



# County of San Diego

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Dear Mr. Chiu:

**COMMENT LETTER – TENTATIVE ORDER NO. R9-2015-0100 PLACE ID:786088WCHIU**

The San Diego Copermittees (Copermittees) appreciate the opportunity to comment on the Regional Water Board's *Tentative Order R9-2015-0100, an Order Amending Order No. R9-2013-0001, NPDES No. CAS010266, as amended by Order No. R9-2015-0001, National Pollutant Discharge Elimination System (NPDES) Permit and Waste Discharge Requirements for Discharges from the Municipal Separate Storm Sewer Systems (MS4) Draining the Watersheds within the San Diego Region (Tentative Order)*. The County of San Diego submits this letter on behalf of the San Diego Copermittees. The Copermittees include the Cities of Carlsbad, Chula Vista, Coronado, Del Mar, El Cajon, Encinitas, Escondido, Imperial Beach, La Mesa, Lemon Grove, National City, Oceanside, Poway, San Diego, San Marcos, Santee, Solana Beach, Vista, the County of San Diego, the San Diego County Regional Airport Authority, and the San Diego Unified Port District.

The Copermittees support water quality improvements in our watersheds through implementation of the MS4 Permit. We request modifications of specified elements of the Tentative Order that we believe will clarify the Permit requirements and facilitate Permit implementation. The comments include the Copermittees' requests for modifications of the Tentative Order, followed by rationale for the requests, and then specific suggested modifications to the language in the Tentative Order. The noted references and page numbers are based on a review of the redline strikeout version of the Tentative Order provided on the Regional Water Board's website<sup>1</sup>.

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<sup>1</sup> [http://www.waterboards.ca.gov/sandiego/water\\_issues/programs/stormwater/docs/2015-0731\\_Tentative\\_Order\\_Attachment%201\\_\(Amended\\_Order\).pdf](http://www.waterboards.ca.gov/sandiego/water_issues/programs/stormwater/docs/2015-0731_Tentative_Order_Attachment%201_(Amended_Order).pdf), accessed on August 24, 2015

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These comments were developed jointly and represent a general consensus among the San Diego Copermittees. Where individual Copermittees have specific concerns relevant to their jurisdictions, these will be expressed in separate written comments provided by individual Copermittees.

**1. Receiving Water Limitations Provision A. Prohibitions and Limitations (page 16/138)**

**Request:** Add sentence to Provision A to clarify its link to Provision B.

**Rationale:** The Prohibitions and Limitations language in Provision A should be aligned with the Water Quality Improvement Planning process described in Provision B. We appreciate the efforts to date to align the two provisions, as Provision B does currently link back to Provision A. However, as currently incorporated into the Tentative Order, the proposed Prohibitions and Limitations provisions may still be interpreted as stand-alone provisions that could subject the Copermittees to state and federal enforcement actions, as well as to third party actions under the federal Clean Water Act's citizen suit provisions. To prevent this from occurring, a clear linkage between the compliance provisions in Provision B and the prohibitions, receiving water limitations, and effluent limitations must be established. Compliance with Provisions A.1, A.2 and A.3 should be linked to Provision B so that it is clear that the compliance mechanism for A.4 is the Water Quality Improvement Plan (Provision B) and/or the TMDL (Attachment E), as applicable.

**Recommendation:** Include streamlined language in Provision A to indicate that compliance can be achieved through implementation of the Water Quality Improvement Plan, specifically through the Alternative Compliance Pathway added as Provision B.3.c. Add a sentence at end of first paragraph:

**Implementation of the Alternative Compliance Option described in Provision B.3.c of this Order shall constitute compliance with the Discharge Prohibitions (A.1.a, A.1.c, A.1.d), Receiving Water Limitations (A.2), and Effluent Limitations (A.3.b) Provisions of this Order.**

**2. Provision B.3.c. Prohibitions and Limitations Compliance Option (page 33/138)**

**Request:** Restructure the annual milestone requirements in the Compliance Option to be more meaningful.

**Rationale:** The Tentative Order was revised to include an option for prohibitions and limitations compliance through the implementation of the Water Quality Improvement Plan, subject to conditions specified in Provision B.3.c.(1) and (2). Provision B.3.c.(1)(a)(vii) that requires at least one annual milestone to be established for each numeric goal. Footnote (9) states: *Annual milestones for each final numeric goal must build upon previous milestones and lead to the achievement of the final numeric goal. The annual milestones may consist of water quality improvement strategy implementation phases, interim numeric goals, and other acceptable metrics.*

The Copermittees appreciate that the Regional Board has included the additional language for compliance through Water Quality Improvement Plan implementation. However, the Copermittees are concerned that the specific requirement for annual milestones will be overly constrictive and burdensome. Each Copermittee would potentially need to establish and track annual milestones for multiple goals within multiple waterbodies in each watershed

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management area, resulting in dozens of annual milestones. Furthermore, it would likely be difficult to establish meaningful milestones for such a high number of goals over each year, especially far into the future. Practically speaking, it is reasonable to identify concrete milestones in Years 1 – 5 of a 30 year effort. More than five years into the future, milestones identified today lose significant meaning and value; milestones would be more meaningful if they were developed adaptively, based on the results of previous efforts.

The Copermittees recognize that milestones would benefit accountability for working towards their goals, but feel that the milestones would be more meaningful if they focus on the priority water quality conditions and were based on the permit cycle (i.e., one milestone per 5 year permit term for each waterbody pollutant combination to be covered under the alternative compliance pathway).

The Copermittees request that the Regional Board consider the following modifications to the language to make the milestone requirement more meaningful.

**Recommendation:** Modify Provision B.3.c.(1)(a)(vii) , footnote 9, B.3.c.(2)(c), and B.3.c.(2)(d) as follows:

**B.3.c.(1)(a) (vii):** For each final numeric goal developed pursuant to Provisions B.3.a and B.3.c.(1)(a)(i)-(v), at least one annual milestone<sup>9</sup> and date for its achievement must be included **for the permit term within each Water Quality Improvement Plan and progress towards attaining the milestone(s) reported upon during each Annual Report reporting period. Further, for each final numeric goal developed pursuant to Provisions B.3.a and B.3.c.(1)(a)(i)-(v), at least one milestone forecasted to be achieved in subsequent permit terms must be included within each Water Quality Improvement Plan. This process will continue** until the final numeric goal is achieved.

**Footnote 9:** Milestones for each final numeric goal must build upon previous milestones and **cumulatively result in** lead to the achievement of the final numeric goal. The annual milestones may consist of water quality improvement strategy implementation phases, interim numeric goals, and other acceptable metrics. **The milestones may also address multiple numeric goals and/or multiple waterbodies, as applicable and appropriate.**

**B.3.c.(2)(c):** The Copermittee's assessments in the Water Quality Improvement Plan Annual Report submitted pursuant to Provision F.3.b.(3) support a conclusion that: 1) the Copermittee is in compliance with the annual **milestones** and dates for achievement developed pursuant to Provision B.3.c.(1)(a)(vii), OR 2) the Copermittee has provided acceptable rationale and recommends appropriate modifications to the interim numeric goals, and/or water quality improvement strategies, and/or schedules to improve the rate of progress toward achieving the final numeric goals developed pursuant to Provisions B.3.a and B.3.c.(1)(a)(i)-(vi); AND

**B.3.c.(2)(d):** Any proposed modifications to the numeric goals, schedules, and/or annual milestones are accepted by the San Diego Water Board as part of subsequent updates to the Water Quality Improvement Plan pursuant to Provision F.2.c; AND

### **3. Provision B.5. Iterative Approach and Adaptive Management Process (page 37/138)**

**Request:** Clarify timing and conditions for watershed model/analysis updates.

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**Rationale:** Provision B.5 requires annual performance of the adaptive management process. As drafted, the new Provision B.3.c language could be interpreted to mean that the watershed model/analysis must be updated annually (B.3.c.(1)(b)(iv)). To add clarity, Provision B.5 should specify that updates to the watershed modeling/analysis are to be performed as determined through the adaptive management process.

**Recommendation:** Add a new Provision B.5.d to clarify that updates to watershed model/analysis are required only if it is determined through the adaptive management process that conditions have changed significantly such that they would alter the results of the previously completed model. As part of the Report of Waste Discharge, the Copermittees would conduct an analysis to determine whether conditions have sufficiently changed to warrant an update to the watershed model/analysis and if so, provide a schedule for conducting the updated analysis.

**B.5.d. Updates to Optional Watershed Analysis [B.3.c.(1)(b)]**  
**Updates to the optional watershed analysis included in Provision B.3.c.(1)(b) are required only if conditions have changed significantly within the watershed or where new information is available that would significantly alter the model results.**

#### **4. Provision F.2.b. BMP Design Manual Updates (Page 126/138)**

**Request:** Allow adequate time for Copermittees to update and implement their BMP Design Manuals.

**Rationale:** The current Order establishes the Effective Date of the BMP Design Manual (and therefore of the requirements of Permit Section E.3.a-d) as December 24, 2015. This date was appropriate at the time of initial Permit adoption because it provided sufficient time for the development of updated content and for the modification of Copermittee programs and regulatory authorities needed for implementation. The Tentative Order would require the Copermittees to update their BMP Design Manuals to incorporate the amended Provisions E.3.a-d within 90 days after the amended Provisions E.3.a-d are adopted by the Regional Board. Given that critical new modifications are now proposed in the Tentative Order, additional time should be provided to allow for their completion and implementation. The first of these are the changes in the definition of redevelopment Priority Development Projects (PDPs) proposed in Section II.E.3.b.(1)(c) through (e). The second is the addition of a modified process for establishing Prior Lawful Approval (PLA) under Section E.3.e.(1). The Copermittees appreciate the work that Regional Board staff put into working with stakeholders and crafting these PLA provisions, and we support their adoption. However, we must also note that the current implementation schedule for implementing updated BMP Design Manual provisions under the Tentative Order severely limits their potential application. In both instances, additional time is requested to: allow Copermittees to ensure regional consistency; modify local BMP Design Manuals; develop updated policies, procedures, and other program documentation; conduct outreach to industry and project proponents; and modify local ordinances.

At a minimum, six months from the adoption of new requirements should be allowed to complete and implement these tasks. However, if these provisions are adopted as proposed at

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<sup>2</sup> Consistent with CASQA recommendations to SWRCB. California Stormwater Quality Association, Letter to Ms. Jeanine Townsend, Clerk to the Board, State Water Resources Control Board, Subject: SWRCB/OCC Files A-2236(a) through (kk); Comments on Proposed Order *In Re Petitions Challenging 2012 Los Angeles Municipal Separate Storm Sewer System Permit (Order No. R4-2012-0175)*, January 19, 2015.

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the November 18, 2015 Regional Board hearing, Copermittees would have just 90 days to implement them.

Please note the following inconsistency in the Tentative Order and Technical Report regarding the extension of dates. The Technical Report (page F-110) states “Provisions E.3.e.(1)(a)[a]-[d] are dependent on the effective date of the BMP Design Manual. Unless otherwise directed by the San Diego Water Board, the effective date of the BMP Design Manual is December 24, 2015 for the San Diego County Copermittees ...” This is in contrast to Provision F.2.b.(4), which requires that revision of the updated BMP Design Manual be completed not later than 90 days after the date the San Diego Water Board adopts the amendments (i.e., by February 16, 2016). Since it is not possible for the BMP Design Manual effective date to precede its revision date, it must be assumed that the intent of Provision F.2.b.(4) is to also extend the effective date.

In recent correspondence on this issue, Regional Board staff has indicated their intent to explicitly extend the effective date by the same 90 days allowed for the BMP Design Manual revision using the discretion granted the Executive Officer under other proposed amendments to Section E.3.d. However, this is problematic for three reasons. First, since any such extension granted by the Executive Officer could only be executed after the hearing, Copermittees would have no assurances that it would actually occur. Second, extending the effective date by 90 days would merely make the revision and effective dates concurrent rather than rectifying the inconsistencies causing the confusion. Third, a 90-day extension of the effective date simply does not provide adequate time to both complete and implement the BMP Design Manual update. For these reasons, the Copermittees request that the effective date of the BMP Design Manual for the Copermittees be extended 180 days from the adoption of the Tentative Order (i.e., May 14, 2016). Modifying the Permit to specifically incorporate this this new effective date, rather than relying on the ability of the RWQCB Executive Officer to do so after the fact, would both provide the time necessary for critical program updates and the certainty needed to plan for them. It would also ensure that these critical changes are fully vetted in an open public forum.

We also recommend that Provision E.3.d. be modified to clarify that the date the BMP Design Manual is implemented (rather than revised) is the same as the “effective date”. This will help to prevent any future confusion regarding the applicability of dates.

Since Copermittees have already modified their ordinances to reflect existing Permit content in anticipation of the December 24, 2015 effective date, most will now need to repeat this process for these new provisions. Depending on each Copermittees’ process, the time needed to modify ordinances alone can greatly exceed the 90 days currently proposed in the Tentative Order. Moreover, even if ordinance revisions can be completed within 90 days, there would still not be sufficient time to complete all of the other required tasks described above. While Regional Board staff has suggested that Copermittees can start this process now, it is unrealistic to expect that they do so based only on the proposed requirements of a this Tentative Order. It would be speculative to assume that the Tentative Order will be adopted as currently drafted, and Copermittees should not be expected to initiate specific program changes or ordinance revisions based on speculation. We therefore request that the BMP Design Manual effective date be extended by 180 days in the adopted Order.

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**Recommendations:** The Copermittees recommend that the Regional Board modify the requirement to specify that the updates be made to the BMP Design Manual within 180 days, as follows:

**Provision E.3.d**

Each Copermittee must update its BMP Design Manual pursuant to Provision F.2.b. Until the Copermittee has updated its BMP Design Manual pursuant to Provision F.2.b.(1), the Copermittee must continue implementing its current BMP Design Manual. The Copermittee must implement the updated BMP Design Manual within 180 days following completion of the update pursuant to Provision F.2.b.(1), unless directed otherwise by the San Diego Regional Water Board Executive Officer. The date the BMP Design Manual is implemented is the “effective date” of the BMP Design Manual. The update of the BMP Design Manual required pursuant to Provision F.2.b.(1) must include the following:

**Provision F.2.b.(4)**

If the San Diego Water Board amends Provisions E.3.a-d during the permit term but after the Copermittee has completed the update pursuant to Provision F.2.b.(1), the Copermittee must revise its BMP Design Manual to incorporate the amended Provision E.3.a-d requirements as soon as possible but no later than **180** days after the date the San Diego Water Board adopts the amendments to Provisions E.3.a-d, unless otherwise directed by the San Diego Water Board Executive Officer. **Under these circumstances, the effective date of the BMP Design Manual is 180 days after the date the San Diego Water Board adopts the amendments to Provisions E.3.a-d.**

**5. Attachment E-6. Revised Total Maximum Daily Loads for Indicator Bacteria, Project I – Twenty Beaches and Creeks in the San Diego Region (Including Tecolote Creek) (Page 227/236)**

**Request:** Modify draft Tentative Order Attachment E Tables 6.1 and 6.4 for consistency with the TMDL.

**Rationale:** The proposed addition of a 10-year wet-weather compliance deadline of April 4, 2021, to Table 6.1 for water bodies in a WQIP that do not include load reductions for pollutants besides bacteria is inconsistent with the adopted TMDL and thereby violates the Clean Water Act regulations at 40 C.F.R. § 122.44(d)(1)(vii)(B). This proposed amendment would subject the segments of beaches and creeks that were removed from the 303(d) list to requirements from which the de-listed segments are specifically exempt under the adopted TMDL. Under the TMDL, no BLRP or CLRP is required for the de-listed segments. The WQIP is a requirement of the MS4 Permit, not the TMDL, and it is not a BLRP. Thus, there is no justification to require a 10-year compliance schedule for the de-listed segments, and the proposed amendment is not consistent with the TMDL.

**Recommendation:** Delete proposed language in Table 6.1 and footnote.

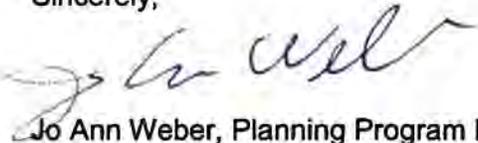
The Copermittees submit the foregoing comments with respect to Tentative Order R9-2015-0100. These comments should not be construed as amending or modifying any of the Copermittees’ positions with respect to any prior Regional Board order or action. Each of the

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Copermittees reserves its right to continue to pursue any and all of its positions, arguments, challenges, petitions, and appeals with respect to any such prior Regional Board order or action.

The San Diego Copermittees thank you for your consideration of these comments. If you have questions or require additional information, please contact Jo Ann Weber at (858) 495-5317 or e-mail at [JoAnn.Weber@sdcounty.ca.gov](mailto:JoAnn.Weber@sdcounty.ca.gov).

Sincerely,



Jo Ann Weber, Planning Program Manager  
Watershed Protection Program

cc: Elaine, Lukey, City of Carlsbad  
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