysis was conducted, or any finding that the burden, including costs, of such monitoring and reporting obligations bear a "reasonable relationship" to the need for the same.

In addition, there is no evidence that has been identified anywhere in the record, either in the findings or otherwise, to show that any such cost benefit analysis, as required under Water Code Sections 13267 and 13225, has ever been performed. Accordingly, no monitoring or reporting obligations associated with any NEL, SAL, or TMDL can be imposed upon the municipalities through the Draft Permit, until the requirements of Water Code sections 13225 and 13267 have first been met.

Response

Please note that an exceedance of a SAL does not mean a discharger is out of compliance. A SAL exceedance is required to be utilized in the iterative process.

In addition, monitoring and reporting requirements in an NPDES permit are authorized by Water Code section 13383, and a Finding has been added to the Tentative Order for clarification. Water Code section 13383 does not include a requirement that the Regional Board provide an explanation in writing of the need for the report or to identify evidence that supports requiring the reports. Water Code section 13267 does not require a cost-benefit analysis, but rather, the burden, including costs, must "bear a reasonable relationship to the need for the report and benefits to be obtained from the reports." The findings in the Order supporting the inclusion of NELs for non-storm water discharges, inclusion of SALs, and implementation of the EPA approved TMDL establish the basis (both the reason for and evidence to support) for requiring the reports based upon monitoring. Monitoring is necessary to determine compliance with the permit provisions intended to achieve compliance with water quality standards and protection of beneficial uses in the affected receiving waters. In addition, exceedances of both NELs and SALs, for example, require the permittees to take additional steps to determine the causes of the exceedances and/or steps that will result in better protection of water quality. Absent monitoring, some of the additional steps will not be required. The requirements are consistent with requirements at comparable sites in the San Diego Region. Please see Section T of the Fact Sheet / Technical Report for Order No. R9-2009-0002 for further discussion of monitoring and reporting.

Comment

The LID provisions in the Draft Permit, along with the accompanying new SSMPs requirements and the Retrofitting and new Hydromodification requirements for development and redevelopment within the jurisdictional boundaries of the various municipalities, are all provisions that conflict with the requirements of the California Environmental Quality Act ("CEQ A"). As such these provisions are contrary to law and cannot appropriately be included in the subject NPDES Permit. For example, the LID provisions require the municipalities to "require each Priority Development Project to implement LID BMPs which will collectively minimize directly connected impervious areas, limit loss of existing infiltration capacity, and protect areas that provide important water quality benefits necessary to maintain riparian and aquatic biota, and/or are particularly susceptible to erosion and sediment loss." (Draft Permit, F.1.d.(4).)

The Draft Permit goes on to require that LID BMPs be implemented unless the subject city makes a "finding of infeasibility for each Priority Development Project," and further requires that the municipality "incorporate formalized consideration, such as thorough checklists, ... into the plan review process for Priority Development Projects." (Draft Permit, F.1.d.(4)(a)(i) & (ii).) The Draft Permit also requires that LID BMPs be implemented at all such priority Development Projects "where technically feasible," and provides that if onsite retention LID BMPs are "technically infeasible that LID bio-filtration BMPs may be utilized." (Draft Permit, F.1.d.(4)(b) & (d).) Further "source control BMPs" are required to be implemented which must include BMPs to "eliminate irrigation runoff." (Draft Permit, F.1.d.(5)(c).)

The Draft Permit also includes a BMP waiver program allowing Priority Development Projects to substitute the implementation of LID BMPs in certain instances, with the implementation of treatment control BMPs and payment into an in lieu funding program and/or watershed equivalent BMPs. The waiver program requires, at a minimum, the net impact of Priority Development Projects from pollutant loadings to be above and beyond the impact caused by projects meeting the LID requirements, after considering "mitigation and in lieu payments." It further requires a cost benefit analysis to be developed as a part of the criteria for the technical feasibility analysis, along with various other mitigation measures for pollutant loads expected to be discharged as a result of not implementing LID BMPs. (Draft Permit, F.1.d.(7).) The LID waiver program goes so far as to allow for a "pollutant credit system," and requires a number of other conditions as a part of the waiver process. (Id) Section F.3.d of the Draft Permit requires the Permittees to "develop and implement a retrofitting program" with the goal of reducing "hydromodification," promoting "LID," and supporting "riparian and aquatic habitat restorations," among other purposes. Beyond these requirements, there are several provisions within the Draft Permit that go so far as to prevent "occupancy and/or the intended use of any portion" of the project, where the various LID and SSMP requirements are not being met. (See Draft Permit, F.1.d.(9).)

It is apparent from these Draft Permit terms that they are all designed to address potential adverse impacts on water quality or riparian or aquatic habitat etc., which may occur from the proposed development project in issue. Such an analysis, however, is already required to be conducted by municipalities under the requirements of California Environmental Quality Act ("CEQA" Public Resources Code Sections 21000 et. seq.). In fact, CEQA imposes numerous specific requirements on municipalities when considering development projects within their respective jurisdictions, and particularly requires that the municipalities consider and mitigate potentially significant adverse environmental impacts that may be expected from the project, specifically including impacts that may be expected on water quality.

CEQA is a comprehensive statute that requires governments to analyze projects to determine whether or not they may have significant adverse environmental impacts. If such significant adverse impacts are determined to be present by the lead governmental agency, then under CEQA, these impacts must be disclosed and reduced or mitigated to the extent feasible. CEQA expressly provides local entities the discretion to analyze and approve projects that are deemed appropriate for the local community, following the environmental analysis directed by the Statute, including an analysis of the impacts of the project on water quality. One example of this discretion is the ability of municipalities to adopt a Statement of Overriding Considerations if the public agency finds that "specific overriding economic, legal, social, technological, or other benefits of the project outweigh the significant effects on the environment." (Public Resources Code [PRC] Section 21081)

By removing the City's discretion under CEQA to approve local developments, the Permit is in conflict with existing State law. For example, the Draft Permit directly conflicts with CEQA by unlawfully attempting to direct how a local governmental agency is to approve a project. Under Public Resources Code Section 21 081.6(c), a responsible agency such as the Regional Board cannot direct how a lead agency - such as a Permittee - is to comply with CEQA's terms:

Any mitigation measures submitted to a lead agency by a responsible agency or an agency having jurisdiction over natural resources affected by the project shall be limited to measures which mitigate impacts to resources which are subject to the statutory authority of an definitions applicable to, that agency. Compliance or non-compliance by a

responsible agency or agency having jurisdiction over natural resources affected by a project with that requirement shall not limit ... the authority of the lead agency to approve, condition, or deny projects as provided by this division or any other provision of law. (Pub. Res. Code § 21081.6(e); emphasis added.)

In direct conflict with the terms of CEQA, the Regional Board, through the Draft Permit, unlawfully seeks to impose Permit terms that plainly seek to "limit the authority of the lead agency to approve, condition, or deny projects."

PRC Section 21081.1 also states that the lead agency's determination "shall be final and conclusive on all persons, including responsible agencies, unless challenged as provided in Section 21167." It similarly states that the lead agency "shall be responsible for determining whether an environmental impact report, a negative declaration, or mitigated negative declaration shall be required for any project which is subject to this division." (PRC Section 21080.1 (a).)

Further, no additional procedural or substantive requirements beyond those expressly set forth in CEQA may be imposed upon a local agency's CEQA review process:

It is the intent of the Legislature that courts, consistent with generally accepted rules of statutory interpretation, shall not interpret this division or the state guidelines adopted pursuant to Section 21083 in a manner which imposes procedural or substantive requirements beyond those explicitly stated in this division or in the state guidelines. (PRC § 21083.1.)

PRC section 21001 provides that local agencies "should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects." (PRC § 21001.) However, the conclusion in the Draft Permit appears to be that all runoff from a wide class of new development and redevelopment projects will result in significant adverse impacts on the environment, and that such impacts must be mitigated by those particular mitigation measures as mandated in the Draft Permit. Thus, the Draft Permit dictates the environmental review, without regard for CEQA's provisions, and eliminates a local governmental agency's discretion to consider and approve feasible alternatives or mitigation measures - even if alternative measures might have a lesser effect on the environment.

In addition, PRC section 21002 provides that, "the Legislature further finds and declares that in the event specific economic, social, or other conditions make infeasible such project alternatives or such mitigation measures, individual projects may be approved in spite of one or more significant effects thereof." PRC section 21081(b) then establishes a mechanism for local agencies to approve projects with unmitigated adverse impacts, if they adopt a Statement of Overriding Considerations. The Draft Permit's design standard requirements would eliminate a municipality's discretion to approve a project without the design standards being met, even if a municipality adopts a Statement of Overriding Considerations.

Under the Draft Permit, therefore, environmentally preferable alternatives and/or mitigation measures that would otherwise be required pursuant to CEQA, could not be pursued and required because of the arbitrary requirements set forth in the Draft Permit. The Draft Permit must be revised so as to avoid conflict with State law, and the referenced provisions in issue should be deleted.

Response Please see Comment no. 163 in the July 1, 2009, Response to Comments IV.

Comment

I am a homeowner in [insert name of community association] (Association) and [insert name of city](City). Although the Tentative Order applies directly to the County of Orange as Principal Permittee and the many south Orange County city Co-Permittees, I will be impacted as I will be required to pay for the cost of implementing measures to assure that the permittees remain in compliance. It is from this perspective that these comments are offered in response to the Tentative Order, No. R-2009-2002 NPDES No. CASO 108740.

1. Adoption of the Tentative Order will require my Association to incur added costs which may result in higher assessments charged to homeowners and trigger a chain-reaction of events that will have devastating consequences to the Association, our homeowners and the City as a whole.

Our community is reeling from the consequences of the current state of the economy, and an ever increasing number of the owners and members of my Association are facing financial collapse and the loss of their homes. Under the terms of the Tentative Order, as the City implements and enforces the mandatory requirements, the Association will be subject to fines and penalties and other administrative actions. In order to respond to these new mandates and to avoid penalties and fines, my Association will be required to implement new administrative procedures and make capital improvements and renovations to existing infrastructure. My Association will be forced to increase dues and assessments charged to the homeowners to provide for these new services and improvements. I will be required to pay more dues and assessments to my Association and may be required to pay for homeowner improvements to assure that the City remains in compliance. These added costs will pose extraordinary hardship upon me and my neighbors and there is an increasing likelihood that I cannot or will not be able to pay increased assessments or the costs of homeowner improvements. The financial burdens imposed by the Tentative Order could be the tipping point in my financial situation and my Association, leading to catastrophic consequences.

Faced with ever increasing debt obligations, I and my neighbors will be forced to prioritize the debts we pay, and when we pay them, and unfortunately, my situation requires that I consider delaying payment of assessments. I am already financially challenged by the amount of taxes, homeowner maintenance costs, monthly mortgage payments and existing levels of assessments I pay. If my obligations increase I may face expensive legal fees, foreclosure and bankruptcy. I cannot afford to pay all of the costs which may result from the adoption of the Tentative Order and all of the other costs I pay for my daily existence. I do not have the resources to pay fines or penalties imposed by the City or the Board.

If the Tentative Order is adopted, my property values will decline and I will be unable to sell my property for a fair price as buyers will be driven away from purchasing property in my city and my Association, choosing instead to purchase property elsewhere to avoid the threat of penalties and fines levied by the City and the Board and increased assessments charged by the Associations to cover the added costs. Homes will sit empty and fall into disrepair, thus decreasing property values and threatening the safety and welfare of our community associations and the homeowners they serve.

The costs of implementing and enforcing the Tentative Order will trigger a financial maelstrom such that I may have inadequate resources to continue to meet my obligations.

The primary objective the Tentative Order is designed to achieve will be frustrated and delayed by the financial collapse of the organizations and homeowners like me who are most capable of making a positive difference in enhancing water quality. There is no evidence that in crafting the Tentative Order, the negative economic consequences were considered and properly addressed.

The Tentative Order should be revised to address and overcome negative economic consequences of implementation. The Tentative Order should support and compliment, and not detract from, the financial stability of the City, my Association and the homeowners like me that they serve.

Response

The Tentative Order does not require Homeowner Associations to increase their homeowner assessments. The homeowner should address such concerns with their respective Homeowner Association. The Tentative Order ensures homeowner associations are held accountable to the same standard as any other resident within the Copermittee's jurisdiction, as such, the Tentative Order does not require any additional requirements on Homeowner Associations. The Tentative Order promotes water conservation and rainwater harvesting that can produce cost savings in the HOAs water bills. In addition, the Tentative Order promotes the use of Low Impact Development which has been shown to increase home values. More likely, home values and assessments are based on market values and economics where the Tentative Order plays a miniscule part.

Comment

2. Adoption of the Tentative Order will unnecessarily create adversity and barriers to the implementation of successful strategies and will divert resources needed to achieve the ultimate objectives of NPDES frustrating and delaying the implementation of successful programs.

The Tentative Order will require the City to adopt a much more strident enforcement posture. I am fearful that the City will be forced to implement strategies using its police powers, rather than achieving favorable outcomes based upon education, mutual cooperation and alignment of systems and processes based upon alliances with me, my Association and my neighbors. This new direction will drastically alter the climate of mutual cooperation and support homeowners and the Association and the City have worked so hard to achieve. This change will result in unnecessary adversity and controversy which will delay and generate resistance to the process of making real progress in achieving the prime objective of enhancement of water quality.

Equally alarming is the change in relations between me and my Association and my neighbors which will result from the adoption of the Tentative Order. The Association will be required to pass increased costs of compliance through to the homeowners. This will enhance the debt burden imposed upon the owners by my Association, and create unnecessary hardship and tension between the Association and homeowners. Increasing dues and assessments in the current economic environment will create significant controversy, paralysis in the implementation process, and dysfunction within the community. The Association and homeowners will be caught in the cycle of ever increasing legal involvement to assure funding for the added costs which will result from adoption of the Tentative Order.

To survive financially, the Association will be forced to more aggressively pursue foreclosure and other legal remedies against delinquent homeowner members to collect unpaid assessments for these added costs. Those homeowners not in default will be required to pay even more to subsidize the debt of their delinquent neighbors.

Adoption of the Tentative Order will sow the seeds of community unrest, pitting neighbor against neighbor and homeowners against the Association and the City against the Association, homeowners and other community interest groups. Instead of achieving compliance with the requirements of NPDES and the Clean Water Act by creating a strong foundation of mutual support and cooperation, compliance will be imposed upon resisting homeowners and other community stakeholders by pursuing costly legal and administrative enforcement, penalties and fines.

The Tentative Order should be revised to support cooperation among key community stakeholders including the City, community associations, homeowners and other interest groups.

Response

The Copermittees are to continue their programs of citizen outreach and education, as has been used for the past 20 years and resulted in the state of today's water quality. The Copermittees already have the authority to issue citations for violations of their ordinances. The Tentative Order does not significantly change the Copermittees legal authority to enforce their ordinances or their public education program. Therefore, the burden of responsibility lies with the Copermittees for adverse citizen reaction due to a Copermittee using "police powers." The Tentative Order is not requiring a Homeowner Association to treat their residents any differently. The Tentative Order has oversight of HOAs to ensure they are abiding by the same pollution prevention regulations as the general populace. Any financial burden should be addressed directly to your HOA. Residents should be especially mindful that the Tentative Order is not used as a scapegoat to otherwise increase HOA coffers. We fail to see how the Tentative Order, in improving water quality, will sow the seeds of community unrest as the commenter fails to provide any logical reasoning behind the conjecture other than broad platitudes and speculation.

Comment No.	410	Commenter No.	56	Comment Subject	General
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Comment 3. The Tentative Order fails to acknowledge the successful efforts of homeowners to achieve compliance.

In spite of this record of accomplishment, the Tentative Order imposes new requirements without justification. Where is the evidence that the programs already in place in the City are not working?

Instead of encouraging the development of pilot programs and other management practices based upon the successful existing practices, systems and operations already implemented, the Tentative Order without justification and in an almost punitive fashion mandates new procedures and compliance to new standards which will be extremely costly to achieve and which will expose me, the City, my Association and my neighbors to civil liability and other administrative penalties.

The Tentative Order should be revised to support pilot programs before setting new standards. Revisions should be made to support existing programs until those programs are shown to be ineffective. New standards and requirements should not be adopted without justification. New requirements and standards should not be adopted until there is evidence that existing programs and systems implemented by the City, the Association and the homeowners are unsuccessful.

Response The Regional Board finds it difficult to respond directly to this comment, as the comment does not specify what new requirements and standards are being imposed without justification. Furthermore, the Tentative Order does not prevent the development of pilot programs and/or other management practices, and the Regional Board contends that many requirements within the Tentative Order are built upon existing pilot programs and management practices.

While many individual homeowners have likely implemented BMPs to protect water quality standards, the Draft 2008 303(d) Report has identified 33 waterbodies and 75 waterbody pollutant combinations within Southern Orange County that are recommended to be listed as impaired (see response to Comment No. 387).

Please also see response to Comment Nos. 408 and 409.

Comment No.	411	Commenter No.	56	Comment Subject	General
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Comment 4. Unequal Application of the permitting process and treatment under the law is not justified.

The requirements of the Tentative Order dramatically exceed those contained in all Orders adopted by the Board and all other regions of the California Water Quality Control Board and are inconsistent with the draft Order for North Orange County. There is no justification for the different and unequal application of the permitting process or the new draconian requirements included in the Tentative Order which if adopted will result in unfair and unequal treatment of me, the City and my Association. Why should owners living in community associations in North Orange County, San Diego County, or elsewhere in California benefit from demonstrably less restrictive standards and requirements in the Orders adopted for those regions than those imposed upon me and my neighbors living in the community associations within the City which will be subject to the Tentative Order if adopted? I strongly believe that homeowners like me, the City and my Association should not be singled out and forced to bear the cost and penalty of unequal treatment under the law. There is no justification for this unfair and unequal treatment.

The Tentative Order should be revised to be consistent with the Order adopted by the Board for San Diego County and with the draft Order of the California Water Quality Control Board, Santa Ana Region, North Orange County.

Response In regards to consistency between the San Diego and Santa Ana Regional Board, please see Comment no. 24 in the July 1, 2009, Response to Comments IV. Please also see response to Comment 373. The purpose of the NPDES Permit is to protect and maintain Water Quality Standards. The Tentative Order will move South Orange County closer to that goal.

Comment No.	412	Commenter No.	56	Comment Subject	General
Comment	<p>In conclusion, I would like to stress that revisions to the Tentative Order are required to assure fair and equal treatment under the law. Revisions are required to support existing programs which are working. New standards or requirements should not be adopted unless and until it has been shown that existing programs are ineffective. Revisions should be made to encourage use of pilot programs to develop and test new requirements and standards before implementation. Revisions are needed to support and encourage cooperation among community stakeholder groups and the City. The Tentative Order should be revised to address and overcome negative economic consequences of implementation. The Tentative Order should support and compliment, and not detract from, the financial stability of the City, the community associations and the homeowners they serve.</p> <p>I ask that you review the above-mentioned information and consider it when making final revisions to the Order. I look forward to your response and stand willing and ready to answer any questions you may have. Please contact me at [insert name and contact information] should you have any questions.</p>				
Response	<p>Please see response to Comment Nos. 387 and 410. It is also unclear what revisions are required and what existing programs, in the opinion of the commenter, are working.</p> <p>The Regional Board contends that the Tentative Order does encourage cooperation between community stakeholder groups and the Copermittees. For example, the WRMP section requires the Copermittees to have a public participation mechanism within each watershed.</p> <p>To the extent economic information was submitted, the Regional Board staff considered economic considerations in developing elements of the Tentative Order, but the Regional Board is not required to conduct a cost-benefit analysis. Please see the Fact Sheet; July 6, 2007, Response to Comments I, Response No. 5; December 12, 2007, Response to Comments II, Response Nos. 1 and 9; February 13, 2008, Response to Comments, Response No 3.</p> <p>In regards to consistency between the San Diego and Santa Ana Regional Board, please see Comment no. 24 in the July 1, 2009, Response to Comments IV. Please also see response to Comment No. 373.</p>				