

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

**TENTATIVE ORDER NO. R9-2006-002**

**WASTE DISCHARGE REQUIREMENTS FOR THE  
FALLBROOK PUBLIC UTILITY DISTRICT  
WASTEWATER TREATMENT PLANT NO. 1  
DISCHARGE TO THE PACIFIC OCEAN VIA THE OCEANSIDE OCEAN OUTFALL**

**RESPONSES TO COMMENTS FROM INTERESTED PARTIES**

<b>Comment #</b>	<b>Comment</b>	<b>Staff Response</b>
<i>Comments from Fallbrook Public Utility District contained in correspondence dated March 22, 2006.</i>		
1.	Fallbrook sincerely appreciates the changes made thus far to the permit. However, a few issues still need to be addressed prior to adoption of this final permit. Fallbrook hopes that the following comments and editorial changes can be incorporated into the Tentative Permit via an errata sheet prior to the proposed permit adoption hearing and that the permit could be adopted on the consent calendar. If that is not possible, Fallbrook repeats its request to defer the permit adoption hearing until May of 2006 so that the Regional Board will have sufficient time to respond to and make the requested changes.	The Regional Board appreciates the early submittal of comments by Fallbrook Public Utility District (FPUD). The Regional Board has had sufficient time to respond to FPUD's comments.  Any unresolved or outstanding issues at the time of the Regional Board meeting should be considered before the Regional Board at the public hearing. If there are none, and if no one else requests to speak on the item, then the Regional Board could move the item to the consent calendar.

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2.	<p><b>Incorporation by Reference of Other Regulatory Documents into the NPDES Permit Is Improper and Unnecessary.</b></p> <p>Fallbrook's collection system is currently covered by a separate WDRs, namely RWQCB Order No. 96-04. The requirements of that separate WDRs, including the reporting requirements, contained therein, are fully enforceable by the Regional Water Board. The Tentative Permit at page 9, para. III.A. specifically references the fact that other separate waste discharge requirements exist and separately regulate Fallbrook. There is no need to incorporate these WDRs by reference into this permit, and to do so will create other problems.</p> <p>First, Order No. 96-04 may soon be superseded by a statewide general permit for collection systems, which is currently being considered by the State Water Resources Control Board. If this occurs, then Fallbrook's permit would need to be re-opened to amend out the application by reference of Order No. 96-04.</p> <p>Second, no amendments could be made to Order No. 96-04 without reopening Fallbrook's permit as such amendments would also indirectly amend the NPDES permit without going through the permit amendment process. Attempts to modify Fallbrook's permit requirements through the adoption or amendment of separate orders instead of actually modifying the NPDES permit would be contrary to federal regulations and would expose Fallbrook to citizen suits and civil and criminal penalties that are not authorized against state-only WDRs. (40 C.F.R. §122.62; see also, Water Code §513263, 13385; Citizens for a Better Environment-California v. Union Oil 83 F.3d 1111, 1119 (9th Cir. 1996)).</p> <p>Finally, no need exists to incorporate by reference another</p>	<p>The proposed incorporation by reference of the monitoring and reporting requirement of Order No. 96-04 is not improper, contrary to the Commenter's contention.</p> <p>Firstly, in the event that the proposed statewide general permit for collection systems supercedes Order No. 96-04, the Regional Board will likely amend Order No. R9-2006-002 (if adopted as currently proposed) to remove reference to the Monitoring and Reporting Program of Order No. 96-04. However, there is actually nothing improper about the incorporation of requirements at this time that may trigger a permit amendment in the future.</p> <p>Secondly, the proposed incorporation by reference of the MRP of Order No. 96-04 in the tentative Order is not prospective and would therefore incorporate the MRP of Order No. 96-04 as it existed on the day of adoption of the tentative Order. Therefore, amending the MRP of Order No. 96-04 (which last occurred in June 2001), would not constitute an amendment of the Discharger's NPDES permit.</p> <p>Thirdly, the sanitary collection system is part of the POTW and subject to the Standard Provisions of the tentative Order, including the requirement to report non-compliance. The specific requirements of the MRP of Order No. 96-04, while not required by federal law, do not contradict the Standard Provision for reporting non-compliance and are therefore not improper. In fact, as pointed out by the Commenter, incorporation of the spill reporting requirements of Order No. 96-04 was specifically suggested by US EPA as a means to comply with the Standard Provision for reporting non-compliance.</p>

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	<p>regulatory document, which is based only on state law, into this federal NPDES permit. Even EPA, in their comment letter on this permit, did not require such incorporation, but merely suggested that this could be one option. The Tentative Permit currently includes prohibitions and requirements to properly operate and maintain the facilities, including the express provision that "a sanitary sewer system is part of the publicly owned treatment works and subject to all federal Standard Provisions." Nothing more is required by federal law. If any additional requirement is included, such as incorporating Order No. 96-04 by reference, then the Regional Board will have exceeded federal law requirements and must conduct further analysis under the Water Code before maintaining those requirements. City of Burbank v. SWRCB, et al, 35 Cal. 4th 613,625 (2005). For these reasons, Fallbrook requests the following changes to the permit at provision VII.C.2.d.:</p> <p>"d. Sanitary Sewer Systems and Sanitary Sewer Overflow Reporting Requirements</p> <p>A sanitary sewer system is a wastewater collection system including sewers, pipes, pumps, or other conveyances which convey wastewater (e.g. domestic, commercial, and industrial wastewater) to a wastewater treatment plant. A sanitary sewer system is part of the publicly owned treatment works and subject to all <u>applicable</u> federal Standard Provisions of this Order if it is owned and operated by the Discharger. A sanitary sewer overflow is each instance of a discharge from a sanitary sewer system at any point upstream of the headworks of the wastewater treatment plant. Temporary storage and conveyance facilities (such as wet wells, impoundments, tanks, highlines, etc.) are part of the sanitary sewer system. <del>and are</del> <u>Discharges</u> <del>are not</del> sanitary sewer overflows provided that sewage</p>	<p>Nonetheless, the Regional Board has decided to remove Provision VI.C.2.d from the tentative Order (see Errata Sheet). FPUD must continue to comply with Regional Board Order No. 96-04 as well as comply with the Standard Provision for reporting non-compliance of the NPDES permit. FPUD, as owner of a POTW consisting of a treatment facility and a wastewater collection system and by having the privilege of discharging to waters of the US and thus requiring an NPDES permit, is subject to both Order No. 96-04 and NPDES requirements. FPUD is inherently different from other agencies that only own wastewater collection systems and thus only subject to Order No. 96-04.</p>

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	<p>from these facilities is not discharged to <u>surface waters</u> <del>waters of the State</del>. <del>The Discharger</del> <u>FPUD has separate reporting requirements</u> for sanitary sewer overflows from the sanitary sewer system owned and operated by <u>FPUD</u> <del>the Discharger</del> in accordance with Monitoring and Reporting Program No. 96-04, Sanitary Sewer Overflow Reporting Procedures for Sewage Collection Agencies, <del>incorporated by reference into this Order</del>.</p> <p>These changes are necessary so that Fallbrook is not held to a different, federally enforceable standard not required of other collection system agencies that are not connected to a publicly owned treatment works. Equal protection requirements mandate that similarly situated entities are treated equally under the law. Fallbrook believes the changes proposed will eliminate the disparity, comply with all applicable law, and remove its objection to this proposed new addition to the Tentative Permit.</p> <p><b><i>REQUEST: Amend Tentative Permit to remove incorporation by reference of Order No. 96-04.</i></b></p>	
3.	<p><b>The Instantaneous Maximum Limits in Table 8 Must be Removed.</b></p> <p>The Fact Sheet for the permit properly states that "NPDES regulations at 40 C.F.R. 122.45(d) require that all permit limits for POTWs be expressed, unless impracticable, as both average monthly and average weekly effluent limits (AMEL and AWEL)." See Fact Sheet at F-18; 40 C.F.R. 9 122.45(d)(2). However, relying upon a 1991 guidance document, the Regional Board set forth an allegedly "supporting rationale for shorter term effluent limitations</p>	<p>The instantaneous maximum limits in Table 8 of the tentative Order are technology-based standards for conventional pollutants specifically required by the California Ocean Plan (COP) for POTWs and certain industrial dischargers. It is not necessary to demonstrate impracticability for these instantaneous limits because they are required by the COP. In order to accommodate the Commenter's request to remove the instantaneous limits in Table 8, the COP must first be amended to remove those technology-based standards. The ability to amend the COP lies strictly</p>

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	<p>such as maximum daily and instantaneous maximum water quality objectives." <i>Id.</i></p> <p>The Regional Board stated that:</p> <p>"In the TSD, USEPA recommends the use of maximum daily effluent limitations in lieu of AWELs for two reasons: 1) the AWEL is based on secondary treatment standards for POTWs and is not related to assuring achievement of water quality standards, and 2) weekly averages could average out peak toxic concentrations and therefore the effluent's potential for causing acute toxic effects would be missed. The TSD states that a maximum daily limitation would be toxicologically protective of potential acute toxicity impacts."</p> <p><i>Id.</i> This analysis, based solely on informal US. EPA guidance, fails to meet the regulatory requirements for conducting an impracticability analysis. Furthermore, the Regional Board cannot rely upon guidance to overrule regulatory or statutory requirements, particularly where case law decided since that guidance was issued has clarified the regulatory requirements. U.S. EPA's guidance, if used in this manner by the Regional Board, transforms into an unlawful underground regulation. See accord <i>Appalachian Power v. U.S. EPA</i>, 208 F.3d 1015, 1028 (D.C.Cir. 2000).</p> <p>In addition, the need for an instantaneous maximum limit for oil and grease, settleable solids, and turbidity is not demonstrated. Since these are technology-based limits (see pg. F-16, Table 9), the rationale that "maximum daily limitation would be toxicologically protective of potential acute toxicity impacts" is inapplicable.</p> <p>Furthermore, the use of monthly and weekly average</p>	<p>with the State Board.</p> <p>The discussion citing USEPA's <i>Technical Support Document for Water Quality-Based Toxics Control (TSD)</i> is found under <i>Section IV.C Water Quality-Based Effluent Limitations (WQBELs)</i> of the tentative Order's Fact Sheet and only applies to WQBELs. The Regional Board in no way suggested that the TSD applies to the determination of impracticability for technology-based standards. Nonetheless, the Regional Board agrees with the rationale provided in the TSD for WQBELs. The TSD provides technically- and scientifically-sound guidance for the protection of beneficial uses based on water quality objectives.</p>

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	<p>limits is <i>per se</i> not impracticable in the case of limits for oil and grease, settleable solids, and turbidity because the Tentative Permit includes AMELs and AWELs for these constituents. See <i>City of Los Angeles v. SWRCB and LA Regional Board</i>, Los Angeles Superior Court, Case No. 060957 at 12 (Apr. 4,2001) ("<u>Indeed, the fact that the Regional Board actually imposed monthly average limitations upon some of the contested effluent limits . . . disproves the impracticability of utilizing monthly average limitations.</u>") (emphasis added); <i>Burbank v. State Water Resources Control Board et al</i>, 35 Cal.4th 613,623, n.6 (April 4,2005 (made final upon denial of rehearing on June 29,2005)("Unchallenged on appeal and thus not affected by our decision are the trial court's rulings that . . . (3) the permits improperly imposed daily maximum limits rather than weekly or monthly averages".); <i>In the Matter of East Bay MUD</i>, State Board Order No. WQO 2002-0012 at pg. 21.</p> <p>For these reasons, any alleged authorization of instantaneous maximum limitations for POTWs based on guidance contained in the TSD must fail as inconsistent with federal requirements. See Water Code § 13372 (requiring state program to be consistent with federal requirements under the CWA); 23 C.C.R. 92235.2. As such, the Regional Board must remove the instantaneous maximum final effluent limitations for oil and grease, settleable solids, and turbidity unless and until the Regional Board provides evidence in the record of impracticability as to each of these limits.</p>	

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	<p><b>REQUEST: Remove the instantaneous maximum effluent limitations for oil and grease, settleable solids, and turbidity from Table 8 because AMELs and AWELs are not impracticable, and have in fact been prescribed in the Tentative Permit.</b></p>	
4.	<p><b>The Compliance Determination Language Must Be Removed or Amended.</b></p> <p>The compliance determination language proposed herein is policy language never adopted by statute or as a regulation. This policy language improperly prejudices where an exceedance equates to an instance of non-compliance or a "violation" and how many days of non-compliance will be found. Even EPA's comment letter found this to be inappropriate. See Comment letter received from USEPA Region IX (Aug. 3,2005)("determinations about whether a discharge violates the Clean Water Act and/or a permit are appropriately made on a case by case basis.") Thus, blanket compliance determination language applicable to all permits is inappropriate.</p> <p>This prejudgment is improper particularly when it is contrary to adopted state law. The Mandatory Minimum Penalties (MMP) statute does not find every exceedance to be a "violation" and does not find 31 or 7 "violations" from 31 or 7 days of exceedances, but merely one violation. See Water Code § 13385(i); State Water Resources Control Board, <i>Water Quality Enforcement Policy</i> at 22(Feb. 19,2002); see also SWRCB SB709 Questions &amp; Answers Document at 15, Q.39 (April 17, 2001)(if "the discharger</p>	<p>The citation from USEPA's August 3, 2005 comment letter was with regards to Provisions VII.N and O of tentative Order No. R9-2005-0137. Those provisions have been removed as requested by USEPA in the current tentative Order. The Commenter cited USEPA's comment in the wrong context since USEPA did not indicate that the comment applied to Provisions VII.A and B of tentative Order No. R9-2005-0137 which are retained in the current tentative Order.</p> <p>The Commenter's requested modifications to Provisions VII.A and B are rejected because they are contrary to USEPA's Memorandum "Issuance of Guidance Interpreting Single Operational Upset" dated September 27, 1989 which clarifies that the exceedance of a monthly average limitation counts as a violation on each day of that calendar month unless there are other relevant factors.</p> <p>Provisions VII.A and B outline the manner by which all instances of non-compliance will be identified, but not the amount of penalty to be assessed. Depending on the type of penalty being proposed for assessment (i.e., discretionary ACLs vs. MMPs) and the circumstances of the non-compliance, the number of non-compliance can</p>

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	<p>has violated a monthly average effluent limitation, the Regional Board should consider that one violation.").</p> <p>Further, the date of the sample generally only indicates a violation on the date of the data collection and other evidence is required to demonstrate that violations occurred on more than one day. See SWRCB SB709 Questions &amp; Answers Document at 13, Q.35 (April 17,2001). For these reasons, the first sentence of the following two paragraphs should be removed as compliance determination language [sic] is more appropriately included in regional or statewide policy documents, instead of individual permits. See <i>e.g.</i>, SIP at 2.4.5, and Ocean Plan (2005) at pg. 17, para. 8. If retained, this language should be amended as follows:</p> <p><b>A. Average Monthly Effluent Limitation (AMEL).</b></p> <p><u>The Regional Board will determine whether the average of daily discharges - over a calendar month exceeds the AMEL for a given parameter, and if so, an alleged violation will be flagged. If the average of daily discharges over the calendar month that exceeds the AMEL for a parameter, the Discharger may be considered out of compliance for that month only. If only a single sample is taken during the calendar month and the analytical result for that sample exceeds the AMEL, the Discharger may be considered out of compliance for that calendar month. For any one calendar month during which no sample (daily discharge) is taken, no compliance determination can be made for that calendar month.</u></p> <p><b>B. Average Weekly Effluent Limitation (AWEL).</b></p> <p><u>The Regional Board will determine whether the average of daily discharges over a calendar week (Sunday through Saturday) exceeds the AWEL for a given</u></p>	<p>be administratively collapsed to a smaller number of violations (e.g., for MMPs, violations within a 30-day period due to a POTW single operational upset may be collapsed to one violation). The procedures for assessing ACLs and MMPs are not contained in the tentative Order.</p> <p>The Commenter's contention that violations can only occur on days when a sample is taken disregards the concept of representative random sampling for compliance determination which allows monitoring frequencies to be less than daily (with reduced monitoring costs) and further ignores statistical principles regarding averages.</p> <p>Provisions VII.A and B apply both when the effluent discharged is in compliance and when it is not; however, the Commenter only indicates its objection when those provisions may result in monetary penalties. Furthermore, the Commenter contends that those provisions, as currently written in the tentative Order, would "prejudge" the number of violations and yet suggests that those provisions would be acceptable if they are modified in the manner requested by the Commenter.</p> <p>However, Provisions VII.A, B and E have been modified as indicated in the Errata Sheet. While retaining the intent of the original language, these provisions have been restated to direct FPUD to consider effluent sample results and to calculate averages and medians in a manner that would allow determination of compliance with the various effluent limitations on each day. The modifications are appropriate since waste discharge requirements should be stated as requirements on dischargers rather than on the Regional Board.</p>

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	<p>parameter, <u>and if so</u>, an alleged violation will be flagged. <u>If the average</u> of daily discharges over the calendar week that exceeds the AWEL for a <u>parameter</u>, <u>the Discharger</u> may be considered out of compliance for that week only. If only a single sample is taken during 6]the calendar week and the analytical result for that sample exceeds the AWEL, the Discharger <i>may</i> be considered out of compliance for that calendar week. For any one calendar week during which no sample (daily discharge) is taken, no compliance determination can be made for that calendar week.</p> <p>Fallbrook, through its membership in the California Association of Sanitation Agencies (CASA) and Tri-TAC, has been working with the State Water Board to suggest amendments, such as those shown above, to the statewide permit template itself. However, if those changes are not made before this permit is adopted, Fallbrook may need to administratively appeal these provisions in order to protect its rights and to be able to more easily take advantage of any changes that may be made in the future. In addition, the Regional Board should include an express re-opener to require the permit to be amended on an expedited basis to incorporate any future changes to the permit template, as may be requested by Fallbrook.</p> <p><b><i>REQUEST: Remove or amend the Compliance Determination section as requested above. In addition, include re-opener language requiring the permit to be reopened on request of Fallbrook to incorporate changes made to the permit template.</i></b></p>	<p>The Commenter's request for inclusion of provisions for express permit reopener language, if further changes to the State Water Board's permit template are made, is rejected. The Commenter's request is non-specific since neither the Commenter nor the Regional Board knows at this time how or which sections of the State Water Board permit template might change in the future. Consequently, inclusion of the requested express reopener provisions at this time is not appropriate.</p>

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5.	<p><b>Page 11, Provision III. C.</b> - The response to comments at page 51, Response 77, stated that the Regional Board had determined that this section was not necessary and had deleted it from the final Order. However, this provision still exists in the Tentative Permit on page 11. Please remove Provision III. C. as was stated would be done in the response to comments. For similar reasons, Provision V.C.7. on page 23 of the Tentative Permit should also be removed. Any exceedances can be addressed through the reopener provision in Provision VI.C.I.h.</p>	<p>Provision III.C was intended to be deleted in tentative Order No. R9-2006-002 but was inadvertently retained. The discussion in Section IV.A of the tentative Order's Fact Sheet reflected the renumbering of the provisions had Provision III.C been removed as intended. The Errata Sheet indicates that Provision III.C is deleted in the tentative Order and subsequent provisions are renumbered.</p> <p>The Regional Board agrees with the Commenter regarding Provision V.C.7. The Errata Sheet indicates that this provision is deleted in the tentative Order.</p>
6.	<p><b>Page 11, Provision 111. F.</b> - This provision, particularly as amended, is inconsistent with the Standard Provisions at pages D-2 and D-3, which authorize bypass and upset under certain conditions. To correct this concern, the beginning of Provision III should be amended to read:</p> <p><b>"III. DISCHARGE PROHIBITIONS</b></p> <p><u>The following prohibitions apply, except under recognized upset and bypass conditions per Attachment D, Standard Provisions G and H:</u>"</p> <p>In addition, Prohibition F on bypass should be removed as inconsistent with federal regulations. 40 C.F.R. § 122.41(m). Further, the Regional Board should authorize diversion around certain portions of the treatment system (filters or biological treatment) for maintenance and operational reasons so long as the effluent limitations are met. See Water Code § 13360(a)(allows the Regional Board to set effluent limitations, but not to specify the manner in which the permit holder must achieve those limits).</p> <p>This Regional Board included in Oceanside's permit the</p>	<p>The request to add qualifier language regarding Standard Provisions for upsets and bypass at the beginning of Section III is rejected. Inclusion of the qualifier language would undermine the intent of prohibitions established in the Basin Plan and the Ocean Plan. California Water Code Section 13243 provides that the Regional Board, in a water quality control plan or waste discharge requirements, may specify certain conditions where the discharge of wastes or certain types of wastes that could affect the quality of waters of the state is prohibited. However, the Regional Board determined that it would be appropriate to add the qualifier language to Provision III.A; the Errata Sheet indicates that this provision is modified accordingly in the tentative Order.</p> <p>The Basin Plan prohibitions (Provisions III.B.1-12) and the Ocean Plan prohibitions (Provisions III.D-F, renumbered III.C-E per the Errata Sheet) are retained in the tentative Order without modification. The Regional Board acknowledges the apparent discrepancy</p>

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	<p>ability to have planned bypasses at the La Salina Wastewater Treatment Plant for repair and maintenance activities, and authorizes that the combined effluent from Monitoring Point M-003 can be used. Fallbrook would like similar provisions in its permit so that if repair or maintenance activities are required, a temporary bypass around treatment processes would be pre-approved in the permit under the required conditions. For these reasons, Fallbrook requests that the following changes to this provision:</p> <p>"F. The bypassing of untreated wastes containing concentrations of pollutants in excess of those in Tables A or B of the Ocean Plan is prohibited, except <u>as set forth herein.</u></p> <p><u>1. Planned bypasses diverted around treatment processes, biological treatment units or advanced treatment units for planned repair, maintenance or upgrades is not prohibited provided all of the following are satisfied:</u></p> <p><u>a. At least three months prior to initiating a bypass, FPUD submits a technical report for the proposed bypass that includes the following:</u></p> <ul style="list-style-type: none"> <li>i. <u>Start date;</u></li> <li>ii. <u>Scope of the proposed project;</u></li> <li>iii. <u>Adequate information to demonstrate that the bypass is not prohibited because it meets the criteria in Provision I.G.3. (a) and (b) of Attachment D Standard Provisions.</u></li> <li>iv. <u>Adequate information to demonstrate that FPUD has minimized the anticipated duration and impact of the proposed bypass.</u></li> </ul>	<p>between federal and state regulations and that the Standard Provisions regarding bypasses could be interpreted to allow certain discharges that are prohibited by the Basin Plan or Ocean Plan. The Regional Board believes these situations should be decided on a case-by-case basis.</p> <p>The requested modifications to Provision III.F to add language that pre-approves bypasses around treatment processes for repair or maintenance is rejected. Firstly, the Standard Provision regarding bypasses are adequate to address bypasses, and additional general bypass provisions are not necessary. Secondly, the Regional Board included special bypass provisions in the City of Oceanside's permit after a case-by-case evaluation of specific information provided by the City about a specific proposed bypass (i.e., bypass of the secondary treatment process of the south treatment train at the La Salina treatment plant). Thirdly, the Regional Board's case-by-case evaluation of Oceanside's proposed bypass considered the City's unique ability to minimize the impact of the bypass, as measured at the City's combined discharge monitoring station (M-003) prior to confluence with FPUD's land outfall, by optimizing treatment processes at the north treatment train of the La Salina treatment plant as well as at the City's larger San Luis Rey treatment plant. If FPUD wishes the Regional Board to consider specific language to cover a specific planned bypass, then FPUD should submit details regarding the planned bypass for Regional Board review.</p>

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	<p><u>b. The Regional Board has provided FPUD with written notification that the proposed bypass is not prohibited prior to initiating the bypass.</u></p> <p><u>c. For the duration of the bypass, the combined effluent at Monitoring Point M-003 is monitored at the same frequency as Monitoring Points M-001 and M-002 for the constituents listed under Monitoring and Reporting Program Table 3a and the combined effluent complies with the technology-based effluent limitations contained in Table 7 of Section IV. Determination of percent removal for CBOD and total suspended solids shall be based on a system-wide basis in lieu of the formula provided under Section V11.H. Compliance Determination."</u></p>	
7.	<p><b>Page 11, Provision IV. A.2. Discharge Specifications, and Pages 19-21, Provisions V. B.</b> As stated in Fallbrook's previous letter, many of the requirements in these two sections are duplicative and the Regional Board's response did not seem to recognize this problem.</p> <p>For example, the Receiving Water Limitations and Discharge Specifications both include requirements related to color, floatables, settleables, and light as follows:</p> <p><u>Color:</u></p> <p>Provision IV.A. The discharge of effluent from Outfall 001 from FPUD's Facilities shall comply with the following:</p> <p>2. Waste discharged to the Pacific Ocean through Outfall 001 must be essentially free of: <u>e. Materials that result in aesthetically undesirable discoloration of the ocean surface.</u></p> <p>Provision V. Unless specifically excepted by this Order,</p>	<p>The Regional Board has determined that it is not necessary to state the narrative water quality objectives of the Ocean Plan in the tentative Order when implementation provisions of the Ocean Plan are included in the tentative Order which ensure compliance with the narrative water quality objectives. The Errata Sheet will indicate that narrative water quality objectives for Color, Floatables, Settleables and Light are deleted from Section V of the tentative Order.</p>

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	<p>the discharge shall not cause a violation of the following water quality objectives. . .</p> <p>B.2. The discharge of waste shall not cause <u>aesthetically undesirable discoloration of the ocean surface.</u></p> <p>[ . . . ]</p> <p>Although the wording is slightly different, the requirement in both cases applies to the discharge of waste and is meant to protect the same environmental endpoint. Thus, there is no reason for two separate requirements. This duplication of requirements is problematic for permit holders as an allegation could be made in an enforcement action or citizen suit that more than one provision of the permit was violated when, in actuality, the two provisions essentially require the same thing. For these reasons, either Provision IV.A.2. or Provision V.B. must be deleted as duplicative and unnecessary.</p>	
8.	<p><b>Page 35, Provision VII. 1.3. Pollutant Minimization Program</b> - The requirement for completion and <i>implementation</i> of a Pollution Prevention Plan (PPP) is contrary to the terms of Water Code §13263.3(k). See <i>accord In the Matter of Tosco Refining</i>, State Board Tentative Permit No. 2001-06 at Page 40 (March 17,2001). For this reason, Fallbrook requests that the words "conduct" and "implementation" be removed from this section of the Tentative Permit.</p> <p>The requirement to develop and <u>conduct</u> a Pollution Minimization Plan (PMP) is contrary to the terms of Water Code §13263.3(k). . See Water Code §13263.3(k) ("a regional board . . . <u>may not include a pollution prevention plan in an waste discharge requirements or other permit</u></p>	<p>Unless the Ocean Plan is amended, the words "and conduct" are retained in the tentative Order because the PMP requirements of the tentative Order are taken directly from the 2005 Ocean Plan. The ability to amend the Ocean Plan lies strictly with the State Board.</p> <p>A PMP and a PPP are not equivalent, and Water Code Section 13263.3 does not apply to PMPs. For example, the required elements of a PMP identified in the 2005 California Ocean Plan are not the same as the required elements of a PPP identified in CWC Section 13263.3(d)(3). While a PPP will satisfy a requirement for a PMP, a PMP may not satisfy a requirement for a PPP.</p>

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	<p><u>issued by that agency</u>"); <i>In the Matter of Tosco Avon Refinery</i>, State Board Order No. 2001-06 at pages 38-40 and 60, para. 9 (March 7,2001)("The Regional Board <u>cannot require in a permit that a discharger implement a pollution prevention plan.</u>") (all emphasis added).</p> <p>Furthermore, the Ocean Plan from which this language was derived was adopted under the authority of the Water Code, including section 13263.3, which authorizes the Regional Boards to require PPPs/PMPs. Therefore, the Ocean Plan and permits based on that plan cannot contradict the requirements in state statutes as regulations may not exceed statutory authority. (<i>Morris v. Williams</i> (1967) 67 Cal.2d 733, 737 ("Administrative regulations that violate acts of the Legislature are void and no protestations that they are merely an exercise of administrative discretion can sanctify them"); <i>see also Pacific Rivers Council v. Thomas</i> (9th Cir. 1994) 30 F.3d 1050, 1054 (an agency determination contrary to the legislative intent "is entitled to <u>no deference</u>") (emphasis added); Gov't Code §13349(b), defining "authority" as the provision of law which permits or obligates the agency to adopt, amend, or repeal a regulation (applicable to the SIP by Gov't Code §11353(b)(4).) Under the <i>Tosco</i> decision, the State Board made no differentiation between PPPs and PMPs. See Order No. 2001-06 at 39 ("the Board treats a waste minimization plan the same as if it were labeled a pollution prevention plan."). The state law proscription against including PPPs in permits was to ensure that the contents of PPPs are not subject to citizen suits under the Clean Water Act. <i>Id.</i> In that case, the Board found that state law, at Water Code §13263.3, did not prevent a requirement in a permit to prepare a PPP/PMP. <i>Id.</i> at 40. However, a requirement to <i>implement</i> the plan was inconsistent with the process set forth in section 13263.3 because the</p>	<p>The State Board decision in the <i>Tosco</i> case, regarding San Francisco Bay Regional Board (SFRB) Order Nos. 00-011 and 00-015, also do not apply to the PMP provisions of the tentative Order. The State Board found that the SFRB orders defined "waste minimization" [and therefore waste minimization plans (WMPs)] in exactly the same way as the definition for "pollution prevention" (and therefore PPPs). Consequently, the State Board concluded that a WMP – as defined in the SFRB orders - was equivalent to a PPP and thus subject to the restrictions of Water Code Section 13263.3. PMPs, however, are different from PPPs, as previously stated, and WMPs in terms of language, purpose and required elements. Furthermore, the SFRB orders regulate discharges of wastes to inland bays but were adopted prior to adoption of the State Implementation Policy for inland surface waters, enclosed bays, and estuaries. The State Board did not clarify the scope of its decision and did not address PMP requirements of the SIP or the Ocean Plan.</p>

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	<p>Regional Board can only require a discharger to comply with the PPP "after providing an opportunity for comment at a public proceeding with regard to that plan." <i>Id. citing</i> Water Code §13263.3(e).</p> <p>Therefore, at most, the permit should require FPUD to develop a PMP and hold a public proceeding allowing for public comment on the PMP. For this reason, Fallbrook requests that the words "and conduct" be replaced in paragraphs 3.b.1) and 2) related to PMPs, with "and provide an opportunity for public comment."</p>	
9.	<p>Fallbrook previously commented that for all studies, monitoring and reporting requirements that go beyond the requirements of 40 C.F.R. §122.48 and §122.44(i), the Regional Board must comply with Water Code section 13225(c) and 13267(b) by completing the required burden analysis (including cost) and providing evidence to support the need for these requirements. That analysis still has not been done. In addition, Fallbrook specifically questions the need for BOD5 monitoring when CBOD5 monitoring will be done and that is the constituent regulated in the Tentative Permit. The inclusion of both is contrary to and more stringent than required by federal law. Federal rules state that C BOD5 requirements substitute for the parameter BOD5. 40 C.F.R. §133.105(e)(l). For these reasons, Fallbrook requests that the BOD monitoring requirement be removed as unnecessary particularly since this was not required for Oceanside.</p>	<p>The requirements authorized under 40 C.F.R. §122.48 and §122.44(i) apply to monitoring the effluent. Some of the proposed requirement are with regards to monitoring and investigating the ocean receiving waters, not the effluent, which are authorized under 40 CFR Section 123.123(d)(2) of Subpart M- Ocean Discharge Criteria. The Ocean Discharge Criteria requires that all permits that authorize the discharge of pollutants from a point source into the ocean "(s)pecificify a monitoring program, which is sufficient to assess the impact of the discharge on water, sediment, and biological quality including, where appropriate, analysis of the bioaccumulative and/or persistent impact on aquatic life of the discharge."</p> <p>The monthly BOD5 effluent monitoring requirement is retained in the revised tentative Order. While there is no BOD5 effluent limitation, it is still appropriate to monitor BOD5 to provide additional information about the effluent such as the levels of other oxygen-demanding constituents in the effluent in addition to carbonaceous compounds, such as nitrogenous compounds. The BOD5 results have also served as a</p>

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		<p>check on FPUD's reported effluent CBOD5 results. There have been occasions when the BOD5 of an effluent sample has been significantly lower than the CBOD5 for the same sample, which is anomalous.</p>
10.	<p>Fallbrook has included, as Attachment A herein, a redline version of the Tentative Permit to correct typographical errors, suggest other small changes, and include comments on specific wording that did not warrant a more detailed comment in this letter. Fallbrook requests that each of the changes proposed therein be considered and that Fallbrook be provided with a revised permit or errata sheet reflecting these changes, or with a response as to the reason why each of these latest comments cannot be made prior to the close of the hearing in accordance with 40 C.F.R. 3124.17.</p>	<p>The Regional Board considered all comments in the Discharger's "redline version" of the tentative Order. These comments were handled as follows:</p> <ul style="list-style-type: none"> <li>- Requests to change references to the Facilities to "FPUD Facilities" have in general been granted.</li> <li>- Requests to refer to Fallbrook Public Utility District as "FPUD" are granted.</li> <li>- Requests to correct typographical errors, incorrect references to the Discharger, or inaccurate dates are granted.</li> <li>- References to the 2001 Ocean Plan are replaced with references to the 2005 ocean Plan, when appropriate.</li> <li>- Requests to make changes already addressed in the comments above are made in accordance with the responses given above.</li> <li>- More significant comments on each page not already discussed above and warranting separate responses are provided after Comment #11 below.</li> </ul>

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11.	<p>We believe that with these suggested changes, Fallbrook can support the adoption of its permit on the consent calendar. However, to the extent issues remain unresolved at the time of the hearing, Fallbrook requests that the hearing be held as a formal hearing, and that Fallbrook be granted an adequate time for its presentation and for the cross-examination of witnesses. Please contact me, or Joe Jackson at Fallbrook, if you have any questions related to our comments. We would like to meet or talk with your staff prior to the scheduled Regional Board hearing on this permit to discuss these issues further. Please let us know whether this request will be granted and of a date that would work for your staff to meet either in person or via telephone to discuss our comments further.</p>	<p>Not all of the Discharger's suggested changes have been made; however, the Regional Board is prepared to move forward with the adoption hearing for the tentative Order on the April 12, 2006 agenda.</p> <p>The Discharger requested that the hearing be held as a formal hearing "to the extent that issues remain unresolved at the time of the hearing." FPUD may request a formal hearing at the Regional Board meeting if they so desire.</p> <p>Regional Board staff met with the FPUD on April 5, 2006 prior to the hearing.</p>
12.	<p><b>FPUD MARK-UP COMMENTS ON PAGE 5</b></p>	<p>Changes made to refer to "Fallbrook Public Utility District" as "FPUD" after the first reference.</p> <p>Changes made to collectively refer to FPUD Wastewater Treatment Plant No. 1, FPUD land outfall pipeline, and the FPUD sanitary collection system as "FPUD Facilities".</p> <p>Deleted reference to a maximum daily flowrate restriction for FPUD's discharge through the OOO.</p>
13.	<p><b>FPUD MARK-UP COMMENTS ON PAGE 6</b></p>	<p>Deleted sentence referring to WC 13241 in Finding F. The Regional Board had not considered the factors in Water Code Section 13241 in establishing the technology-based effluent limitations based on secondary treatment standards at 40 CFR 133. As federal requirements, inclusion of those effluent limitations do not require consideration of the factors in Water Code Section 13241.</p>

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14.	<b>FPUD MARK-UP COMMENTS ON PAGE 7</b>	<p>The Alaska Rule finding was included as standard language from the State Board permit template. The Basin Plan, Ocean Plan, and Thermal Plan have all been approved by USEPA. While the finding is a factual statement, it is removed from the tentative Order as not necessary. The findings are renumbered accordingly.</p> <p>The finding for “Stringency of Requirements for Individual Pollutants” is retained without changes on advise from Regional Board counsel.</p>
15.	<b>FPUD MARK-UP COMMENTS ON PAGE 8</b>	<p>The word “incorporates” is retained the State Board permit template. The Regional Board understands that State Board Resolution No. 68-16 is consistent with and is equivalent to the federal antidegradation policy.</p> <p>Requested changes to Finding O, renumbered as Finding N, are rejected.</p>
16.	<b>FPUD MARK-UP COMMENTS ON PAGE 9</b>	<p>Details of Notification of Interest Parties in the Fact Sheet have been corrected.</p> <p>Qualifier language at the beginning of Section III. Discharge Specifications regarding upset and bypass conditions is not added; however, it has been added to Provision III.A.</p> <p>FPUD Comment [MT7] is noted. See response to Comment #6 for more details.</p>
17.	<b>FPUD MARK-UP COMMENTS ON PAGE 10</b>	<p>No changes were made to prohibitions from the Basin Plan under Section III.B of the tentative Order. These Basin Plan prohibitions have been determined to apply to FPUD and have been incorporated in the tentative Order. Basin Plan prohibitions that did not apply to</p>

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		<p>FPUD have not been included. Provision III.B.9 does not necessarily duplicated Provisions III.A, III.B.5, or III.B.8 since discharges the FPUD Facilities can be a source of wastes or pollutants other than treated or untreated wastewater, such as sludge and chemicals.</p> <p>Provision III.C has been deleted and Provisions III.D, E, and F have been retained and renumbered as Provisions III.C, D, and E. These retained prohibitions are taken verbatim from the 2005 California Ocean Plan. Also see response to Comment #6.</p>
18.	<b>FPUD MARK-UP COMMENTS ON PAGE 11</b>	<p>The Discharge Specification under Provision IV.A.2 are retained and Receiving Water Limitations under Provision V.B.1-4 are deleted. Also see response to Comment #7.</p>
19.	<b>FPUD MARK-UP COMMENTS ON PAGE 12</b>	<p>The request to limit the flowrate limitation under Provision IV.A.6 to “dry-weather” flowrate is rejected. “Dry-weather” is undefined and is problematic in general. Also, a flowrate limitation during “wet-weather” has not been proposed by FPUD. The Regional Board could consider different flowrate limitation during May-October and November-April as was done for the Encina Wastewater Authority.</p>
20.	<b>FPUD MARK-UP COMMENTS ON PAGE 13</b>	<p>The request to delete the column for 6-month median effluent limitation in Table 8 is rejected in order to maintain the consistent format in the effluent limitation and performance goals tables recommended in the State Board permit template.</p> <p>See response to Comment #3 regarding instantaneous effluent limits.</p>
21.	<b>FPUD MARK-UP COMMENTS ON PAGE 22</b>	<p>The provisions under Section V.B have been deleted. See response to Comment #18. Sections V.C-V.E have been renumbered accordingly.</p>

<b>Comment #</b>	<b>Comment</b>	<b>Staff Response</b>
22.	<b>FPUD MARK-UP COMMENTS ON PAGE 23</b>	<p>Provision V.D.7 (in Section V.D renumbered as Section V.C) has been deleted.</p> <p>The request to modify Provision VI.A.2.a is rejected since any permit non-compliance would be found to be a violation of the Clean Water Act or the California Water Code or both.</p> <p>The request to modify Provision VI.A.2.c is rejected since the requirement of CCR Title 23 for certified operators only apply to wastewater treatment plants.</p>
23.	<b>FPUD MARK-UP COMMENTS ON PAGE 24</b>	<p>The expiration date has been changed to June 1, 2011; however, this is contingent on the adoption of the tentative Order on April 12, 2006 with an effective date of June 1, 2006.</p>
24.	<b>FPUD MARK-UP COMMENTS ON PAGE 25</b>	<p>Provision VI.A.2.j is deleted as requested.</p>
25.	<b>FPUD MARK-UP COMMENTS ON PAGE 26</b>	<p>Provision VI.C.1.e is modified as requested.</p> <p>The requested modification to Provision VI.C.1.f is rejected. See response to Comment #4.</p> <p>FPUD Comment [MT20] is noted.</p> <p>The flowrate in Provision VI.C.2.a is modified to the correct value for FPUD.</p>
26.	<b>FPUD MARK-UP COMMENTS ON PAGE 27</b>	<p>The requirements for Spill Prevention and Response Plans under Section VI.C.2 have been deleted.</p>
27.	<b>FPUD MARK-UP COMMENTS ON PAGE 28</b>	<p>The requirements for Sanitary Sewer Systems and Sanitary Sewer Overflow Reporting Requirements under Section VI.C.2 have been deleted.</p>

<b>Comment #</b>	<b>Comment</b>	<b>Staff Response</b>
28.	<b>FPUD MARK-UP COMMENTS ON PAGE 29</b>	The requirements for Sanitary Sewer Systems and Sanitary Sewer Overflow Reporting Requirements under Section VI.C.2 have been deleted. See response to Comment #2.
29.	<b>FPUD MARK-UP COMMENTS ON PAGE 31</b>	FPUD Comment [MT25] is noted. FPUD Comment [MT26] is noted. See response to Comment #4.
30.	<b>FPUD MARK-UP COMMENTS ON PAGE 32</b>	See response to Comment #4.  Regarding FPUD Comment [MT27], the tentative Order does contain a Maximum Daily Effluent Limitation for Chronic Toxicity.  FPUD Comment [MT28] is noted. The requested changes are not made although the corresponding provisions have been modified.  FPUD Comment [MT29] is noted.
31.	<b>FPUD MARK-UP COMMENTS ON PAGE 33</b>	The requested changes to Provision VII.G have been made.
32.	<b>FPUD MARK-UP COMMENTS ON PAGE 34</b>	The requested changes to Provisions VII.I.2.a and VII.I.2.b are not made since these provisions are taken from the Ocean Plan.
33.	<b>FPUD MARK-UP COMMENTS ON PAGE 35</b>	See response to Comment #8.
34.	<b>FPUD MARK-UP COMMENTS ON PAGE 36</b>	Requested change to “Elements of a Pollutant Minimization Program” is not made since the original language is from the Ocean Plan.  FPUD Comment [MT33] is noted.  The Section for “Receiving Water Sampling Protocol” is

Comment #	Comment	Staff Response
		<p>deleted.</p> <p>Reference to an effluent limitation for acute toxicity has been changed to performance goal.</p>
35.	<b>FPUD MARK-UP COMMENTS ON PAGE 37</b>	<p>A statistical significance level has been specified for the acute toxicity Pass/Fail determination.</p> <p>Reference to a performance goal for chronic toxicity has been changed to effluent limitation.</p>
36.	<b>FPUD MARK-UP COMMENTS ON PAGE A-2</b>	<p>The definition for chemical oxygen demand has been deleted.</p>
37.	<b>FPUD MARK-UP COMMENTS ON PAGE A-3</b>	<p>The definition for Daily Maximum Limit is deleted.</p> <p>The requested modification to the definition for Discharge is made.</p>
38.	<b>FPUD MARK-UP COMMENTS ON PAGE A-4</b>	<p>The definition for Maximum Daily Effluent Limitation (MDEL) is retained. The tentative Order includes a chronic toxicity MDEL.</p> <p>A definition for Self-Monitoring Report (SMR) has been added as requested.</p>
39.	<b>FPUD MARK-UP COMMENTS ON PAGE D-2</b>	<p>This is standard provision language from the State Board permit template.</p>
40.	<b>FPUD MARK-UP COMMENTS ON PAGE E-3</b>	<p>Receiving Water monitoring stations S6 and S7 are deleted.</p>
41.	<b>FPUD MARK-UP COMMENTS ON PAGE E-4</b>	<p>Receiving Water monitoring stations N6 and N7 are deleted.\</p> <p>The influent monitoring requirement for BOD5 is retained. See response to Comment #9.</p>
42.	<b>FPUD MARK-UP COMMENTS ON PAGE E-5</b>	<p>The requested change to Provision IV.A.2 is rejected.</p>

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43.	<b>FPUD MARK-UP COMMENTS ON PAGE E-8</b>	The Regional Board disagrees with FPUD Comment [MT43]. The minimum levels (MLs) established in the Ocean Plan are analytical levels achievable by many accredited laboratories. The State Board established the ML requirements of the Ocean Plan after a scientific process that included many accredited laboratories throughout the state, the Commenter is referred to the Functional Equivalent Document for the 2001 California Ocean Plan. In September 2002 and March 2004, the Regional Board advised FPUD to evaluate current analytical quantitation levels of its contract laboratories in anticipation of the ML requirements.
44.	<b>FPUD MARK-UP COMMENTS ON PAGE E-9</b>	The requested correction to the acute toxicity monitoring frequency is made.
45.	<b>FPUD MARK-UP COMMENTS ON PAGE E-11</b>	Sections VI and VII, which did not included any monitoring requirements, have been deleted as requested.
46.	<b>FPUD MARK-UP COMMENTS ON PAGE E-17</b>	The reserved section for Special Studies (Section IX.B) is deleted.
47.	<b>FPUD MARK-UP COMMENTS ON PAGE E-18 AND E-19</b>	Several modifications to MRP Section X – Reporting Requirements have been made to delete duplicated requirements, clarify certain requirements, and incorporate recommendations from the State Board permit template.
48.	<b>FPUD MARK-UP COMMENTS ON PAGE F-8</b>	Regarding FPUD Comments [MT54] and [MT55], Table 4 summarizes the requirements of Order No. 2000-012 as well as FPUD WTP1 effluent data collected during the period 1999-2003, but it does not imply that the data collected was used in developing the requirements of Order No. 2000-012.

<b>Comment #</b>	<b>Comment</b>	<b>Staff Response</b>
49.	<b>FPUD MARK-UP COMMENTS ON PAGE F-10</b>	Regarding FPUD Comment [MT56], see response to Comment #43.
50.	<b>FPUD MARK-UP COMMENTS ON PAGE F-11</b>	<p>The requested changes are rejected. The tentative Order, when adopted, only permits point discharges through from FPUD through the OOO to the Pacific Ocean, but not surface waters in general.</p> <p>Based on the State Water Board's advice, the phrase "state law under Chapter 4" is not inserted in the Finding because the reference to Chapter 5.5 is sufficient. Chapter 5.5 states that the other provisions of the Porter-Cologne Act apply to the extent that they are consistent with the Clean Water Act etc.</p> <p>The clause ". . .for discharges that are not subject to regulation under CWA section 402 . . ." is not added because Article 4 Chapter 4 of the CWC applies to all discharges to waters of the State and not just to discharges that are not subject to regulation under CWA section 402. It should be noted that, while the tentative Order regulates FPUD's POTW discharge to waters of the State that are also waters of US for purposes of the federal CWA, FPUD is also regulated under separate waste discharge requirements, pursuant only to Article 4, Chapter 4 of the CWC, for its discharges to waters of the State that are not waters of the US.</p>
51.	<b>FPUD MARK-UP COMMENTS ON PAGE F-12</b>	<p>Order No. 2000-12 contained three technology-based acute toxicity effluent limitations. These have been replaced with one water quality-based effluent limitation.</p> <p>Discussion of the silver effluent limitation has been modified.</p>

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52.	<b>FPUD MARK-UP COMMENTS ON PAGE F-16</b>	Regarding FPUD Comment [MT61], see response to Comment #3.
53.	<b>FPUD MARK-UP COMMENTS ON PAGE F-18</b>	Regarding FPUD Comment [MT61], see response to Comment #3.
54.	<b>FPUD MARK-UP COMMENTS ON PAGE F-24</b>	FPUD Comments [MT65] and [MT66] are noted.
55.	<b>FPUD MARK-UP COMMENTS ON PAGE F-25</b>	Regarding FPUD Comment [MT67], the issue of prospective incorporation for the radioactivity water quality objective was considered by the State Water Board at the time those objectives were adopted. Also see response to Comment #62 in Response to Comments for Tentative Order No. R9-2005-0137.
56.	<b>FPUD MARK-UP COMMENTS ON PAGE F-38</b>	Regarding FPUD Comment [MT71], see response to Comment #41.  Regarding FPUD Comment [MT72], see response to Comment #44.
57.	<b>FPUD MARK-UP COMMENTS ON PAGE F-42</b>	FPUD Comment [MT73] is noted.
58.	<b>FPUD MARK-UP COMMENTS ON PAGE F-44</b>	Regarding FPUD Comment [MT75], this section of the Fact Sheet explains that the intent of Provisions VII.A-H is to clarify how violations and non-compliance will be identified and counted but not how liability will be determined in accordance with state law and other enforcement considerations.
59.	<b>FPUD MARK-UP COMMENTS ON PAGE F-45</b>	FPUD Comment [MT76] is noted.
60.	<b>FPUD MARK-UP COMMENTS ON PAGE F-46</b>	FPUD Comments [MT77] and [MT78] are noted.  The Regional Board did not interpret 40 CFR 122.41(n) as applying only to technology-based effluent limitations

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		because 40 CFR 122.41(n) defines “Upset” as “an exceptional incident in which there is unintentional and temporary non-compliance with technology based permit effluent limitations beyond the reasonable control of the permittee. An upset does not include noncompliance to the extent caused by operational error, . . . , or careless or improper operation.”
61.	<b>FPUD MARK-UP COMMENTS ON PAGE G-1</b>	It is highly impractical to include the calculations conducted to determine the minimum initial dilution factor since those calculations were iterative computer modeling simulations. The information provided in Attachment G identifies all model inputs and necessary information to allow duplication of the calculations using Visual Plumes. More detailed documentation of the Visual Plumes modeling is maintained in the Regional Board records.