Responses to Comments II

on

Revised Tentative Order No. R9-2006-0011

(San Diego County Municipal Storm Water Permit)

San Diego Regional Water Quality Control Board

December 13, 2006

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LIST OF ABBREVIATIONS AND ACRONYMS

ADT - Average Daily Traffic
BAT - Best Available Technology
BIA - Building Industry Association of San Diego County
BIASC – Building Industry Association of Southern California
BIASDC - Building Industry Association of San Diego County
BILD – Building Industry Legal Defense Foundation
BMP - Best Management Practice
Basin Plan - Water Quality Control Plan for the San Diego Basin
CASQA - California Stormwater Quality Association
CBIA – California Building Industry Association
CCC - California Coastal Commission
CCWHE – Coalition for Clean Water and a Healthy Economy
CDFG - California Department of Fish and Game
CELSOC – Consulting Engineers and Land Surveyors of California
CEQA - California Environmental Quality Act
CFR - Code of Federal Regulations
CICWQ – Construction Industry Coalition on Water Quality
Copermittees - County of San Diego, the 18 incorporated cities within the County of San Diego, the San Diego Unified Port District, and the San Diego County Regional Airport Authority
CWA - Clean Water Act
CWC - California Water Code
CZARA - Coastal Zone Act Reauthorization Amendments of 1990
ESAs - Environmentally Sensitive Areas
FR - Federal Register
GIS - Geographic Information System
IC/ID - Illicit Connections and Illicit Discharges
IEA – Industrial Environmental Association
JURMP - Jurisdictional Urban Runoff Management Plan
LARWQCB - Los Angeles Regional Water Quality Control Board
MEP - Maximum Extent Practicable
MRP - Receiving Waters Monitoring and Reporting Program
MS4 - Municipal Separate Storm Sewer System
NOI - Notice of Intent
NPDES - National Pollutant Discharge Elimination System
NRDC - Natural Resources Defense Council
NURP - Nationwide Urban Runoff Program
Regional Board - San Diego Regional Water Quality Control Board
RGOs - Retail Gasoline Outlets
ROWD - San Diego County Copermittees' Report of Waste Discharge
RURMP - Regional Urban Runoff Management Plan
RWLs - Receiving Water Limitations
SANDAG - San Diego Association of Governments
SIC - Standard Industrial Classification Code

SUSMP - Standard Urban Storm Water Mitigation Plan
SWMP - Storm Water Management Plan
SWRCB - State Water Resources Control Board
SWPPP - Storm Water Pollution Prevention Plan
TAC - State Water Resources Control Board Urban Runoff Technical Advisory Committee
TIE - Toxicity Identification Evaluation
TMDL - Total Maximum Daily Load
USEPA - United States Environmental Protection Agency
WDRs - Waste Discharge Requirements
WLAs - Waste Load Allocation
WQC - Water Quality Criteria
WQBELs - Water Quality Based Effluent Limits
WSPA - Western States Petroleum Association
WURMP - Watershed Urban Runoff Management Plan

INTRODUCTION

The Regional Board received a total of approximately 91 written comments on the revised Tentative Order No. R9-2006-0011 dated August 30, 2006 from approximately 37 different organizations and individuals. Each of these final written comments is responded to in this document. A few of the comments received were equivalent to other comments received; these comments were grouped with other similar comments and responded to once in order to minimize redundancy in this document.

In soliciting comments on the revised Tentative Order No. R9-2006-0011 dated August 30, 2006, the Regional Board was seeking input on modifications made in response to comments on the original Tentative Order (dated March 10, 2006). The majority of the comments were not of this nature. Instead, most comments addressed requirements found in the original Tentative Order or consisted of expanded arguments on previously raised legal issues. The Regional Board has responded to all comments received in a continued effort to increase understanding of the revised Tentative Order's requirements.

The overall organization of this document is consistent with the organization of revised Tentative Order No. R9-2006-0011 dated December 13, 2006. Responses to "General Comments" are presented first, followed by responses to "Comments on Findings". The remainder of the document contains responses to "Comments on Specific Sections," presented in same sequence as the sections in the revised Tentative Order.

The Regional Board appreciates the efforts of all those who contributed by commenting on the revised Tentative Order No. R9-2006-0011. The comments are valuable and some have resulted in proposed permit language changes. To the extent that a revision to the permit language is proposed as a result of a particular comment, that fact is noted in the response to that comment.

The latest revised Tentative Order and Fact Sheet (dated December 13, 2006) are available in conjunction with this Responses to Comments II document at:

http://www.waterboards.ca.gov/sandiego/programs/sd_stormwater.html.

RESPONSES TO GENERAL COMMENTS

Section: General **Sub-section:**

Commenter(s): City of Carlsbad

Comment: The City supports comments submitted by the Copermittees and their legal counsels in their letter dated October 30, 2006, and supports comments submitted by the City County Managers Association in their letter dated October 26, 2006.

Response: Comment noted.

Section: General **Sub-section:**

Commenter(s): City County Managers Association

Comment: There are a few remaining concerns mentioned in comments submitted by the copermittees technical group, and we ask that you carefully consider their viewpoints on subjects such as, but not limited to, the deadline for submitting JURMP Annual Reports, clarification of language to avoid ambiguity or misinterpretations, and the time needed to complete detailed work plans for new monitoring programs.

Response: Comment noted.

Section: General **Sub-section:**

Commenter(s): City County Managers Association, San Diego Copermittees

Comment: It's our understanding that adoption of the permit will be recommended for the December 13th meeting. We respectfully ask that adoption be postponed to allow careful deliberation of the yet-to-be-heard comments at the hearing as well as the written comments received by the end of October.

Response: The determination on whether to adopt the Tentative Order or postpone adoption will be made by the Regional Board members at the December 13th Regional Board meeting.

Section: General **Sub-section:**

Commenter(s): Joe Purohit

Comment: In general, regulatory oversight must accomplish at least these two objectives, as has been the case in many industries (telecom, power): (1) Ensure that the regulated industry meets certain societal goals and/or delivers its goods or services within prescribed standards of quality and service; and (2) Protect, enhance and eventually maximize consumer welfare/benefits, i.e., the regulated industry must operate at least cost and highest efficiencies. Overall, the revised permit addresses the first objective (water quality) very well but falls short in ensuring that co-permittees will conduct themselves in ways that maximize consumer welfare/benefits (i.e., least cost, most efficient operation).

The perception of most consumers and businesses is that improved water quality is not as primary a need as electricity, roads or telephones. Because of such perceptions, it is all the more important that consumer welfare/benefits be maximized. It must become one of the core tenets of storm water regulations. The SDRWQCB, to the extent permitted by law and its regulatory authority, is urged to include mechanisms in the new permit towards meeting this goal, in 2007 or at the earliest practical date.

Response: The Tentative Order includes extensive requirements to help ensure the efficiency and effectiveness of the Copermittees' efforts. Section I of the Tentative Order requires the Copermittees to assess the effectiveness of all of their activities. For example, the section requires "jurisdictional activities/BMPs that are ineffective or less effective than other comparable jurisdictional activities/BMPs shall be replaced or improved." Maximized effectiveness of activities is expected to maximize "consumer welfare/benefits."

Section: General **Sub-section:**

Commenter(s): Joe Purohit

Comment: "Findings," Sections C-7 and D-1b of the revised permit confirm that after almost five years there has been no material improvement in our region's water quality. This raises a few questions: What are the causes for the findings of Sec. C-7 and D-1b? Understanding these causes will help avoid the problems for the next 5-years cycle. The situation gets more complicated if a co-permittee incurs a substantial penalty for violation of the permit. The consumers pay to the industry participants (co-permittee, its environmental consultants, attorneys, water testing companies, etc.) for the original compliance, then again during the appeal phase and then again for the penalty. The water quality has still not improved, and there is a high likelihood that there is no change in industry participants either. Who then are the primary beneficiaries of the previous storm water permit? Responses from the SDRWQCB to the above comments would be welcome. Also, what are SDRWQCB's plans to ensure these situations are not repeated in the next 5-years cycle of the permit?

Response: Findings C.7 and D.1.b of the Tentative Order do not confirm that no material improvement in the region's water quality has occurred over the last five years. Instead, the findings assert that despite the efforts of the previous years, many water quality problems attributable to urban runoff persist. Because of the variability of urban runoff water quality data, statistically significant trends of improving water quality can often take many years to be detected. Despite this difficulty, improving water quality trends have been observed at Tecolote Creek (total suspended solids, total zinc) and Chollas Creek (total suspended solids, total dissolved solids, and dissolved nickel). In addition, some Copermittees have reported documented water quality improvements. The City of San Diego and the City of Encinitas report reduced beach postings and beach closures resulting from elevated indicator bacteria counts.

The Tentative Order includes an increased focus on water quality results, rather than simply focusing on program implementation. The emphasis on watershed programs in the Tentative Order focuses the Copermittees' efforts directly on water quality results. Addressing urban runoff management on a watershed scale focuses on water quality results by emphasizing the receiving waters within the watershed. The conditions of the receiving waters drive management actions, which in turn focus on the water quality problems of the receiving waters each watershed. In addition, numerous changes have been made to the requirements of the Tentative Order; each of these changes is designed to address a specific water quality problem or compliance issue. Each of these changes is discussed in detail in the Fact Sheet. Moreover, the Tentative Order includes a new emphasis on assessment of the effectiveness of the Copermittees' programs. As the Copermittees continually assess and improve their programs' effectiveness with regards to existing development, water quality improvements are expected.

Section: General **Sub-section:**

Commenter(s): Joe Purohit

Comment: Numerous regulatory mechanisms are available to protect and enhance consumer benefits. A few that can be expediently implemented for the new storm water permit are discussed below. They have proven to be hugely successful in other industries. Disclosure of costs: Costs of regulated activities must be fully disclosed by each co-permittee. In the short term, of particular importance are vendor payments for key products and services (e.g., water quality testing). The benefits of such cost disclosure are: (1) A better understanding of the overall cost structure which can help the regulator and the “market” identify areas for efficiency improvements; (2) Increased competition among existing suppliers and new entrants; (3) Greater risk-taking and innovation in new technologies and processes. For example, testing water quality

at substantially lower costs, or new sampling methodologies that lower total costs.

Response: The Tentative Order requires the Copermittees to disclose costs at section G. The section requires the Copermittees to identify their various categories of expenditures and the specific items to be accounted for in each category. The Copermittees are then required to report expenditures for each category in their annual reports.

Section: General **Sub-section:**

Commenter(s): Joe Purohit

Comment: Various watershed-level and regional considerations may have led the SDRWQCB to issue a single permit having oversight over 22 municipalities and government agencies. A single permit approach, however, carries the risk of encouraging "group think" and behavior which may be expedient for the short-term needs of the co-permittees but in the long run will be detrimental to maximizing consumer benefits.

Technology is available today that allows each jurisdiction to measure and analyze water quality (pollutant levels) at all storm water ingress and egress points. Setting relative improvement in water quality over a certain period of time as the jurisdictional regulatory objective is more likely to result in a competitive environment that benefits the consumer. Increased competition can also be expected from suppliers of products and services, and amongst the jurisdictions as each strives to excel and differentiate itself from others based on natural and anthropomorphic characteristics native to its franchised geographic area.

If not practicable to implement for the entire region, such an approach can be readily trialed (with sufficient regulatory involvement) over an exemplar watershed or even with a few co-permittees for a period of few years.

Response: While the Tentative Order is one permit issued to 21 municipalities, efforts have been made to tailor the permit and its requirements to differing natural and anthropomorphic characteristics within watersheds. Section E of the Tentative Order requires the Copermittees to organize by watersheds and address the different specific water quality problems within each watershed. In addition, each Copermittee is required to develop its own programs for its jurisdiction, rather than rely on a region wide program. These components can be expected to potentially result in the benefits discussed in the comment.

Section: General **Sub-section:**

Commenter(s): Natural Resources Defense Council

Comment: The proposed permit fails to comply with the federal requirement to estimate the expected reductions in pollutant loading to be achieved by the permit's terms. EPA regulations require that municipal storm water NPDES permits include an estimate of the reduction in pollutant loading expected to be achieved. With the exception of TMDL analyses for diazinon in Chollas Creek and for dissolved copper in Shelter Island Yacht Basin, we are unable to locate in the staff report, response to comments, or findings, exactly what pollutant reductions are expected through implementation of the proposed permit's terms.

Response: 40 CFR 122.26(d)(2)(v) is a requirement applicable to the Copermittees, not the Regional Board. The Tentative Order requires the Copermittees to estimate pollutant load reductions at section I.

Section: General **Sub-section:**

Commenter(s): San Diego Unified Port District

Comment: Add language to the Permit clarifying that Copermittees are not responsible for major sources of pollutants that are not under their direct control. The RWQCB stated in their Response to Comments "the Tentative Order does not hold the Copermittees responsible for pollution originating outside their jurisdictions. Instead, the Tentative Order holds the Copermittees responsible for their contribution of pollutants to receiving waters" (Response to Comments, pp 13-14). This concept, however, is not directly stated in the revised Draft Permit. As such, Copermittees may be liable for violations to water quality standards caused by pollutant sources beyond their control, such as aerial deposition. Language in the Permit must acknowledge that Copermittees do not have control, nor can they prevent, all pollutant sources from entering their MS4.

Response: The Copermittees are responsible for pollutant discharges into and from their MS4s, regardless of the origin of the pollutant. The Preamble to the Phase II NPDES storm water regulations is clear on this matter: "The operator of a small MS4 that does not prohibit and/or control discharges into its system essentially accepts 'title' for those discharges. At a minimum, by providing free and open access to the MS4s that covey discharges to waters of the United States, the municipal storm sewer system enables water quality impairment by third parties. Section 122.34 requires the operator of a regulated small MS4 to control a third party only to the extent that the MS4 collection system receives pollutants from that third party and discharges it to the waters of the United States. The operators of regulated small MS4s cannot passively receive and discharge pollutants from third parties."

The previous response referred to in the comment addresses discharges to receiving waters that do not enter the Copermittees' MS4, such as private direct discharges to creeks that do not also serve as MS4s or direct agricultural discharges to receiving waters. The response does not find that the Copermittees are not responsible for all discharges from their MS4s.

Section: General **Sub-section:** Multiple

Commenter(s): CICWQ, BIASC, BIASDC, BILD, CELSOC

Comment: In addition, the Regional Board should revise a number of conditions in the Revised Tentative Order to allow for Copermittees to collaborate with other groups and entities, including Homeowners Associations ("HOAs"), Commercial Property Owners Associations ("COAs"), and similar associations and industry groups, to maximize compliance with the Revised Tentative Order. The Revised Tentative Order in its current form does not sufficiently encourage cooperation of Copermittees with other groups in a manner that can benefit water quality. In its responses to comments, the Regional Board staff recognized that water quality benefits can result from regional agreements and cooperation between agencies, and small and large MS4s. The same concept also applies to agreements with HOAs, COAs and similar entities, and such collaboration may allow the Copermittees to expand their water quality reach, which allows for greater water quality benefits.

For example, Copermittees should be allowed to collaborate with HOAs and COAs on methods for oversight of residential areas and on the regional residential education program requirements. See Provision D.3.c.2.(4)-(5). The HOAs are likely going to play an important part in implementing such programs, and thus it makes sense for the HOAs to be involved in development of such program requirements. Involvement of the HOAs during the creation of such programs will allow for more effective programs to be developed that have a greater chance of success in terms of implementation, education, and ultimately greater water quality benefits.

Response: Nothing in the Tentative Order precludes the Copermittees from collaborating with HOAs and other groups. In addition, such efforts are encouraged by Finding D.3.h and section D.6 and E.2.h of the Tentative Order.

Section: General **Sub-section:** Legal

Commenter(s): Best Best & Krieger

Comment: Despite the development of the Small MS4 Permit, its stand-alone nature, and the extensive investment which Small MS4 permittees continue to make into their SWMPs, the Revised Permit suggests that it is Large MS4s, and not their upstream Small MS4 counterparts, which will ultimately remain responsible for the impacts of storm water discharges on receiving water quality in the San Diego region. For example, the recent changes to the Revised Permit state that the Large MS4 Permittees are required to work towards and implement a "watershed based urban runoff management" plan. (Revised Permit at p. 9.) In addition, the changes to the Revised Permit provide that Large MS4 permittees must develop and implement a Jurisdictional Urban Runoff Management Program to "prevent urban runoff discharges from the MS4 causing or contributing to a violation of water quality standards." (Id. at p. 16.) Notably, neither the watershed-based management plan nor the Jurisdictional Urban Runoff Management Plan distinguish between storm water discharges which originate from the Large MS4 and those which originate from Small MS4s which discharge into the Large MS4 storm sewer systems. In fact, the Revised Permit makes clear that, despite the relatively recent implementation of the Small MS4 Permit program, the Large MS4 permittees will remain responsible for discharges from any "Small MS4 that is 'interrelated' to a medium of large MS4." (Id. at p. 2.)

Many, if not the majority, of Small MS4s discharge their storm water runoff into the storm sewer system of a Large MS4s. Accordingly, it would seem that these Small MS4s are "interrelated" to the Large MS4 permittee. Under the Revised Permit, then, it is the Large MS4 permittee which appears ultimately responsible for ensuring that storm water discharges "do not caus[e] or contribut[e] to the violation of any applicable water quality standard."

Because the Revised Permit has such an extensive scope, the obligations of Large MS4s and those of Small MS4s seem unnecessarily duplicative. Both Large and Small MS4 permittees are required to develop and implement water quality plans, storm water monitoring, and other measures under supposedly separate permitting programs. Yet, both Large and Small MS4 storm water discharges enter the Large MS4 storm sewer system, and that is the system upon which the Regional Board has placed primarily responsible for receiving water quality. As such, the administrative costs, time, and other burdens associated with the implementation of Large and Small MS4 permits appear duplicative and unnecessary. Accordingly, Best Best & Krieger's public agency clients believe that the Regional Board needs to take a deeper look at the relationship between the Large and Small MS4 permits, eliminate the unnecessary duplication of effort and costs among the two sets of permittees.

Response: As required by the Phase II NPDES storm water regulations and the General Phase II Storm Water Permit, Phase II MS4s are responsible for reducing their pollutant discharges to the MEP and ensuring that their discharges do not cause or contribute to violations of water quality standards. This responsibility exists regardless of whether the Phase II MS4 discharges into a

Phase I MS4 or not. The Tentative Order does not alter this condition, since the Tentative Order only applies to the Copermittees listed at page 2 of the Tentative Order, and not to Phase II MS4s. The commenter's implication that the Tentative Order's requirements for the Copermittees should somehow relieve Phase II MS4s of responsibility for their discharges is misguided.

Phase II MS4s which discharge to Phase I MS4s have the primary responsibility for their discharges. However, once Phase II MS4 discharges enter Phase I MS4s, the Phase I MS4 accepts secondary responsibility for the discharges. The reason Phase I MS4s have secondary responsibility for Phase II MS4 discharges entering their MS4s is because their MS4s enable the discharges to reach receiving waters unimpeded. The Preamble to the Phase II NPDES storm water regulations agrees with this approach, stating that MS4s "cannot passively receive and discharge pollutants from third parties" (Fed. Reg. 68766).

Since primary responsibility in such instances lies with the Phase II MS4, the Regional Board will first look to the Phase II MS4 in situations where compliance is an issue. However, involvement from the applicable Phase I MS4 will also be expected because the Phase I MS4 is also a discharger. The Phase I MS4 will be expected to ensure pollutant discharges from its MS4 are reduced to the MEP. Since the Phase I MS4 will likely not have direct jurisdiction over the Phase II MS4, approaches for achieving MEP may include interagency agreements, memoranda of understanding, shared resources, etc.

This approach is not duplicative, since Phase I MS4s will need to do little regarding Phase II MS4 discharges so long as the Phase II MS4 discharges are in compliance, as is required of them.

Section: General **Sub-section:** Legal

Commenter(s): BIA & CCWHE

Comment: The responses are inconsistent with regard to the role of the urban runoff management plans. The Regional Board staff's statement that, "the plans only serve as descriptions of the programs, to be used by the Copermittees to guide their implementation," is inconsistent with the Revised Tentative Order itself, Responses to Comments, pp. 29, 30, 31. The Copermittees are required to revise and update their Jurisdictional Urban Runoff Management Plans (JURMPs) and Watershed Urban Runoff Management Plans (WURMPs), as well as develop a Regional Urban Runoff Plan (RUMP). See Revised Tentative Order (J)(1). These plans are intended to provide a detailed, written account of the overall programs. See id. They must be submitted to the Regional Board for review, Revised Tentative Order (J)(1)(a)(2); (J)(1)(b)(3); (J)(1)(c)(2). The Copermittees must also submit annual reports on each of the programs. See Revised Tentative Order (J)(3). Modifications of the programs may be initiated by

the Executive Officer, or the Copermittees may submit requests for modification to the Executive Officer. Revised Tentative Order (K). Thus, the plans are an important and necessary part of the regulatory regime. They inform the Regional Board regarding the details of each of the programs, and they are essential to the Regional Board's ability to monitor and enforce those programs. The Regional Board staffs characterization calls into question the Regional Board's ability to enforce the contents of these plans.

Response: The fact that the Copermittees are required to revise and update their plans does not mean that the plans are a "substantive part of the regulatory regime" necessary to ensure MEP is achieved, as contemplated by the court. The plans serve to organize the Copermittees efforts to address urban runoff. As a practical matter, any program of the size required by the Tentative Order should be documented in writing. This serves to guide implementation of the program by the numerous individuals responsible for program implementation. Naturally, when a program changes, the plan describing the program should be updated. Such updates will keep the plans current.

Nor does the fact that the plans are to be submitted to the Regional Board mean that the plans are a "substantive part of the regulatory regime" necessary to ensure MEP is achieved, as contemplated by the court. Submittal of the plans allows confirmation that the plans have been developed. As discussed above, development of the plans will provide organization and guidance to the Copermittees in implementing their programs. Therefore, confirmation that the plans have been developed is worthwhile. The plans will also be reviewed by the Regional Board to ensure that the Copermittees' programs do not include errors or components in contravention to the Tentative Order's requirements. However, this does not indicate that the plans are the only documents which include the details necessary to determine that MEP is achieved; on the contrary, the Tentative Order's requirements are detailed enough to ensure achievement of MEP. Review of the plans is simply one oversight approach utilized by the Regional Board to ensure program compliance with the Tentative Order, similar to the Regional Board's use of audits, inspections, etc.

Likewise, section K of the Tentative Order does not support the commenter's position. Section K of the Tentative Order addresses changes to the Copermittees' programs, not their plans. A permit section that addresses the Copermittees' programs does not bear light on the nature of the urban runoff management plans. Similarly, the commenter's contention that submittal of urban runoff management program annual reports somehow relates to the status of the urban runoff management plans is without merit. The annual reports describe how the Copermittees conducted their programs, and are not related to the urban runoff management plans.

Finally, the Tentative Order's requirements are sufficient to assess the compliance of the Copermittees' programs. The requirements are adequately

detailed to ensure that the Copermittees' programs achieve the MEP standard and other standards required. Moreover, the annual reports to be submitted by the Copermittees provide ample information to assess Copermittee compliance.

Section: General **Sub-section:** Legal

Commenter(s): BIA & CCWHE

Comment: The Regional Board staff qualified many of their responses with the statement that, "[additional information in response to this comment may be developed." Responses to Comments, pp. 29-67. Federal regulations require certain procedural requirements to be adopted by States in order to gain EPA approval to operate NPDES permit programs, including requirements regarding response to comments. 40 C.F.R. 124.l(e); 40 C.F.R. 123.25(a)(31). The Regional Board must respond to all significant comments on the draft permit prior to, or contemporaneously with, issuance of the final permit. 40 C.F.R. 124.17(a). To the extent the Regional Board staff may be suggesting that they may further respond to comments after the issuance of the final permit, such an attempt would violate the minimum procedural requirements mandated by the federal regulations.

The Regional Board staff included this statement in their responses to many comments raising significant legal questions regarding the Revised Tentative Order. While the statement itself may not be legally improper, it does raise substantial public policy concerns. The reissuance of the San Diego County Municipal Stormwater Permit is an extremely important matter to the San Diego region, and as demonstrated at the June 21, 2006 public hearing, it has generated keen community interest. Therefore, it is vitally important to the public participation process that the Regional Board staff develop its legal arguments in support of its rejection of many proposed improvements and fully respond to comments prior to consideration of the Revised Tentative Order by the Regional Board.

Response: The Regional Board received and responded to approximately 534 comments on the Tentative Order. Only approximately 11 of the responses included the phrase referred to in the comment. While these 11 responses were adequate and complete, the phrase was included to indicate that in the event that additional helpful information was forthcoming, that the Regional Board would provide it for public consideration. The comment did not intend to assert that such information would be developed after adoption of the Tentative Order. Any such information will be provided to the Regional Board members and the public prior to the Regional Board's consideration of adoption of the Tentative Order. Additional information on some of the comments in question is included in Attachment A.

Section: General **Sub-section:** Legal

Commenter(s): BIA & CCWHE

Comment: The Coast Law Group raised similar concerns regarding public participation with respect to the plans. Responses to Comments, pp. 42-43. The Regional Board staff responded, in part, by stating,

Additional public participation processes are not necessary for the urban runoff management plans required in the Tentative Order. The Tentative Order itself contains sufficient detailed requirements to ensure that compliance with discharge prohibitions, receiving water limits, and the narrative standard of MEP are achieved, without formal approval of the plans by the Regional Board. This is achieved by requiring the Copermittees to implement programs that meet specific requirements, rather than requiring the Copermittees to develop plans. Therefore, the extensive formal process followed by the Regional Board for adoption of the Tentative Order is sufficient. Responses to Comments, p. 43.

This response initially states the plans are required, and then in the third sentence it appears to suggest that the Copermittees are not required to develop plans. This is in further contrast to the response to the Coalition's comments, in which the Regional Board staff appears to say that Copermittees are required to implement a program which meets specific requirements, and the plans only serve as descriptions of the programs to be used by the Copermittees to guide their implementation. Responses to Comments, p. 29. Thus the role of the plans is unclear. Additionally, if the plans are not necessary to ensure compliance with discharge prohibitions, receiving water limits, and the narrative standard of MEP are achieved, it is unclear why the Copermittees should be required to spend public funds to develop, revise and update them.

It is rare that both environmental groups (as demonstrated by comments submitted by the Coast Law Group) and business interests (as demonstrated by comments submitted on behalf of the Coalition and the BIA) agree on an issue. Here, all stakeholders agree that additional public participation processes are necessary with regard to the plans. This rare agreement emphasizes the need for the Regional Board to fully and consistently respond to this issue.

Response: The responses in the Responses to Comments document are consistent. The responses emphasize that the Tentative Order includes detailed requirements for the Copermittees' programs that ensure standards are met. Conversely, the responses make clear that the Tentative Order does not rely upon the Copermittees' development of plans in order to ensure MEP is achieved. The focus of the Tentative Order is on development and implementation of programs which meet the Tentative Order's interpretation of MEP, rather than creation of Copermittee plans which exhibit MEP.

While the Tentative Order does not rely upon the plans to ensure MEP and other standards are achieved, the plans still serve a useful purpose. As stated above, the plans serve to organize the Copermittees' efforts to address urban runoff. As a practical matter, any program of the size required by the Tentative Order should be documented in writing. This serves to guide implementation of the program by the numerous individuals responsible for program implementation.

Section: General **Sub-section:** Legal

Commenter(s): BIA & CCWHE

Comment: The Revised Tentative Order contains over 250 significant changes, and there are over 250 pages of responses to comments. This "revised" draft permit is essentially a brand new draft NPDES permit. As such, it is subject to certain procedural requirements including the opportunity for a public hearing prior to adoption. If the Regional Board moves to adopt the Revised Tentative Order without first providing the opportunity for a public hearing, then it is acting contrary to both federal and state laws.

The Regional Board administers the federal NPDES system locally under the state's agreement with the Environmental Protection Agency ("EPA"). As such, under the Clean Water Act ("CWA") implementing regulations, the Regional Board is considered a local NPDES permitting authority that is subject to the same NPDES program requirements as the EPA. See 40 C.F.R. 123.25. Under these regulations, the Regional Board must prepare a new draft NPDES permit when it determines that conditions exist for the revocation and reissue of the preexisting NPDES permit. 40 CFR 124.5(c)(1).

Such conditions arise when the Regional Board "receive[s] new information that cumulative effects [of water pollutants or storm water runoff on the environment are unacceptable," which triggers a NPDES permit revocation and reissue proceeding. 40 CFR 122.62(a)(2). This revocation and reissue proceeding moves forward upon the "agreement" of permittees to the proceedings. This "agreement" is evidenced by the submission of a new application by the Copermittees.

The Copermittees submitted a Report of Waste Discharge ("RWD"), which is the functional equivalent of a new NPDES permit application, to the Regional Board. Thus, the act of submitting the RWD provides the necessary "agreement" for the revocation and reissue proceeding, which then "reopens the entire permit[,] subject to revision, and [a modified permit] is reissued fm a new term." 40 CFR 122.62. The preexisting NPDES permit remains in force because the Copermittees must "comply with all conditions of the existing permit until a new final permit is issued." 40 CFR l24.5(c)(2).

When required to revoke and reissue the NPDES permit, the Regional Board must issue a draft permit in accordance with the procedures set forth in Title 40, Part 124 of the Code of Federal Regulations. 40 C.F.R. 122.62. These procedures require that a draft permit be accompanied by a "fact sheet, . . . based on the administrative record, publicly noticed[,] [] made available for public comment, [and provide] an opportunity for a public hearing," 40 CFR 124.6(e) (emphasis added). Thus, a draft permit pending for adoption before the Regional Board must be subject to public comment. Additionally, the Regional Board must provide an opportunity for a public hearing.

Since the existing NPDES permit remains in force, any revised draft permit that is a "substantial modification" of the existing permit is considered a new "draft permit," which again triggers the public participation requirements mandated by the CWA implementing regulations. The Revised Tentative Order contains over 250 significant modifications of the original draft tentative order. It constitutes a "substantial modification" of both the original tentative order and the existing permit. Thus, the Regional Board is required by federal regulations to afford an opportunity for a public hearing before voting on adoption of the Revised Tentative Order.

The CWA requires that a permitting authority provide for public participation before issuing a decision on whether to adopt an NPDES permit. 33 U.S.C. § l342(a)(l), (b)(3) (2005). The United States Supreme Court interpreted this statutory directive to require &that the NPDES Administrator provide an opportunity for a public hearing, if the NPDES Administrator finds that "sufficient public interest" in the permit decision exists. Castle v. Pac. Legal Found., 445 U.S. 198,216 (1980).

If it appears that "significant public interest" exists in a permitting decision (as it does here), then the NPDES Administrator is bound to hold a public hearing on the matter. In that instance, interested parties may "open substantive consideration of [the conditions of a new permit] through healing requests" when those hearing requests "purport to affect those conditions." Id. Given the large number of participants, the large volume of comments, and the high level of attendance at the prior hearing on the original tentative order, and the significant public interest in conditions that would be imposed under the Revised Tentative Order (as demonstrated by this communication), the standard for "significant public interest" has been met. There is no justification for refusing to hold a public hearing on the Revised Tentative Order.

Additionally, the Ninth Circuit Court of Appeals has held that an. NPDES permitting authority "shall provide an opportunity for a hearing before [any] permit application is approved." Envtl. Def. Ctr.. Inc. v. U.S. Envtl. Prot. Agency, 344 F.3d 832, 857 (9th Cir. 2003) (citing 33 U.S.C. l342(a)(l) (2005)). While the Ninth Circuit applied this principle specifically to Notices of Intent under a Phase II

general permitting scheme, these public participation requirements mandated by the CWA apply to all NPDES permit applications.

Finally, when, as here, a permitting authority is presented with arguments that proposed changes to a NPDES permit affect the rights of interested parties, the CWA requires that those parties be afforded an opportunity for a public hearing in which they may present their arguments. Trustees for Alaska v. US. Envtl. Prot. Agency, 749 F.2d 549, 557 (9th Cir. 1984). The Coalition and the BIA, both "interested parties," assert that their rights will be affected by the conditions that would be imposed by the Revised Tentative Order if adopted, Under the CWA's public participation requirements, the Regional Board must afford them a public hearing to present their comments regarding the Revised Tentative Order.

The Regional Board is also subject to the governing statutes contained in the California Water Code. The Water Code requires regional water quality control boards to "formulate and adopt water quality control plans for all areas within the region." CAL. WATER CODE 13240. The Revised Tentative Order fulfills this mandate by developing directives for administration of management programs by the Copermittees. For example, in Section H of the Revised Tentative Order, the Regional Board proposes to set Total Maximum Daily Loads ("TMDLs") for "Water Quality Based Effluent Limits" by Copermittees in the areas of Chollas Creek and the Shelter Island Yacht Basin. This directive specifies limits in order to establish a standard of “water quality" for storm water in those areas. This represents a standard for "water quality control." As such, the Revised Tentative Order qualifies as a "water quality control plan."

The Water Code mandates that "[the regional boards shall not adopt any water quality control plan unless a public hearing is first held." Id 13244. The Revised Tentative Order constitutes a sufficiently distinct version of a "water quality control plan" such that a new public hearing is required because, for example, in Section H alone there are multiple substantive changes that affect the Copermittees differently than the terms proposed under the original tentative order.

The Regional Board has stated its tentative plans to vote on adoption of the Revised Tentative Order without mention of a public hearing. This contradicts the express provisions of Water Code 13244. Despite the fact that a public hearing was held on the original tentative order, the issuance of the Revised Tentative Order precipitates the need for an entirely new public hearing. See id. A new public hearing is required pursuant to Water Code 13244 because the Regional Board is considering adoption of a "water quality control plan" as part of the Revised Tentative Order.

Additionally, the Water Code empowers the Regional Board, "as authorized or required by the Federal [Clean Water Act]," to "issue waste discharge requirements . . . which apply and ensure compliance with all applicable

provisions of the [Clean Water Act]." Id. 13377. The Regional Board may only adopt these requirements "after notice and any necessary hearing." CAL. WATER CODE 13378. A move to adopt the Revised Tentative Order, which contains approximately over 250 significant modifications of the original draft tentative order, should clearly precipitate the need for the public to comment on these changes in an open hearing before the Regional Board. Thus, in moving to vote on adoption of the Revised Tentative Order without first holding such a hearing, the Regional Board is acting in violation of Water Code 13378.

Response: The Regional Board held a public hearing on the Tentative Order on June 21, 2006. No additional public hearing is necessary, because all modifications made to the Tentative Order were made directly in response to comments from interested parties. As such, all of the modifications were reasonably foreseeable and were a logical outgrowth of the permit adoption process. Modifications that are reasonably foreseeable and are a logical outgrowth of the permit adoption process do not necessitate an additional public hearing. In any event, at the December 13, 2006 Regional Board meeting, the Regional Board plans to accept oral comments on modifications to the Tentative Order that were made following the June 21, 2006 public hearing. Moreover, the Regional Board accepted and responded to written comments on the modifications to the Tentative Order. These efforts address any perceived flaws in the Regional Board's process for consideration of adoption of the Tentative Order.

The revised Tentative Order does not constitute an entirely new draft permit for which a new public hearing must be held. The revised Tentative Order is just that; a revision to the previously issued Tentative Order. The vast majority of the Tentative Order has not been revised. Since a public hearing has already been held on the Tentative Order, an additional public hearing is not needed simply to address reasonably foreseeable revisions made in response to comments.

The Tentative Order is not a water quality control plan. Section 13244 of the California Water Code's use of the term "water quality control plan" refers to the Regional Boards' Basin Plans, the Ocean Plan, etc. Therefore, the section does not apply to the Tentative Order. Moreover, as explained above, the Regional Board has held a public hearing on the Tentative Order, and is therefore in compliance with California Water Code section 13378.

Section: General **Sub-section:** Legal

Commenter(s): CCWHE, BIASDC, CELSOC, BIASC, CICWQ, BILD

Comment: The Court of Appeal in the previous litigation over the San Diego County MS4 Permit concluded that MEP was the standard applicable to MS4 Permits and that the Regional Board has discretion to exceed the MEP standard

only if expertise and factual information determined that the heightened standard was a necessary and workable enforcement mechanism necessary to achieve the goals of the Clean Water Act. (Building Industry Assn. of San Diego County, supra, 124 Cal.App.4th at p. 884.) Nowhere in the Revised Tentative Order or accompanying supporting documentation and information has the Regional Board sufficiently shown that the requirements exceeding the MEP standard are necessary and a workable enforcement mechanism to achieve the water quality goals of the Clean Water Act.

Response: Oddly, the commenter attempts to use the court decision on the current San Diego County Municipal Storm Water Permit (Order No. 2001-01) as an argument against the requirements of the Tentative Order. The current permit and Tentative Order utilize the same regulatory approach with respects to achievement of the MEP standard and compliance with receiving water quality standards. The Court of Appeal, Fourth Appellate District found that "the Permit's Water Quality Standards provisions are proper under federal law." Rather than place limitations on the Regional Board when requiring compliance with receiving water quality standards, the Court found the Regional Board's approach wholly appropriate under federal law. In the Fact Sheet, the Regional Board explains it approach for requiring compliance with water quality standards, and explains why it is necessary.

Section: General **Sub-section:** Legal

Commenter(s): CCWHE, BIASDC, CELSOC, BIASC, CICWQ, BILD, CBIA

Comment: Clean Water Act section 402(p)(3)(B), the basis for municipal storm water regulation, authorizes the issuance of permits for discharges “from municipal storm sewers.” Contrary to this, the Revised Tentative Order attempts to regulate discharges “into” the MS4 system which is inappropriate and inconsistent with the regulatory scheme for municipal storm water discharges established by the Clean Water Act, State Water Resources Control Board orders and related court decisions. In Order WQ2001-0015, the State Water Resources Control Board determined that the Regional Board cannot prohibit discharges “into” the MS4 system and that permit provisions that attempted to regulate all discharges into the MS4 system were too broad in light of the statutory framework of municipal storm water regulation under the Clean Water Act. In that order the State Board stated, “the specific language in this prohibition too broadly restricts all discharges ‘into’ an MS4, and does not allow flexibility to use regional solutions, where they could be applied in a manner that fully protects receiving waters.” (Order WQ2001-0015.) Indeed, a footnote in that order provides, “Discharge Prohibition A.1. also refers to discharges into the MS4, but it only prohibits pollution, contamination, or nuisance that occur in ‘waters of the state.’ Therefore, it is interpreted to apply only to discharges to receiving waters.” (Id. (emphasis added).)

In addition, in its discussion of the MS4 regulatory scheme the Court in Building Industry Assn. of San Diego County, supra, 124 Cal.App.4th at p. 871 stated, "municipalities and other public entities are required to obtain, and comply with, a regulatory permit limiting the quantity and quality of water runoff that can be discharged from these storm sewer systems." Thus, both the courts and the State Water Resources Control Board have made clear that the Clean Water Act regulates discharges "into" receiving waters – not discharges "into" the MS4. Regulating discharges "into" the MS4 system shifts the legal burden of compliance from the discharger to the Copermittees without adequate statutory authorization to do so and in violation of the statutory scheme set up for municipal storm water regulation in the Clean Water Act.

In the Responses to Comments, Regional Board staff state, "[s]ince the Copermittees own and operate their MS4s, they cannot passively receive discharges from third parties." (Responses to Comments, p. 26.) In support of this statement, they cite [64] Fed. Reg. 68766. On this page, the Environmental Protection Agency ("EPA"), in describing its final Phase II Rule, states, "the operators of regulated small MS4s cannot passively receive and discharge pollutants from third parties." However, the issue of whether a small MS4 could be required to regulate third parties discharging into their system was not a settled matter. In fact, the EPA went on to explain that the individual permit option is an alternative for municipal system operators who seek to avoid third party regulation according to all or some of the minimum measures required under the general permit. Thus, the citation to 64 Fed. Reg. 68766 does not clearly demonstrate federal authority to require MS4 operators to regulate discharges by third parties into their systems.

Further, from a water quality perspective, regulating discharges "into" the MS4 system unduly constrains regional water quality solutions that will benefit water quality, particularly in the context of the watershed management plans in the Revised Tentative Order. The internal conflict in the Revised Tentative Order between mandating regional solutions, and making those legally difficult if not impossible to implement by requiring treatment before discharge into the MS4 system should be eliminated. For all of these reasons, the Revised Tentative Order should be revised to eliminate all requirements and implications that Copermittees are responsible for non-compliant and illicit dischargers.

Response: The Tentative Order appropriately requires control of discharges into the MS4 in accordance with federal law. The Clean Water Act and NPDES federal regulations clearly require control of discharges into the MS4. Section 402(p)(3)(B)(ii) of the Clean Water Act states that MS4 permits must "prohibit non-storm water discharges into the storm sewers." 40 CFR 122.26(d)(2)(iv)(B) requires Copermittees to "detect and remove […] illicit discharges and improper disposal into the storm sewer." 40 CFR 122.26(d)(2)(iv)(D) requires the

Copermittees to "reduce pollutants in storm water runoff from construction sites to the municipal storm sewer system."

The Tentative Order's approach to regulating discharges into and from the MS4 is in accordance with SWRCB Order WQ 2001-15. In that order, the SWRCB reviewed the current permit (Order No. 2001-01) requirements and made one change to one prohibition. The order upheld all other requirements of the current permit. The Tentative Order incorporates the one change made by the SWRCB, and continues the approach of the current permit, as it was upheld by the SWRCB in Order WQ 2001-15. SWRCB Order WQ 2001-15 certainly does not preclude the Regional Board for included requirements in the Tentative Order which address discharges into the MS4. On the contrary, the order supports such requirements, stating: "It is important to emphasize that dischargers into MS4s continue to be required to implement a full range of BMPs, including source control."

The Court of Appeals, Fourth Appellate District, found that the current permit's approach to regulation of discharges into the MS4 was appropriate. Since the Tentative Order utilizes the same approach, the court decision supports the Tentative Order's requirements.

Section: General **Sub-section:** Legal

Commenter(s): CCWHE, BIASDC, CELSOC, BIASC, CICWQ, BILD, CBIA

Comment: The California Supreme Court has concluded that a regional board must take into account the factors listed in Water Code section 13241 and relevant case law when adopting standards that are more stringent than federally imposed standards. (City of Burbank v. State Water Resources Control Board (2005) 35 Cal.4th 613.) The Revised Tentative Order contains a number of instances where the Regional Board has gone beyond the standards imposed by the Clean Water Act, and thus additional analysis under Water Code section 13241 is required for adoption of such standards and conditions. The Revised Tentative Order requires the control of runoff from all construction and industrial sites, imposes additional inspection and MS4 cleaning requirements, mandates advanced treatment and incorporates numeric effluent limits – none of which is mandated by the Clean Water Act.

Response: As has previously been stated, the requirements of the Tentative Order do not exceed federal law. Therefore, the Regional Board need not consider the factors listed in Water Code section 13241 in adopting the Tentative Order. (City of Burbank v. State Water Resources Control Board (2005) 35 Cal.4th 613.) Control of pollutants in urban runoff from construction and industrial sites is required by 40 CFR 122.26(d)(2)(iv)(C-D). Maintenance of the MS4 is required by 40 CFR 122.26(d)(2)(iv)(A)(1). Reduction of pollutant

discharges from construction sites to the maximum extent practicable is required by 40 CFR 122.26(d)(2)iv)(D): The Regional Board finds that advanced treatment is necessary to achieve the MEP standard at construction sites that pose an exceptional threat to water quality. The Tentative Order does not incorporate numeric effluent limits in order to implement TMDLs. The WQBELs used in the TMDL section of the Tentative Order are BMP-based, rather than numeric. Section H.1.a requires the Copermittees to "implement BMPs capable of achieving the interim and final diazinon Waste Load Allocation (WLA)." Section H.2.a requires the Copermittees to "implement BMPs to maintain a total annual copper discharge load of less than or equal to 30 kg copper / year." The WLAs included in the Tentative Order are performance standards for implemented BMPs, not effluent limitations. The WLAs are to be used to assess if additional BMPs are necessary. Moreover, the Interim TMDL Numeric Targets for diazinon do not constitute numeric effluent limits, since they are receiving water limitations. In that respect, they are similar to the receiving water limitations in section A.3 of the Tentative Order. The TMDL requirements of the Tentative Order do not exceed federal law. The federal NPDES regulations require NPDES permit requirements to be "consistent with the assumptions and requirements of any available wasteload allocation" (40 CFR 122.44(d)(1)(vii)).

Section: General **Sub-section:** Legal

Commenter(s): CCWHE, BIASDC, CELSOC, BIASC, CICWQ, BILD, CBIA

Comment: The Revised Tentative Order improperly attempts to shift enforcement obligations from the Regional Board to the Copermittees and requires the Copermittees to undertake enforcement action against dischargers, without the legal authority to do so. For example, the Revised Tentative Order requires inspection by the Copermittees of industrial and commercial sites to determine if such sites have obtained coverage under the applicable NPDES permit, to assess compliance with ordinances and permit requirements, and to perform visual inspections for illicit discharges. These are all activities that are properly handled by the Regional Board and not the Copermittees who have no legal authority to undertake enforcement action to respond to such violations.

The Revised Tentative Order, like the previous tentative order, also requires the Copermittees to adopt and apply ordinances to prohibit or otherwise regulate discharges into and from MS4s caused by third parties, including private residents, other local agencies, and non-traditional MS4s. (See, e.g., Revised Tentative Order Section D.3.) These third parties include non-traditional MS4s, such as universities, community colleges and public schools, that have not been designated under the State Board's General Permit for Storm Water Discharges from Small MS4s (Water Quality Order No. 2003-0005-DWQ, NPDES No. CAS00000X) ("Small MS4 Permit"). In support of its Small MS4 Permit, the State Board stated that the regional boards may designate non-traditional MS4s

at any time subsequent to the adoption of the Small MS4 Permit. (See State Board's Findings In Support of Small MS4 Permit, No. 12.) Instead of designating non-traditional MS4s, the Regional Board impermissibly attempts to shift its obligation to regulate these Phase II jurisdictions to the Copermittees through the Revised Tentative Order.

Response: The Tentative Order does not shift enforcement obligations from the Regional Board to the Copermittees. The NPDES federal regulations clearly hold the Copermittees responsible for discharges into and from their MS4s from industrial and commercial sites (40 CFR 122.26(d)(iv)(2)(A) and (C). The Copermittees are required to reduce pollutant discharges to the MEP; assessing coverage under the General Industrial Storm Water Permit during inspections conducted for other purposes falls within this scope. Moreover, the Copermittees have conducted this practice under the current permit and do not object to continuing this practice. It has proven beneficial to both the Regional Board and the Copermittees in the past by getting non-filers covered under the permit. The Copermittees are only required to assess compliance with their own ordinances and permit requirements. They are not required to assess compliance with the General Industrial Storm Water Permit's requirements (see Finding D.3.a). The Copermittees are also clearly held responsible for illicit discharges into their MS4s. The Clean Water Act prohibits non-storm water discharges from entering the MS4 (section 402(p)(3)(B)(ii)). 40 CFR 122.26(d)(2)(iv)(B) requires the Copermittees to detect and remove illicit discharges into the storm sewer.

The Tentative Order does not shift responsibility for Phase II MS4 discharges to the Copermittees. Phase II MS4s which discharge to Phase I MS4s have the primary responsibility for their discharges. However, once Phase II MS4 discharges enter Phase I MS4s, the Phase I MS4 accepts secondary responsibility for the discharges. The reason Phase I MS4s have secondary responsibility for Phase II MS4 discharges entering their MS4s is because their MS4s enable the discharges to reach receiving waters unimpeded. The Preamble to the Phase II NPDES storm water regulations agrees with this approach, stating that MS4s "cannot passively receive and discharge pollutants from third parties" (Fed. Reg. 68766).

Since primary responsibility in such instances lies with the Phase II MS4, the Regional Board will first look to the Phase II MS4 in situations where compliance is an issue. However, involvement from the applicable Phase I MS4 will also be expected because the Phase I MS4 is also a discharger. The Phase I MS4 will be expected to ensure pollutant discharges from its MS4 are reduced to the MEP. Since the Phase I MS4 will likely not have direct jurisdiction over the Phase II MS4, approaches for achieving MEP may include interagency agreements, memoranda of understanding, shared resources, etc.

Section: General **Sub-section:** Legal

Commenter(s): CCWHE, BIASDC, CELSOC, BIASC, CICWQ, BILD, CBIA

Comment: Where the new programs and higher levels of service are not specifically required by the federal regulations, Regional Board staff must show that they are necessary to meet the MEP standard. Neither the Revised Tentative Order nor the Responses to Comments provides this explanation.

As an example, the Revised Tentative Order requires the Copermittees to develop and implement a Hydromodification Management Plan ("HMP"). (See Revised Tentative Order D.1.g.) Regional Board staff stated in response to comments from the Copermittees that limits have been placed on urban runoff flows under certain circumstances to protect the beneficial uses of waters as required by federal law. (See Responses to Comments, pp. 60-61.) As an initial matter, Regional Board staff identified no studies or factual data supporting their claim that any specific water bodies' beneficial uses have been impaired as a result of hydromodification impacts. Moreover, no federal authority requires the development and implementation of an HMP to protect beneficial uses. Further, it has not been shown that the development and implementation of an HMP, and particularly a ban on hardened improvements, is the only strategy available to the Regional Board in order to satisfy its obligation to protect the beneficial uses of the waters at issue here. Thus, there is no federal mandate that the Regional Board require the development and implementation of an HMP in the Revised Tentative Order. The HMP requirements apply to, among others, flood control capital improvement and maintenance projects. Therefore, costs associated with the development and implementation of the HMP requirements, including those associated with flood control capital improvement and maintenance projects, are incurred pursuant to an unfunded state mandate.

As a second example, the Revised Tentative Order requires each Copermittee to implement a schedule of maintenance activities for the MS4 and MS4 facilities that must include inspection 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 and at least annual inspection of all other MS4 facilities. (See Revised Tentative Order section D.3.a.(3)(b).) 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. (See id.) This constitutes a higher level of service compared to the existing permit. (See Order No. 2001-01 section F.3.a.(5).) As specific legal authority for the annual inspection and cleaning of MS4s, Regional Board staff relies on 40 Code of Federal Regulations section 122.26(d)(2)(iv)(A)(1, 3 and 4). (See Responses to Comments, p. 62.) The cited subdivisions of this section do not require the annual inspection and cleaning of MS4s. Assuming, arguendo, that the Regional Board is authorized by this section to impose annual inspection and cleaning of MS4s, it is not required to do so. Further, it has not been shown that

annual inspection and cleaning of MS4s is necessary to meet the federal MEP standard. Therefore, this higher level of service in the Revised Tentative Order is not required pursuant to a federal mandate. Instead, it is an unfunded state mandate.

As a third example, the Revised Tentative Order places additional requirements on the Copermittees with regard to the descriptions and analysis of Watershed Activities, and it requires no less than two Watershed Water Quality Activities and two Watershed Education Activities be in an active implementation phase in each permit year. (See Revised Tentative Order section E.2.) The new requirements regarding the WURMPs constitute a higher level of service compared to the existing permit. Regional Board staff cite 40 Code of Federal Regulations section 122.26(a)(3)(ii), 40 Code of Federal Regulations section 122.26(a)(3)(v), 40 Code of Federal Regulations section 122.26(a)(5) and 40 Code of Federal Regulations section 122.26(d)(2)(iv) as specific legal authority for this requirement. (See Responses to Comments, pp. 63-64.) While this regulation may provide such authority, it does not mandate the imposition of a watershed program, nor does it require the new levels of service in the Revised Tentative Order. Thus, the new levels of service required with regard to the WURMPs constitute unfunded state mandates.

These are just three examples of new programs or higher levels of service imposed by the Revised Tentative Order and subject to reimbursement as unfunded state mandates. It is essential to identify in the Revised Tentative Order what is required of Copermittees that is above and beyond that mandated, not permitted, by federal law. Without clear identification of the requirements that exceed federal mandates, it is impossible for the Regional Board to identify the extent to which it is requiring Copermittees to develop new programs or higher levels of service under Porter-Cologne, rather than the Clean Water Act, and thus, risks running afoul of the prohibition on unfunded state mandates.

Regional Board staff's reliance on federal statutes and regulations for the authority to adopt many of the new programs and higher levels of service in the Revised Tentative Order does not demonstrate that those new programs and higher levels of service are required by a federal mandate. Thus, if challenged, it seems likely that the Commission would determine the costs for these new programs and higher levels of service are mandated by the state and thus the Copermittees would be entitled to reimbursement.

Response: Hydromodification Management Plan

The impact of hydromodification on beneficial uses has been well documented, both nationally and in southern California. Researchers studying flood frequencies in Riverside County have reported that increases in watershed imperviousness of only 9-22% can result in increases in peak flow rates for the two-year storm event of up to 100% (Schueler and Holland, 2000a). Such

changes in runoff have significant impacts on channel morphology. Ephemeral/intermittent channels in southern California appear to be more sensitive to changes in imperviousness than channels in other areas. Morphology of small channels in southern California was found to change with only 2-3% watershed imperviousness, as opposed to 7-10% watershed imperviousness in other parts of the nation (Coleman, et. al., 2005).

Stream channels typically respond to increased runoff rates and durations by increasing their cross-sectional area to accommodate the higher flows. This is done through widening of the channel banks, down-cutting of the channel bed, or both. This channel instability results in streambank erosion and habitat degradation, which is a significant impact to beneficial uses. Channel instability causes impacts to beneficial uses through sedimentation, loss of overhead cover, and loss of instream habitat structures, such as the loss of pool and riffle sequences (Schuler and Holland, 2000b). Numerous studies have exhibited the link between urbanization, poor habitat quality, and impaired beneficial uses such as reduced insect and fish diversity (Ibid.). These findings are also supported by the Copermittees' bioassessment data, which typically exhibits Poor to Very Poor Index of Biotic Integrity ratings for San Diego County channels, even though toxicity is frequently not found to be persistent (County of San Diego, 2005). Moreover, data from Orange County shows a relationship between benthic community response and physical habitat quality. Ecological condition tended to drop rapidly for sites with poor or moderate physical habitat conditions (Orange County Copermittees, 2006). Physical habitat conditions account for many factors directly impacted by hydromodification, such as instream cover, embeddedness, sediment deposition, channel alteration, riffle frequency, vegetative protection, and riparian vegetation.

Development and implementation of a Hydromodification Management Plan is a necessary and practicable means of protecting beneficial uses. The Regional Board need not exhibit that this specific requirement is the only solution to a particular problem in order to include the requirement in the Tentative Order. The Fact Sheet exhibits that the approach incorporated into the requirement is strongly supported by technical evidence and has been implemented elsewhere in California and the United States. As such, it is an appropriate requirement for inclusion in the Tentative Order.

Finally, development of the HMP does not constitute a higher level of service. The Copermittees' current permit, Order No. 2001-01, requires development of "criteria to ensure that discharges from new development and significant redevelopment maintain or reduce pre-development downstream erosion and protect stream habitat." Likewise, the Tentative Order requires the Copermittees to "identify a range of runoff flows for which Priority Development Project post-project runoff flow rates and durations shall not exceed pre-project runoff flow rates and durations, where the increased flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial

uses." As can be seen, the Tentative Order's HMP requirements only clarify what is already required by Order No. 2001-01, but do not impose more stringent substantive requirements. The HMP provisions continue to require MS4 dischargers to control urban runoff flows from new development to prevent downstream erosion and protect beneficial uses as part of their obligation to reduce pollutant discharges.

Inspection and Maintenance of the MS4

Regular inspections and maintenance of the MS4 is necessary for MEP to be achieved. The federal regulations and USEPA guidance are clear on this issue. 40 CFR 122.26(d)(2)(iv)(A)(1) provides that the proposed management program include "A description of maintenance activities and a maintenance schedule for structural controls to reduce pollutants (including floatables) in discharges from municipal separate storm sewers." In addition, USEPA finds that "Lack of maintenance often limits the effectiveness of storm water structural controls such as detention/retention basins and infiltration devices. […] The proposed program should provide for maintenance logs and identify specific maintenance activities for each class of control, such as removing sediment from retention ponds every five years, cleaning catch basins annually, and removing litter from channels twice a year. If maintenance activities are scheduled infrequently, inspections must be scheduled to ensure that the control is operating adequately. In cases where scheduled maintenance is not appropriate, maintenance should be based on inspections of the control structure or frequency of storm events. If maintenance depends on the results of inspections or if it occurs infrequently, the applicant must provide an inspection schedule. The applicant should also identify the municipal department(s) responsible for the maintenance program" (1992). USEPA's contemplation that regular inspection and maintenance of the MS4 clearly indicates that such activities are necessary to achieve the MEP standard.

Annual inspection and maintenance of the MS4 has been exhibited to be practicable, and therefore falls within the MEP standard. For example, the Riverside County Copermittees inspect and clean all of their catch basins, storm drain inlets, and open channels annually (San Diego Regional Water Quality Control Board, 2004). Moreover, in their comments on the Tentative Order, the Copermittees propose to conduct annual inspections and maintenance of the MS4 (County of San Diego, 2006). The fact that the San Diego County Copermittees themselves propose annual MS4 inspection and cleaning exhibits its practicability. By definition, a practicable activity falls within the scope of MEP and does not exceed the MEP standard mandated by federal law.

In addition, annual inspection and maintenance of the MS4 is not an increased level of service. For example, the San Diego Unified Port District and the City of Imperial Beach report in their Jurisdictional Urban Runoff Management Program documents that they inspect and clean all of their catch basins annually (2002).

The Tentative Order's MS4 inspection and maintenance requirements clarify what is required, but do not require an increased level of service. The level of service required remains reduction of pollutant discharges to the MEP.

Watershed Activities

The federal NPDES storm water regulations clearly contemplate addressing urban runoff on a watershed basis. Federal NPDES regulation 40 CFR 122.26(a)(3)(ii) states: "The Director may […] issue distinct permits for appropriate categories of discharges […] including, but not limited to […] all discharges within a system that discharge to the same watershed […]" Federal NPDES regulations 40 CFR 122.26(a)(3)(v) states: "Permits for all or a portion of all discharges from large or medium municipal separate storm sewer systems that are issued on a system-wide, jurisdiction-wide, watershed, or other basis may specify different conditions relating to different discharges covered by the permit, including different management programs for different drainage areas [watersheds] which contribute storm water to the system." Federal NPDES regulation 40 CFR 122.26(a)(5) states: "The Director may issue permits for municipal separate storm sewers that are designated under paragraph (a)91)(v) of this section on a system-wide basis, a jurisdiction-wide basis, watershed basis, or other appropriate basis." Federal NPDES regulation 40 CFR 122.26(d)(2)(iv) states: "Proposed programs may impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls."

Moreover, USEPA guidance recommends the NPDES permits address water quality issues on a watershed basis. Its Watershed-Based NPDES Permitting Policy Statement issued on Jan. 7, 2004 states the following:

> EPA continues to support a holistic watershed approach to water quality management. The process for developing and issuing NPDES permits on a watershed basis is an important tool in water quality management. EPA believes that developing and issuing NPDES permits on a watershed basis can benefit all watershed stakeholders, from the NPDES permitting authority to local community members. A watershed-based approach to point source permitting under the NPDES program may serve as one innovative tool for achieving new efficiencies and environmental results. EPA believes that watershed-based permitting can:
>
> - lead to more environmentally effective results;
> - emphasize measuring the effectiveness of targeted actions on improvements in water quality;
> - provide greater opportunities for trading and other market based approaches;
> - reduce the cost of improving the quality of the nation's waters;
> - foster more effective implementation of watershed plans, including total maximum daily loads (TMDLs); and

- realize other ancillary benefits beyond those that have been achieved under the Clean Water Act (e.g., facilitate program integration including integration of Clean Water Act and Safe Drinking Water Act programs).

Watershed-based permitting is a process that ultimately produces NPDES permits that are issued to point sources on a geographic or watershed basis. In establishing point source controls in a watershed-based permit, the permitting authority may focus on watershed goals, and consider multiple pollutant sources and stressors, including the level of nonpoint source control that is practicable. In general, there are numerous permitting mechanisms that may be used to develop and issue permits within a watershed approach.

Therefore, the watershed requirements of the Tentative Order are based on the federal NPDES regulations and federal recommendations and guidance. Moreover, the Regional Board has included the watershed requirements in the Tentative Order in order to be in accordance with these regulations and guidance. As such, the watershed requirements do not constitute an unfunded state mandate.

It is also worth noting that requirements for implementation of watershed activities has been exhibited to be practicable. The Copermittees currently implement watershed activities under Order No. 2001-01. In addition, the requirement that the Copermittees implement two watershed activities within each watershed was recommended by the Copermittees themselves. Since implementation of watershed activities is practicable, it falls within the federally mandated MEP standard and does not exceed the standard.

Finally, implementation of two watershed activities does not constitute an increased level of service. In its June 7, 2006 letter to the Regional Board providing “Watershed Comments on Tentative Order R9-2006-0011,” the San Diego Unified Port District claimed that 21 watershed activities were implemented in the San Diego Bay watershed during fiscal year 2004-2005, with six of those watershed activities actively reducing pollutant loads. The Tentative Order’s watershed requirements clarify what is required, but do not require an increased level of service. The level of service required remains reduction of pollutant discharges to the MEP.

Section: General **Sub-section:** Legal

Commenter(s): CCWHE, BIASDC, CELSOC, BIASC, CICWQ, BILD, CBIA

Comment: While regulated parties may design aspects of their own storm water programs, those programs "must, in every instance, be subject to meaningful review by an appropriate entity to ensure that each such program reduces the discharge of pollutants to the maximum extent practicable," Envtl. Def. Ctr. Inc.,

344 F.3d at 856. Additionally, like the Phase II NOIs considered by the Ninth Circuit, these plans are subject to public participation requirements including public availability and the opportunity for a hearing. See id. at pp. 857- 858.

The Regional Board staffs attempt to distinguish the Ninth Circuit's holding by stating that "the judicial ruling has not been extended to permits such as the Tentative Order" is unconvincing. Response to Comments, p. 29. Whether the permit is a Phase I NPDES permit or a Phase II NPDES permit, the minimum procedural requirements under the CWA must be satisfied. The Revised Tentative Order, if adopted, will be issued to multiple Copermittees who will be required to develop, revise and update their own storm water programs and describe those programs in detailed plans. The programs (and the plans describing them) are substantive components of the regulatory regime. Thus, the Ninth Circuit's analysis is squarely on point.

Response: As we have previously stated, the court decision cited by the commenter deals with a general permitting scheme, under which general permits are issued containing very little (if any) requirements to assure standards are met. The court concludes that because the general permits will not require controls to reduce the discharge of pollutants to the MEP, the plans developed under the general permits must be reviewed. The permitting approach used in the Tentative Order is significantly different than the general Phase II permitting approach. The Tentative Order itself contains sufficient detailed requirements to ensure that compliance with discharge prohibitions, receiving water limits, and the narrative standard of MEP are achieved. Rather than require the Copermittees to simply develop and implement a plan which describes a program, the Tentative Order requires the Copermittees to implement a program which meets specific requirements. The plans only serve as descriptions of the programs, to be used by the Copermittees to guide their program implementation. As such, the plans do not serve as “functional equivalents” of the Tentative Order and are not “substantive components of the regulatory regime.” Moreover, the level of detail included in the requirements of the Tentative Order ensures that use of the plans as “functional equivalents” of the Tentative Order is not necessary.

In adopting the Tentative Order, the minimum procedural requirements of the Clean Water Act will be satisfied. Since the Tentative Order itself contains the substantive requirements which must be met to achieve applicable standards, additional procedures for the urban runoff management plans are not necessary.

Section: General **Sub-section:** Legal

Commenter(s): CICWQ, BIASC, BIASDC, BILD, CELSOC

Comment: The Revised Tentative Order deprives the regulated community of due process in a number of instances because many of the terms, conditions and requirements are so vaguely stated that the Revised Tentative Order does not provide the regulated community with adequate notice of what is required to comply with the Revised Tentative Order, and, conversely, fails to provide adequate notice as to what may constitute a violation of the Revised Tentative Order once it is adopted. "Notice is fundamental to due process." 7 Witkin § 638 (10th ed. 2006). The lack of an adequate definition constitutes improper notice to the regulated community in violation of due process. Cal. Const. Art. I, §§ 7, 15; Cal. Gov. Code § 11340 et seq. (A "standard that has no content is no standard at all and is unreasonable." Wheeler v. State Bd. of Forestry (1983) 144 Cal.App.3d 522, 527-528).

The critical instance of insufficient notice relates to provisions of the Revised Tentative Order governing the standard of water quality control that must be attained by Copermittees under the Permit. For example, currently the Revised Tentative Order does not adequately address situations where water quality controls are implemented by Copermittees to the Maximum Extent Practicable ("MEP"), as required by federal law , but receiving water violations are nonetheless detected. This issue will be particularly difficult for Copermittees to address if it is not factually clear that discharges from public storm drain (MS4) systems are proximately causing or contributing to receiving water violations, and/or if no additional best management practices (BMPs) can be identified to provide additional water quality control because, in fact, BMPs meeting the MEP standard have already been implemented.

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

Response: The Copermittees must reduce the discharge of pollutants to the MEP and ensure that their MS4 discharges do not cause or contribute to violations of water quality standards. If the Copermittees have reduced pollutant discharges to the MEP, but their discharges are still causing or contributing to violations of water quality standards, the Tentative Order provides a clear and detailed process for the Copermittees to follow. This process is often referred to as the "iterative process" and can be found at section A.3. The language of section A.3 is prescribed by the SWRCB and is included in MS4 permits statewide. Section A.3 essentially requires additional BMPs to be implemented

until MS4 discharges no longer cause or contribute to a violation of water quality standards.

The commenter's assertion that achievement of MEP serves as compliance with the Tentative Order, to the exclusion of the requirement that receiving water quality standards be met, is incorrect. This point was directly addressed by the Court of Appeal, Fourth Appellate District in its decision on the current permit, Order No. 2001-01 (Building Industry Association of San Diego County, et al., v. State Water Resources Control Board, et al). The court states: "If the maximum extent practicable standard is generally "less stringent" than another Clean Water Act standard that relies on available technologies, it would be unreasonable to conclude that anything more stringent than the maximum extent practicable standard is necessarily impossible." As such, achievement of MEP does not serve as a ceiling for Copermittee urban runoff management efforts. Copermittees must also ensure that MS4 discharges are not causing or contributing to violations of water quality standards.

Section: General **Sub-section:** Legal

Commenter(s): City County Managers Association

Comment: In contrast to RWQCB staff's thoughtful responses to technical comments, it appears that the question of unfunded state mandates is unaddressed or treated with summary dispatch. During the previous comment period copermittee attorneys questioned the presence of potentially unfounded mandates within the proposed permit. The attorneys have clarified their questions pertaining to both federal and state law and prepared a lengthy analysis on the topic for your review. We ask that you review their analysis with the same care shown to the technical comments because the outcome presents significant fiscal and constitutional implications for all stakeholders including the RWQCB.

Response: The responses to the unfunded mandate comments were adequate and complete. However, additional responses have been crafted to address new comments on the unfunded mandate issue. Please see these new responses for more information.

Section: General **Sub-section:** Legal

Commenter(s): Natural Resources Defense Council

Comment: The Board is poised to adopt the finding that implementation of the proposed permit "is expected to ultimately achieve compliance with water quality standards." Indeed, under State Board Order WQ 2001-01, the Regional Board

is obligated to require compliance with water quality standards. Yet contrary to the quoted finding, and despite the legal requirement to meet water quality standards, the weight of the evidence here shows that water quality impairments persist—and in some cases are worsening—in the San Diego Region after over 15 years of storm water management under the existing regime. This fact is not in dispute. The Copermittees' own monitoring data show that urban runoff remains a primary cause of water quality impairment in the San Diego region:

> Persistent exceedances of Basin Plan water quality objectives for various urban runoff-related pollutants [including] diazinon, fecal coliform bacteria, total suspended solids, turbidity, metals, etc. . . . At some monitoring stations, statistically significant upward trends in pollutant concentrations have been observed. . . . [U]rban runoff discharges are not only causing or contributing to water quality impairments, [but] are a leading cause of such impairments in San Diego County.

As these comments by Board staff demonstrate, the record clearly shows not only that water quality problems remain, but that Board staff has determined that the existing urban runoff management regime has failed to prevent worsening water quality.

Absent any evidence to the contrary—and we are unable to locate any such evidence in the record—these observations lead to the ineluctable conclusion that another permit structured largely the same way as the previous permit is unlikely to produce improvements in water quality. This is especially true considering the rapid pace of development that exists and is expected to continue in the region, because "[u]rban development creates new pollution sources as human population density increases and brings with it proportionately higher levels of car emissions, car maintenance wastes, municipal sewage, pesticides, household hazardous wastes, pet wastes, trash, etc. . . . . As a result, the runoff leaving the developed urban area is significantly greater in pollutant load. . . ." These observations are problematic because none of the documents—neither the staff report, the responses to comments, nor the findings—actually demonstrates that the proposed permit will achieve water quality objectives in light of the previous permit's utter failure to do so.

While new or improved provisions such as hydromodification, inspections, watershed-based activities, mobile businesses, the regional urban runoff management program, and development planning render the proposed permit a stronger regulatory program than the previous permit, almost no evidence is presented to show that any of the improvements will in fact achieve water quality compliance or suffice to meet MEP. Rather, it is merely asserted, without substantiating analyses, that the proposed permit will "attain water quality objectives in the Basin Plan by limiting the contributions of pollutants conveyed by urban runoff." It is the Board's burden to show that the proposed permit will achieve compliance with water quality standards as required for post-first round

municipal storm water discharge permits, but neither the staff report, nor the findings, nor the responses to comments makes such a demonstration. Rather, these documents simply assert the legal foundations of MEP and describe how, in theory, advancing a constantly-improving MEP standard will allow the permit to achieve compliance with water quality objectives.

For example, to explain the finding that the proposed permit represents MEP and will achieve water quality compliance, Board staff states that "[t]he Copermittees' continual evolution in meeting the MEP standard is expected to achieve compliance with water quality standards." This statement is reflective of the approach throughout the record—merely stating the conclusion required by law without pointing to specific evidence and describing how the evidence demonstrates that the proposed permit represents an improved incarnation of MEP that will achieve water quality improvements. In fact, as noted, the facts in the record prove the findings to be false: the Copermittees are not meeting standards notwithstanding nearly fifteen years of alleged efforts.

Similarly, the staff report's section on watershed planning provides another example of the absence of reasonably detailed and adequately supported discussion of how the proposed permit's new provisions will achieve water quality standards. This section quotes EPA guidance stating that "[a] watershed-based approach to point source permitting under the NPDES program may serve as one innovative tool for achieving new efficiencies and environmental results. . . [by] lead[ing] to more environmentally effective results." We fully agree that a watershed-based program should be pursued for these reasons. But such statements are vastly under-specific and consequently fail, given the failure of the previous permit to achieve water quality objectives, to show that the proposed permit will.

Response: The approach utilized in the Tentative Order for achieving compliance with receiving water quality standards is wholly consistent with the approach intended by USEPA and outlined by the SWRCB. Due to the nature of storm water discharges, and the typical lack of information on which to base numeric water quality-based effluent limitations, USEPA uses an interim permitting approach for NPDES storm water permits. "The interim permitting approach uses best management practices (BMPs) in first-round permits, and expanded or better-tailored BMPs in subsequent permits, where necessary, to provide for the attainment of water quality standards. 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" (USEPA, 1996). This is exactly the approach incorporated into the Tentative Order. Where adequate information exists, the requirements of the Tentative Order has been modified from the requirements of the current permit. The Tentative Order contains extensive modifications of this type, all of which are intended to improve receiving water quality.

This approach is also consistent with the approach outlined by the SWRCB. In Order WQ 99-05, the SWRCB outlined an iterative process for achieving compliance with receiving water quality standards. The SWRCB's approach is found at section A.3 of the Tentative Order. This approach is also supported in SWRCB Order WQ 2001-15, which states that "[c]ompliance [with receiving water limitations] is to be achieved over time, through an iterative approach requiring improved BMPs." Again, this is the approach utilized by the Tentative Order, which requires implementation of BMPs that are improved over those required in the current permit.

Despite the commenter's contentions, the modifications incorporated into the Tentative Order are not negligible. Nor do they merely continue the current path found in the current permit. On the contrary, they are significant modifications which are reasonably expected to result in significant improvements in water quality. The current permit, and Regional Board oversight efforts up to this point, have focused largely on program development. Now that the Copermittees have developed substantial programs, the Tentative Order shifts its focus to water quality improvements. For example, the Tentative Order includes an increased emphasis on watershed approaches. Watershed activities which directly reduce discharges of pollutants of concern are required annually. Targeted reductions in pollutant discharges will improve water quality. The Tentative Order has also formalized the process for assessing the effectiveness of BMPs and improving upon BMPs found to be ineffective. This formalized process for continual increases in BMP effectiveness will result in water quality improvement, since more effective BMPs result in greater pollutant reductions. TMDLs have also been incorporated into the Tentative Order, and will continue to be added to the Tentative Order as they are adopted and approved. In addition to these broad modifications, the Tentative Order also includes numerous more specific modifications which each improve BMP requirements and reduce pollutant discharges in urban runoff. Collectively, these pollutant discharge reducing modifications will have a net positive effect on receiving water quality.

Section: General **Sub-section:** Legal

Commenter(s): Natural Resources Defense Council

Comment: By failing to include "substantive information about how the [Copermittees] will reduce discharges to the maximum extent practicable," the proposed permit is inconsistent with the Clean Water Act's public participation requirements. Public participation rights are a cornerstone of the Clean Water Act's goals. We acknowledge that the Board has undertaken extensive procedures to accept and respond to public comment. But the opportunity to comment is rendered less than effective when substantive portions of the permit's regulatory framework are missing, to be determined by the Copermittees

at some later date. This failure to proceed in the manner prescribed by law will render the adoption of this permit an abuse of discretion by the Board if uncorrected.

Response: The Tentative Order contains sufficient requirements to ensure the Copermittees will reduce the discharge of pollutants to the maximum extent practicable. The Tentative Order is replete with specific requirements and minimum measurable outcomes. In this respect, the Tentative Order is more substantive than the current MS4 permit, which is generally considered to be one of the most stringent MS4 permits in California and the nation. Where the Copermittees are to develop particular details of their programs, adequate language is provided to guide the Copermittees' efforts and ensure the MEP standard is required. Since the Tentative Order contains substantive requirements which ensure the achievement of the MEP standard, the public participation opportunities provided during the consideration and adoption of the Tentative Order are sufficient.

Section: General **Sub-section:** Legal

Commenter(s): Natural Resources Defense Council

Comment: To withstand scrutiny upon appeal, the record must clearly demonstrate that the Board relied on solid evidence to support its decision, and that the action taken is consistent with applicable law. The State Water Resources Control Board exercises independent judgment to determine whether an action or order of a regional board is reasonable or constitutes an abuse of discretion. Under this standard of review, abuse of discretion is established if "the [agency] has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." If it is asserted that the findings are not supported by the evidence, "abuse of discretion is established . . . [where] the findings are not supported by the weight of the evidence." Furthermore, the Board must make clear how it arrived at its conclusion by presenting written determinations that detail a thorough analysis of the evidence and the applicable legal factors. That is, it must present "findings to bridge the gap between the raw evidence and the ultimate decision or order." The Board's written determinations must provide sufficient detail to clearly demonstrate its "analytical route."

Response: Comment noted.

Section: General **Sub-section:** Legal

Commenter(s): San Diego Copermittees, CCWHE, BIASDC, CELSOC, BIASC, CICWQ, BILD, CBIA

Comment: Article XIII B, Section 6 of the California Constitution provides that "[w]henever 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 that local government for the costs of the program or increased level of service . . ." except in certain specific circumstances. Through Proposition 1A, approved by the voters in 2004, Section 6 was amended to further provide that "for the 2005-06 fiscal year and every subsequent fiscal year, for a mandate for which the costs of a local government claimant have been determined in a preceding fiscal year to be payable by the state pursuant to law, the Legislature shall either appropriate, in the annual Budget Act, the full payable amount that has not been previously paid, or suspend the operation of the mandate for the fiscal year for which the annual Budget Act is applicable in a manner prescribed by law." The concern that prompted the voters to include Section 6 in the California Constitution "was the perceived attempt by the state to enact legislation or adopt administrative orders creating programs to be administered by local agencies, thereby transferring to these agencies the fiscal responsibility for providing services that the state believed should be extended to the public." (Long Beach Unified School District v. State of California (1990) 225 Cal. App. 3d 155, 174.)

Nothing in constitutional or statutory law allows the state to shift costs to local agencies without reimbursement merely because those costs were imposed upon the state by the federal government. Hayes v. Commission on State Mandates, 11 Cal. App. 4th 1564, 1593 (1992). A central purpose of the principle of state subvention is to prevent the state from shifting the cost of government from itself to local agencies. City of Sacramento v. State of California, 50 Cal. 3d 51, 68 (1990). The courts have concluded that a state mandate exists where the state has a choice in the manner of implementation of the federal mandate. County of Los Angeles v. Commission on State Mandates, 32 Cal. App. 4th 805, 816 (1995). The focus is not simply that the obligation arises out of a federal mandate. A determination of whether certain obligations (and therefore costs) were imposed upon a local agency by a federal mandate must focus upon the local agency which is ultimately forced to bear the costs and how those costs came to be imposed upon that agency. Hayes v. Commission on State Mandates, 11 Cal. App. 4th at 1594. If the state freely chooses to impose the costs upon the local agency as a means of implementing a federal program then the costs are the result of a reimbursable state mandate regardless of whether the costs were imposed upon the state by the federal government. Id. As shown in the attached chart, and supported by the December 2000 chart prepared by this Board, various provisions of the currently drafted permit reveal an exercise of choice by this Board in the manner of implementing federal law. Therefore, the requirements under this Draft Permit that are not express federal mandates constitute mandates by the state subject to the subvention requirements.

A “new program” within the meaning of Section 6 is a program that carries out the governmental function of providing services to the public, or a law that, to implement state policy, imposes unique requirements on local governments and does not apply generally to all residents and entities in the state. (County of Los Angeles v. Commission On State Mandates (1995) 32 Cal. App. 4th 805, 816.) A reimbursable “higher level of service” concerning an existing “program” exists when a state law or executive order mandates not merely some change that increases the cost of providing services, but an increase in the actual level or quality of governmental services provided.” (San Diego Unified School District v. Commission On State Mandates (2004) 33 Cal.4th 859, 877.) Both Section 6 and state law establish certain exceptions to the state mandate provisions, three of which have some potential application to the Draft Permit. First, as a threshold matter, Government Code section 17516 currently purports to exempt orders of the Regional Board from the state mandate provisions. The copermittees contend that Government Code section 17516 is unconstitutional, and Judge Victoria E. Chaney of the Los Angeles County Superior Court, has, in fact, declared Section 17516 to be unconstitutional in County of Los Angeles, et al v. State of California, et al, Consolidated Case Nos. B5087969 and B5089785. Judge Chaney’s decision has been appealed by the State to the Court of Appeal, Second Appellate District, as Civil Case No. B183981. The matter has been fully briefed, but as of the date of this comment, no date for oral argument has yet been scheduled. It is the copermittees position that Government Code section 17516 is not a valid bar to their unfunded state mandate claim.

Second, Government Code section 17556(c) provides that a statute or executive order shall not be considered to be a state mandate if the “statute or executive order imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation.” The copermittees acknowledge that much of the Draft Permit imposes requirements mandated by a federal law or regulation. However, the copermittees contend that many of the requirements of the Draft Permit exceed the mandates in the federal law and regulations. The copermittees have attempted to set forth in detail in an attachment the portions of the Draft Permit which they believe exceed the federal mandates. The copermittees also contend that draft Finding E.9 and the Board’s own documents establish that a large percentage (up to 40%) of the requirements of the Draft Permit exceed the federal mandates.

Third, Government Code section 17556(d) provides that a state mandate will not be considered to be “unfunded” if the local agency “has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.” The copermittees’ previous comment explained why this provision is not a bar to an unfunded state mandates claim. The requirements of Proposition 218, as interpreted by cases such as Howard Jarvis Taxpayers Ass’n v. City of Salinas (2002) 98 Cal.App.4th 1351, severely

limit the ability of the copermittees to fund the mandates of the Draft Permit. Certainly, the copermittees authority, whatever it may be, is not "sufficient to pay for the mandated program or increased level of service." It is for this reason that the copermittees raise the unfunded state mandate issue – to find a funding source for this state mandated program or increased level of service.

The copermittees contend that the language of the Draft Permit and previous Board statements demonstrate that portions of the Draft Permit constitute unfunded state mandates. First, Finding E.9 states that:

Requirements in this order that are more explicit than the federal storm water regulations in 40 CFR 122.26 are prescribed in accordance with the CWA section 402(p)(3)(B)(iii) and are necessary to meet the MEP standard.

It is the copermittees' view that when the Board elects to be "more explicit than the federal storm water regulations" it is imposing state, rather than federal, mandates. While the Board's imposition of such "more explicit" mandates may be based upon its belief that such additional mandates are needed to meet the MEP standard, that cannot convert those additional mandates into mandates required by federal law or regulations. Such an elastic view of federal law would mean that the federal mandates are different in San Diego County than in Riverside County, in Texas than in New Jersey. This is inconsistent with basic concepts of federal law.

The copermittees further contend that their reading of Finding E.9 is consistent with prior official documents of the Board. For example, in Attachment 4 to Agenda Item 5 of the Board's December 13, 2000 meeting, Conclusion 14 provides that:

Approximately 60% of the requirements in Tentative Order 2001-02 are based solely on the 1990 federal NPDES Storm Water Regulations. The remaining 40% of the requirements in the Tentative Order "exceed the federal regulations." Requirements that "exceed the federal regulations" are either more numerous, more specific/detailed, or more stringent than the requirements in the regulations.

At least one legal commentator has cited to Conclusion 14 to help explain the federal/state law structure of the NPDES process and has noted that in certain circumstances, such as CEQA, "this feature of going beyond the federal requirements is legally significant." (Minan, Municipal Storm Water Permitting in California, (2003) 40 San Diego L. Rev. 245, 251 and fn. 30.)

Again, the copermittees do not refer to this statement to show that the Board has exceeded its legal authority. The copermittees understand that the Board believes that the portions of the Draft Permit that "are more explicit" or, as the Board phrased the issue in 2000, which "exceed the federal regulations," are needed to meet the MEP standard and are consistent with the Board's authority.

The copermittees simply disagree with the proposition that anything the Board does in an attempt to achieve the MEP standard constitutes a federal mandate, and ask the Board to acknowledge, as it did in 2000, that portions of the Draft Permit are not mandated by federal law.

It cannot legally or logically be the case that anything the Board mandates in an NPDES permit is by definition a federal mandate simply because all NPDES permits must strive to achieve the MEP standard. Such an approach would mean that the requirements of federal law and the federal regulations vary widely from region to region, state to state.

Rather, the logical approach, used by the Board in 2000, is to compare the express requirements of federal law and regulations (i.e., what must be in every NPDES permit) with the requirements of each individual permit to determine those areas in which the Board has elected to use its discretion to impose requirements that "exceed" or are "more explicit" than the federal mandates. In short, not everything imposed under the umbrella of federal law is a federal mandate.

Second, the additional requirements of the Draft Permit constitute a "higher level of service" concerning an existing "program." The courts have interpreted the phrase "higher level of service" in a manner that forecloses the Board's "elaboration" response. By definition, the iterative process mandated by the State Board is designed to increase the level or quality of the storm water program, and the Draft Permit attempts to do just that. Since the Board's "elaborations" are intended to increase the actual level or quality of the copermittees' storm water program, they constitute a "higher level of service" within the meaning of Section 6.

In both instances, the Board has exercised a choice in the manner in which it has imposed many of the requirements under this permit. As such, those requirements shall be reimbursable.

Response: The Tentative Order and its requirements do not constitute an unfunded state mandate. The contention that NPDES permits and their requirements are unfunded state mandates has been repeatedly heard and denied by the SWRCB. (See SWRCB Order Nos. WQ 90-3 and WQ 91-08). Indeed, the unfunded state mandate argument was recently heard by the SWRCB when it considered the appeal of the LARWQCB's SUSMP requirements. The LARWQCB's SUSMP requirements are municipal storm water permit requirements for new development that are similar or identical to many of the requirements of the Tentative Order. The unfunded state mandate argument was summarily rejected by the SWRCB in that instance (SWRCB Order WQ 2000-11).

Since that time, nothing has occurred that would change how unfunded state mandates are determined. While Proposition 1A elucidates the process for reimbursement when an unfunded state mandate occurs, it does not alter how unfunded state mandates are identified. As such, notice must be taken of the SWRCB's previous decisions that NPDES requirements do not constitute unfunded state mandates.

The Tentative Order and its requirements are not unfunded state mandates for several reasons. First, California Constitution, Article XIII B, Section 6 was not intended to address a permit, order, or requirements therein issued by a regulatory agency of state government imposing federal requirements upon parties prohibited from discharging waste into the waters of the State and the United States under both state and federal law. Indeed, the Legislature clarified that the unfunded mandate provision of the California Constitution does not apply to regional board orders. (Gov. Code section 17516). If the commenter's analysis was correct, every permittee could file a "claim" for reimbursement to comply with any regulatory action, claiming that the regulatory action requires a "new program" or an "increased level of service." The Constitution addresses reimbursement for additional "services" mandated by the State upon local agencies, not regulatory requirements imposed upon all permittees, including cities and counties. The intent of the constitutional section was not to require reimbursement for expenses incurred by local agencies complying with laws that apply to all state residents and entities. (See City of Sacramento v. State of California, 50 Cal. 3d. 51 (1990) citing County of Los Angeles v. State of California, 43 Cal. 3d. 46).

A central purpose of the principle of state subvention is to prevent the state from shifting the cost of government from itself to local agencies. (Hayes v. Commission on State Mandates, 11 Cal. App. 4th 1564, 1581 (1992)). In this instance, no such shifting of the cost of government has occurred. The responsibility and cost of complying with the Clean Water Act and Phase I NPDES municipal storm water regulations lies squarely with the local agencies which own and operate MS4s, not with the State. The State cannot shift responsibilities and costs to local agencies when the responsibilities and costs lie with the local agencies in the first place.

Second, even if the Tentative Order could be characterized as requiring a mandate for an increased level of governmental services, it is not an unfunded state mandate because it implements a federal program, rather than a state program. State subvention is not required when the federal government imposes the costs of a new program or a higher level of service. (Cal. Const. Art XIII B; Id). Citing case law, the commenter attempts to assert that any use of discretion on the part of the Regional Board in implementing a federal program reflects "a matter of true choice," and is therefore a state mandate. (Id). This is a misrepresentation of the case law. In *Hayes v. Commission on State Mandates*, above, the Court only contemplates whether participation itself in a federal

program is “a matter of true choice” in order to determine if an unfunded state mandate has occurred. It does not contemplate whether any use of discretion on the part of a regulatory agency in implementing the necessary details of a federal program constitutes an unfunded state mandate. Therefore, the case does not support the commenter’s claims.

Any discretion exercised by the Regional Board in implementing federal law in the Tentative Order is in accordance with federal law and guidance. For example, use of permit writer discretion and the inclusion of more detailed requirements in the Tentative Order is consistent with USEPA guidance. The preamble to the Phase I NPDES storm water regulations states “this rule sets out permit application requirements that are sufficiently flexible to allow the development of site-specific permit conditions” (FR 48038). In addition, in its review of a City of Irving Texas NPDES municipal storm water permit, the USEPA Environmental Appeals Board stated that Congress “created the ‘maximum extent practicable’ (‘MEP’) standard and the requirement to ‘effectively prohibit non-storm water discharges’ into the MS4 in an effort to allow permit writers the flexibility necessary to tailor permits to the site-specific nature of MS4 discharges” (2001). The Tentative Order, to be issued to implement a federal program, does not become an unfunded state mandate simply because the Regional Board appropriately exercised its discretion in defining the particulars. The Regional Board’s implementation of a federal program according to federal law and guidance does not constitute an unfunded state mandate.

Third, the Tentative Order is not an unfunded state mandate because its requirements do not exceed the requirements of federal law. As we have previously noted, all of the Tentative Order’s requirements are necessary to comply with federal law mandates. The Clean Water Act requires that MS4s reduce the discharge of pollutants to the MEP. All requirements of the Tentative Order are necessary to achieve the MEP standard, and therefore do not exceed federal law.

In its review of the current San Diego County Municipal Storm Water Permit (Order No. 2001-01), the State of California Court of Appeal, Fourth Appellate District reached the same conclusion. The Court “determined that none of the challenged Permit requirements violate or exceed federal law.” (*Building Industry Association of San Diego County, et al., v. State Water Resources Control Board et al.*, 2004). This finding applies to a wide range of requirements, since the Building Industry of San Diego County used an across the board approach to the challenges it raised in its lawsuit. This is significant, since the Tentative Order’s requirements mirror the requirements of Order No. 200-01. Where the Tentative Order contains new requirements not specifically found in Order No. 2001-01, the new requirements only provide additional detail to requirements already in existence in Order No. 2001-01 and to implement the MEP performance standard. Any new requirements in the Tentative Order simply elaborate on Order No. 2001-01’s pre-existing requirements. For example, the Tentative

Order's requirements addressing hydromodification expand on the pre-existing Order No. 2001-01 requirement that Copermittees develop criteria "to control peak storm water discharge rates and velocities in order to maintain or reduce pre-development downstream erosion and protect stream habitat" (Order No. 2001-01 section F.1.b.(2)(j)). Since the requirements of the Tentative Order and Order No. 2001-01 are comparable, the Court's finding that requirements of Order No. 2001-01 do not exceed federal law is also applicable to requirements of the Tentative Order.

Fourth, the Tentative Order and its requirements are not an unfunded state mandate because they do not constitute a new program or higher level of service. The performance standard applicable to MS4s has remained the same since subdivision (p), extending "point source" regulation to storm water discharges was added to Section 402 of the Clean Water Act (33 U.S.C. 1342) in 1987. The Regional Board has issued two prior iterations of requirements implementing this performance standard, each with incrementally greater detail to provide municipalities with guidance regarding elements of municipal storm water management programs that are practicable, and therefore, appropriate components for compliance with the performance standard. However, despite the incrementally increasing levels of detail, the fundamental requirement that municipalities reduce pollutants in MS4s to the MEP remains the cornerstone of the mandate imposed upon municipalities by the federal Clean Water Act and implementing NPDES regulations for storm water.

Fifth, the Tentative Order and its requirements are not an unfunded state mandate because the Copermittees have the authority to levy service charges, fees, or assessments to fund their efforts to comply with the Tentative Order. Government Code section 17556(d) provides that an unfunded state mandate will not be considered in such instances. Municipalities have ample governmental authority to levy service charges, fees, or assessments to pay for storm water management programs that reduce pollutants to the MEP; municipalities also have the authority to levy taxes to provide adequate funding for storm water management programs; lack of political determination to impose taxes or fees for storm water management does not constitute lack of authority.

Federal regulations that implement the storm water provisions of the Clean Water Act require municipalities to ensure appropriate funding for compliance with requirements for discharges of storm water in MS4s. Municipalities' applications for waste discharge requirements that implement the NPDES regulations for storm water must include assurances that the municipalities can provide adequate funding to reduce pollutants in MS4 in accordance with the MEP performance standard. (40 C.F.R. 122.26, implementing subdivision (p) of Clean Water Act Section 402; 33 U.S.C. 1342(p)).

As exhibited, the commenter's claim that the Tentative Order is an unfunded state mandate fails on many fronts. The Tentative Order's requirements do not necessitate subvention to the Copermittees by the State.

Section: General **Sub-section:** Legal

Commenter(s): San Diego Copermitees, City County Managers Association, CCWHE, BIASDC, CELSOC, BIASC, CICWQ, BILD

Comment: The Regional Board has failed to comply with the requirements of Public Resources Code section 21080.5 and relevant case law. The Regional Board has failed to prepare an adequate certification and has failed to identify and adequately analyze the potential significant environmental impacts associated with adoption and implementation of the Revised Tentative Order. In order to comply with the CEQA, the Regional Board must prepare an adequate certification pursuant to Public Resources Code section 21080.5 prior to adoption of the Revised Tentative Order.

Response: This contention is based on the preliminary decision of the California Court of Appeal for the Second Appellate District in *Los Angeles v. California State Water Resources Control Board* (Case No. B184034), issued on October 5, 2006, in which the Court concluded that W.C. 13389 did not relieve regional water boards of substantial obligations to document their assessment of the environmental consequences of regulatory actions implementing the federal Clean Water Act. Municipalities subject to NPDES requirements for discharges in municipal separate storm sewer systems in the Los Angeles Region had challenged the Los Angeles Water Board's action alleging inadequate compliance with CEQA among other objections; the State Water Board and the Los Angeles Superior Court upheld the Los Angeles Water Board's action; the Court of Appeal affirmed the trial court decision in part, but reversed regarding CEQA compliance, vacating the Los Angeles MS4 NPDES requirements and remanding the matter to the Los Angeles Water Board for environmental review under Chapters 1, commencing with Section 21000, and 2.6, commencing with Section 21080, of CEQA (Division 13, commencing with Section 21000, of the California Public Resources Code).

On November 6, 2006, the California Court of Appeal for the Second Appellate District, modified its decision in *Los Angeles v. California State Water Resources Control Board* (B184034). The revised decision affirms in its entirety the determination of the trial court that Section 13389 provides a CEQA exemption for state waste discharge requirements issued under Chapter 5.5, commencing with Section 13370, of the Porter-Cologne Water Quality Control Act (Division 7 commencing with Section 13000, of the California Water Code) implementing the National Pollutant Discharge Elimination System regulations under the federal Clean Water Act.

Therefore, the Regional Board remains exempt from conducting CEQA review when adopting NPDES permits. However, it is worth noting that the Regional Board has considered numerous environmental factors during the extensive process of crafting the Tentative Order, the Fact Sheet, the Response to Comments documents, and other supporting documents.

Section: Multiple **Sub-section:** Multiple

Commenter(s): CCWHE, BIASDC, CELSOC, BIASC, CICWQ, BILD

Comment: Especially in light of the Blue Ribbon Panel's recommendations, the Revised Tentative Order may be inconsistent with the requirements of the General Construction Storm Water Permit when it is reissued by the State Board. Inconsistencies between these two permits would impose an economic and administrative burden on both the Copermittees and developers. From a policy perspective, it is important for the statewide General Construction Storm Water Permit and the statewide General Industrial Storm Water Permit to govern discharges from those types of facilities to the standards applicable in those permits (BAT/BCT) without unnecessary and confusing interference by the Regional Board through the MS4 Permit. It should also be noted that the General Construction Storm Water Permit (Order No. 99-08-DWQ) and the General Industrial Storm Water Permit (Order No. 9703-DWQ) provide sufficient regulation to protect water quality and have stricter standards for protection of water quality, and the proposed regulation of construction and industrial sites under the Revised Tentative Order creates unnecessary, duplicative regulation and requires additional water quality control in accordance with a different water quality standard (MEP v. BAT/BCT) which will be confusing to the regulated community without providing any real water quality benefit.

Chairman Minan expressed his opinion at the June 21, 2006 public hearing that the standards in the General Construction Storm Water Permit and the MS4 permit ought to be the same, and that he favors the view that if a developer meets the General Construction Storm Water Permit standards, that ought to satisfy the MS4 requirements. (See Uncertified Rough Draft of Regional Water Quality Control Board Meeting – June 21, 2006, p. 183, lines 4-8.) Regional Board staff appears to have failed to address this issue in the Responses to Comments.

Response: The Tentative Order is not inconsistent with the requirements of the General Construction Storm Water Permit. The commenter fails to point out any inconsistencies. The General Construction Storm Water Permit requires an effective combination of erosion and sediment control; the Tentative Order requires the same by identifying effective erosion and sediment controls to be implemented. Since all of the requirements of the Tentative Order fall within the

MEP standard, and the MEP standard is generally considered less stringent than the BAT/BCT standard, all of the Tentative Order's requirements are consistent with the General Construction Storm Water Permit. Moreover, as exhibited in the Fact Sheet, advanced treatment falls underneath both the BAT/BCT and MEP standards.

Dual regulation of construction and industrial sites by the Regional Board and municipalities is dictated by the federal regulations. In creating the dual regulation scheme, USEPA found it to be necessary due to the threat to water quality posed by construction and industrial sites. See Finding D.3.a and corresponding Fact Sheet discussion. As such, it is not unnecessary or duplicative.

Section: Multiple **Sub-section:** Multiple

Commenter(s): CICWQ, BIASC, BIASDC, BILD, CELSOC

Comment: The conditions in the Revised Tentative Order regarding implementation of BMPs do not provide sufficient flexibility to achieve maximum water quality and environmental benefits. For example, the language of Finding 2.b. broadly denouncing the water quality benefit of regional BMPs, contrary to factual evidence generated by engineering studies produced by the International Stormwater BMP Database (ASCE/EPA, 2004) combined with List 1 of Provision D.1.4 related to site design BMPs do not allow for the sufficient implementation of regional BMPs, even when those BMPs can be very useful in achieving water quality control and volume reductions. In light of professional recommendations to the contrary, the provisions of the Revised Tentative Order should be revised to allow the use of regional, end-of-pipe BMPs in appropriate circumstances, particularly to supplement site specific source controls. For example, under the existing language of the Revised Tentative Order, use of infiltration facilities to reduce or eliminate increase in runoff volume at the downstream end of the MS4, prior to discharge into the receiving water would be precluded. In many situations infiltration at the downstream end of the MS4 is a better option, particularly to supplement upstream source controls, and particularly when land costs, land availability and/or water conservation needs are an issue. Although routing flows through vegetation prior to conveyance to an infiltration facility would reduce the size of the infiltration facility, it should not be mandated because in some cases infiltration at the downstream end of the MS4 is the preferable option from a water quality perspective, as well as from a land and water conservation perspective (e.g., project is proposing to collect all runoff in a retention pond for storage and reuse for irrigation; in that case infiltration through vegetated areas would need to be minimized in order to maximize capture and reuse potential).

In addition, some projects (e.g. redevelopment projects) may not feasibly be able to use site design BMPs listed in List 2, and more regional solutions downstream of infill sites may also benefit water quality by controlling discharges from other, neighboring existing development. Language in the Revised Tentative Order, like that in the provisions cited above, discourages regional BMPs, and therefore limits water quality benefits. Therefore, such provisions should be revised to allow for regional BMPs, endorsed by professional associations and appropriate for maximizing water quality control.

Response: While Finding D.2.b of the Tentative Order states a preference for onsite BMPs for the reasons clearly articulated in the finding and Fact Sheet, the Finding does not limit the Copermittees' flexibility in using offsite treatment BMPs. In fact, the Tentative Order expressly provides the option for shared offsite BMPs for new development and redevelopment projects at section D.1.d.(6)(b), provided the BMPs are upstream of receiving waters. Any "regional" or shared treatment BMP must be upstream of receiving waters because receiving waters cannot be used to transport or assimilate waste (40 CFR 131.10)(a)). In addition, the site design BMP requirements of section D.1.b.(4) (Lists 1 and 2) of the Tentative Order have no bearing on the use offsite shared treatment BMPs. Section D.1.b.(4) address site design BMPs, rather than treatment BMPs. Moreover, the Tentative Order's hydromodification requirements and restrictions on infiltration do not preclude the use of shared infiltration BMPs. Shared infiltration BMPs can be used provided they are upstream of receiving waters and meet the infiltration restrictions. The Copermittees also have the option of developing alternative infiltration restrictions which could ease shared infiltration BMP implementation if the current restrictions are burdensome.

Section: Multiple **Sub-section:** Multiple

Commenter(s): CICWQ, BIASC, BIASDC, BILD, CELSOC

Comment: Other provisions in the Revised Tentative Order do not allow sufficient flexibility for the Copermittees to collaborate with third parties on certain compliance responsibilities, including Provisions D.1.e.(1) and D.3.a.(3)(a) which require BMP maintenance and verification be undertaken by the Copermittees and do not allow such activities to be performed by third parties, eliminating assistance to the Copermittees that can be provided by proprietary BMP vendors, HOAs, COAs, etc.

Response: Treatment control BMPs are required to be regularly maintained by section D.1.d.(6)(d)vi. BMP vendors, HOAs, etc. can be used to meet this requirement. However, it is the Copermittee's responsibility to ensure that the mechanism it uses to require treatment control BMP maintenance is effective, since the mechanism is under the Copermittee's control. Moreover, the inspection program is essentially a spot check program. As such, the inspection

burden is manageable for the Copermittees on their own. To allow third parties to conduct a spot check program would not provide adequate oversight by the Copermittees, due to the limited number of inspections required.

Section: Multiple **Sub-section:** Multiple

Commenter(s): CICWQ, BIASC, BIASDC, BILD, CELSOC

Comment: Similarly, a number of other terms and provisions of the Revised Tentative Order are not adequately defined in violation of the due process rights of the regulated community. Many terms and conditions of the Revised Tentative Order are characterized by broad, vague, undefined and/or subjective language, resulting in difficulty in implementation and creating potential liability for the Copermittees. For example, terms such as "Minimum Widths Necessary" (D.1.d.(5)(a); D.1.d.(4)); "High levels of average daily traffic" (D.1.d(7)(e)); "High volumes of trash and debris" (D.3.a.(3)(b)(i)); "Highest," "Moderate," and "Low" volumes of trash and debris (D.3.a.(5)); "Environmentally Sensitive Area" D.1.d.(2)(g); and "All other …. tributary to a CWA Section 303(d) impaired water body segment" D.3.b.(1)(c); D.3.c.(2)(f). The terms cited above are not adequately defined in the Revised Tentative Order so as to provide the regulated community with sufficient notice of what is required in order to comply with such provisions. Thus, these terms should be clarified by the Regional Board in the Revised Tentative Order before the MS4 Permit is adopted.

Response: In crafting permit language, the Regional Board is not required to define every word or term in the Tentative Order. Such an approach is neither feasible or desirable. Where a term is not expressly defined in the Tentative Order, the permit language provides the Copermittees with some level of flexibility in implementing their programs - a common request of the Copermittees. While flexibility is provided, additional language in the Tentative Order or the common definitions of the terms provide notice of what is required by the Copermittees. For example, the term "minimum widths necessary" is clarified in the Tentative Order by the phrase "provided that public safety and a walkable environment for pedestrians are not compromised." Therefore, the provision requires that the minimum widths identified by the Copermittee as necessary for public safety are to be used. High, moderate, and low levels of traffic, trash, or debris can be identified relative to a typical condition, consistent with the definitions of high moderate, and low. As can be found in a common dictionary, high levels would exceed the typical condition range, moderate levels would fall within the typical condition range, and low levels would be below the typical condition range. "Environmentally Sensitive Area" is defined in Attachment C. Areas "tributary to a CWA Section 303(d) impaired water body segment" are those areas from which runoff ultimately drains to a CWA section 303(d) impaired water body segment.

Section: Multiple **Sub-section:** Multiple

Commenter(s): San Diego Copermittees

Comment: Sections A and B set forth the general prohibitions under state or federal law pertaining to discharges. However, subsequent sections, such as Sections D (page 15), D.1 (page 15-16), D.2 (page 26), D.3 (page 29), D.4 (page 38), E.2 (page 43) and F (page 46) still contain paraphrases of the prohibitions in various forms. Given the inconsistencies between the prohibitions in Sections A and B and the differing versions throughout the permit, the copermittees cannot determine if the terms in Sections D through F were intended to prohibit the same conduct as in Sections A and B or expand on those prohibitions. If intended to prohibit the same conduct, there is no reason or benefit in restating the prohibitions. More importantly, restating the prohibitions using different language creates ambiguity. On the other hand, if Sections D through F are intended to prohibit different conduct, no state or federal authorization has been specified.

Response: Sections D.1, D.2, D.3, D.4, E.2 and F do not contain requirements that differ from section A. The commenter fails to describe how the restated requirements and section A are different. The restatement of the requirements in each of the sections noted is necessary to ensure that each program component developed and implemented by the Copermittees results in the achievement of compliance with section A. By requiring each component of the Copermittees' program to comply with section A, a necessary link is drawn between development and implementation of program components and the prohibitions in section A. This is critical, because section A contains the overarching requirements of the Tentative Order. The development and implementation of each program component must be guided by these overarching requirements. Restatement of the requirements in each program component section helps ensure that this will occur.

RESPONSES TO COMMENTS ON FINDINGS

Section: Finding **Sub-section:** Finding C.4

Commenter(s): CICWQ, BIASC, BIASDC, BILD, CELSOC

Comment: Finding C.4. provides that "human illnesses have been linked to recreating near storm drains flowing to coastal waters" and that urban runoff pollutants can bioaccumulate in humans; however, the Regional Board has not cited the evidence in the record that supports this contention, and the contention is contrary to a proper and complete summary of available scientific evidence as a whole. As a result, the finding is misleading and does not constitute a comprehensive summary of available scientific evidence. By way of example, a study conducted by PBS&J in coastal watersheds near Laguna Beach in Orange County (PBS&J, 1999) found that indicator bacteria concentrations in receiving waters downstream from the developed/urban watersheds were not significantly different than concentrations in receiving waters downstream from undeveloped watersheds. Additional analysis conducted by Paulsen and List (Paulsen and List, 2005) further supported these findings. These studies conclude that the occurrence of bacteria and pathogens in surface water, and the resulting potential for illness, cannot be directly linked to urban runoff, as opposed to runoff from natural areas. Further, Paulsen and List summarize the debate over the use of bacteria monitoring for pathogenic indicators, and point out that scientific studies show no correlation between bacteria levels and pathogens and therefore bacteria may not indicate a significant potential for causing human illness (Paulsen and List, 2005). In a recent field study conducted by Schroeder et al., pathogens (in the form of viruses, bacteria, or protozoa) were found to occur in 12 of 97 samples taken, but the samples that contained pathogens did not correlate with the concentrations of indicator organisms (Schroeder et. al. 2002). These studies suggest that bacteria is not necessarily a proper indicator of pathogens and associated water quality issues. The far reaching statement in Finding C.4. suggesting that human illnesses has been directly linked to urban runoff is not supported by substantial evidence, and contradicts the available scientific evidence.

Response: The evidence in the record supporting Finding C.4 is cited in the Fact Sheet. The study linking recreation near storm drains and occurrence of illness was conducted by R.W. Haile in 1996, titled "An Epidemiological Study of Possible Adverse Health Effects of Swimming in Santa Monica Bay." The study found that swimmers near storm drains had a 57 percent greater incidence of fever than those swimming farther away. This study also confirmed the increased risk of illness associated with swimming in areas with high densities of indicator bacteria. Illnesses were reported more often on days when water samples tested positive for enteric viruses. In addition, a recent study by Ryan Dwight found that of the more than 5 million people who swam at the two beaches from 1998 to 2000, there were about 36,000 cases of stomach ailment

and 38,000 cases of respiratory, eye and ear infections caused by exposure to waters polluted by urban runoff and other sources (Dwight, et al., 2005). Dwight also found that surfers in urban North Orange County reported nearly twice as many illnesses as surfers in rural areas of Santa Cruz in 1998 (Dwight, et al., 2004). These studies support the finding that "pollutants in urban runoff can threaten human health" (Finding C.4).

The commenter goes on to challenge the use of bacterial indicators for identifying waters which pose a risk to public health. Use of bacterial indicators is recommended by USEPA based upon numerous studies. In the late 1970s and early 1980s, USEPA conducted public health studies evaluating several organisms as possible indicators, including fecal coliforms, E. coli, and enterococci. The studies showed that enterococci was a very good predictor of illness in all waters, and E. coli was a very good predictor in fresh waters (USEPA, 2004).

Section: Finding **Sub-section:** Finding C.9

Commenter(s): CICWQ, BIASC, BIASDC, BILD, CELSOC

Comment: Finding C.9. provides that runoff from urban areas is significantly greater in pollutant loads than pre-development runoff from the same area. However, available data indicate that the relationship between pollutant loads and land use is a much more complicated than Finding C.9. indicates, and Finding C.9. is, as a result, only generally true in certain circumstances. Whether runoff from urban areas contains significantly greater pollutant loads than runoff from the same areas in the pre-development condition will depend on a number of factors, including pre-development land use, and the type of pollutant at issue. As a result, while the statement Finding C.9. may be true for some pollutants depending upon pre-urban land uses, it certainly is not true for all situations. For example, urbanized areas typically contribute far smaller loads of TSS and other sediment related pollutants in runoff than open space and agricultural uses. Similarly, urban areas generally contribute lower pesticide and nutrient loads than prior land uses associated with agriculture. This Finding should be revised to accurately reflect the complex relationship of pollutant loads for urbanized areas v. those associated with pre-development conditions. In its current form, Finding C.9. is too simplistic and, as a result is inaccurate and misleading.

Response: Finding C.9 finds that runoff from developed areas contains a greater pollutant load than runoff from undeveloped areas. The finding makes no claim regarding agricultural areas, though agricultural areas are typically considered developed areas. This finding is correct and supported by the Fact Sheet and data from San Diego County. Storm event mean concentrations of biochemical oxygen demand, chemical oxygen demand, total suspended solids, total phosphorus, dissolved phosphorus, total kjeldahl nitrogen, total copper, total

zinc, and total cadmium in runoff coming from residential, commercial, and industrial areas in San Diego County all exceed storm event mean concentrations of those constituents in runoff coming from parks and open/undeveloped areas. 94% of the pollutant/developed land use combinations assessed had storm event mean pollutant concentrations above storm event mean pollutant concentrations for runoff from undeveloped areas (City of San Diego, 2001). Therefore, the finding that the pollutant load from developed areas exceeds pollutant loads from undeveloped areas is accurate.

Section: Finding **Sub-section:** Finding D.1.a

Commenter(s): San Diego Unified Port District

Comment: In the Response to Comments, RWQCB staff stated that "the Tentative Order does not require that the Copermittees ensure that water quality standards in receiving waters are met; it requires that the Copermittees ensure that their discharges do not cause or contribute to a violation of water quality standards in receiving waters" (Response to Comments pp. 13-14). While this may be the RWQCB's intent, language retained in the revised Draft Permit states that "urban runoff management program implementation is expected to ultimately achieve compliance with water quality standards" (Finding D.1.a). This statements assumes that pollutant causing exceedances of water quality standards are completely under the control of the Copermittees. Language in the Permit must clarify that Copermittees are responsible only for MS4 discharges that cause or contribute to a violation of receiving water quality standards.

Response: The Tentative Order addresses discharges from MS4s. Therefore, any reference to compliance with water quality standards refers to discharges from MS4s. Nowhere does the Tentative Order hold the Copermittees responsible for water quality problems not caused by MS4 discharges. Therefore, additional clarifying language is not needed.

RESPONSES TO COMMENTS ON SPECIFIC SECTIONS

Section: D **Sub-section:** D.1.b

Commenter(s): CICWQ, BIASC, BIASDC, BILD, CELSOC

Comment: The current language of the Revised Tentative Order appears to impermissibly expand the application of the California Environmental Quality Act, Cal. Pub. Res. Code § 21000 et seq., by mandating environmental review of projects not already subject to environmental review under CEQA. Sections D.1.b. and D.1.c. of the Revised Tentative Order apply to all development projects, as no acreage or other thresholds are applied in the current definition of "development project" found in Attachment C to the Revised Tentative Order. However, CEQA does not apply to certain activities that would be considered "development projects" under the definition provided in the Revised Tentative Order. Instead, CEQA only applies to those projects requiring discretionary approvals from state or local agencies. Cal. Pub. Res. Code § 21080. The Regional Board should make clear in the Revised Tentative Order that these requirements only apply to those projects that are already subject to environmental review under CEQA.

Response: Sections D.1.b and D.1.c of the Tentative Order are not limited to CEQA review; they apply to all of a Copermittee's environmental review processes. Copermittees do more environmental review than just CEQA. For example, Copermittees review grading plans to ensure proper BMPs will be implemented to protect water quality. Since the Copermittees environmental review processes are wide-ranging, limitations on CEQA review do not apply to these sections of the Tentative Order.

Section: D **Sub-section:** D.1.d.(2)

Commenter(s): Natural Resources Defense Council

Comment: Under the proposed permit's "Priority Development Project" program, not enough development activity is required to meet numeric SUSMP storm water runoff treatment standards. While we strongly support the inclusion of a new heavy industrial category and the broader coverage of commercial development reflected in the revised document, the proposed permit's failure to include a square footage-based "catch-all" provision for new development projects is a serious omission. An area-based catch-all would require any kind of development project above a specified footprint to meet numeric SUSMP storm water runoff treatment standards. Such an approach is critical to the success of the entire permit in achieving water quality compliance because virtually all urban development significantly increases pollutant loading and increases storm water runoff volume and rate by increasing impervious surfaces

that disrupt the natural hydrology of land. Under the proposed permit's current language, development projects that do not fall within one of ten narrowly-defined categories are not required to meet numeric SUSMP runoff treatment standards, no matter how much impervious surface they create. Because storm water runoff is a primary cause of water quality impairment in the region and the region is experiencing massive growth and development representing more and more impervious land cover, it is vital that the new permit require that any development projects that create 5,000 square feet or greater of impervious surface meet numeric SUSMP runoff treatment standards. Five thousand square feet is an appropriate threshold because it represents the maximum extent practicable standard ("MEP") required under the Clean Water Act.

As Board staff has recognized, MEP is at least in part defined by other municipalities' approaches, because effective implementation is an indication of the feasibility and practicability of storm water management practices. Thus, it is appropriate to compare the requirements in the proposed permit to those in other municipalities' storm water management programs to evaluate whether the proposed permit's requirements actually require the maximum practicable effort to reduce municipal storm water discharges.

Here, such a comparison shows that the proposed permit's requirements come up short compared to other storm water programs around the country. For instance, as our June 20 letter described, scores of municipalities around the country include blanket, area-based thresholds for new development storm water control requirements. Specifically, evidence in the record shows that a 5,000 square feet threshold represents MEP in the context of defining the scope of new development projects to which specific storm water treatment standards apply, as several states and municipalities—and even the proposed permit's redevelopment provision—currently apply a 5,000 square feet catch-all threshold.

Second, as Board staff has noted, "MEP is a dynamic performance standard which [sic] evolves over time as urban runoff management knowledge increases, [and] . . . must be continually assessed and modified to incorporate improved programs, control measures, [BMPs], etc.." In this vein, Board staff emphasized in the responses to comments that the Phase I permit, which has been effect for over 15 years, should be at least as stringent as the newer Phase II regulations that apply to small MS4 operators. We agree. But the Phase II regulations have already been in place for five years, and represent a flexible approach afforded to first-time storm water permittees. Moreover, as staff has recognized in discussing the relevance of the Phase II regulations to determining MEP in this context, Phase I municipalities generally face "greater water quality concerns" than the small municipalities subject to Phase II regulations. Given the evolving nature of MEP, no evidence shows that five-year old standards—the length of an entire permit term—are adequate to fulfill MEP today for the Phase I San Diego Copermittees, especially since, as discussed above, more stringent programs are currently in place across the country. Moreover, while the proposed permit is

more stringent than Phase II regulations in some respects, such as setting a 5,000 square feet trigger for specific development categories, it is actually less stringent than the Phase II regulations in that it lacks a catch-all threshold for new development projects.

Similarly, the staff report and responses to comments refer to State Board Order WQ 2000-11 to support the existing development thresholds, asserting that the development categories and thresholds in the six-year old Order "reflect a reasonable interpretation of MEP." Again, in light of the Board's obligation to continually improve and strengthen MEP in the permit, it is unclear why the staff continues to use as the foundation for the new San Diego municipal storm water permit today what the State Board considered MEP more than five years ago. Moreover, it is worth noting that WQ 2000-11 interpreted MEP for a 1996 permit. The Board must demonstrate that this permit meets MEP, yet neither the staff report nor responses to comments nor the findings cite evidence or provide an analysis showing that it does. An appropriate analysis of MEP would address more recent evidence documenting implementation of effective BMPs at least in the years since the previous permit was adopted. We find no such analysis in the record. If evidence in the record in fact justifies the proposed permit's reliance on five-year old standards and shows that the proposed permit does in fact represent MEP, we ask that it be pointed out for clarification.

With respect to the measures that are necessary to reach MEP in the permit, both the staff report and the responses to comments explain that the new permit, because it is a third-generation Phase I permit, should be at least as stringent as Phase II permits, which are by design less demanding and more flexible under the Clean Water Act. On this basis, the proposed permit lowers the threshold for storm water requirements applicable to new commercial development projects from 100,000 square feet to one acre. Yet no justification is given for the decision to set the limit at one acre, which represents the threshold in the less-stringent, five-year old Phase II regulations, when the weight of evidence shows that 5,000 square feet is, in fact, the appropriate MEP threshold for all categories of new development.

Similarly, the responses to comments repeatedly—and correctly—emphasizes the importance of establishing a permit that is at least as stringent as the regulations for Phase II permits. Board staff even quotes language from the Phase II regulations that sets an area-based catch-all threshold for development projects—yet the proposed permit does not include an analogous catch-all provision. This contradiction goes unexplained.

Response: The Priority Development Project categories used to trigger the SUSMP requirements of the Tentative Order reflect the MEP standard. As we have previously stated, these categories have been identified by the SWRCB in Order WQ 2000-11 as constituting MEP. The categories have not been exhibited to be ineffective or insufficient in addressing runoff from development projects, so

there is no reason to conclude that they no longer reflect the MEP standard. Moreover, the categories result in application of post-construction BMP requirements on a scale that is roughly equivalent to the scale of post-construction BMP application by the programs cited by the commenter as defining the MEP standard.

There are two reasons that this is the case. First, the Tentative Order requires that "[w]here 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" (section D.1.d.(1)). Therefore, the entirety of any project which includes a parking lot or surface used for the transportation of vehicles that is 5,000 square feet must meet the SUSMP requirements. In addition, any 5,000 square foot project that will grade on any natural slope that is 25% or greater must also meet the SUSMP requirements. Since these conditions are common on most new development projects, the SUSMP requirements will apply to the entirety of most new development projects, making the creation of a new SUSMP threshold of 5,000 square feet of impervious surfaces unnecessary.

Second, most of the programs cited by the commenter as using thresholds for application of post-construction BMPs that are more stringent than the Tentative Order include criteria or exemptions which make the requirements less rigorous or equivalent to those found in the Tentative Order. For example, Contra Costa County is required to apply post-construction BMP requirements to projects that create 10,000 square feet of impervious surfaces. As noted above, the Tentative Order contains provisions that require application of post-construction BMP requirements to many projects that create 5,000 square feet of impervious surfaces, making the Tentative Order more stringent than the Contra Costa County approach in many respects. Likewise for the State of New Jersey, which only applies runoff control requirements to projects creating one-quarter acre or more of impervious surfaces. The State of Washington only requires treatment of runoff from pollutant generating impervious surfaces that are 5,000 square feet or greater. Pollutant generating impervious surfaces include surfaces subject to vehicle use. The Tentative Order does not limit treatment requirements to pollutant generating impervious surfaces. In addition, as previously noted, the Tentative Order requires treatment of impervious surfaces that are 5,000 square feet or greater and are used by vehicles. Since the Tentative Order contains some requirements that are more rigorous than the requirements of the State of Washington, and other requirements that are identical, the Tentative Order's requirements can be considered roughly equivalent to those of the State of Washington. The States of Missouri, Illinois, and West Virginia require control of runoff from projects larger than one acre. The Tentative Order generally meets or exceeds the requirements of these states. When viewed in their entirety, the post-construction BMP requirements cited by the commenter do not exceed the SUSMP requirements of the Tentative Order. Therefore, if the requirements cited by the commenter meet the MEP standard, so do the requirements of the Tentative Order.

However, we agree with the commenter that the Tentative Order's requirements must be as rigorous as the Phase II NPDES requirements. Phase I municipalities are generally larger and have more pollutant sources than Phase II municipalities, and therefore should at least meet the requirements applied to Phase II municipalities. While the Tentative Order's application of SUSMP requirements to development projects is more rigorous than the Phase II requirements in almost all cases, there is the possibility that there may be a development project larger than one acre that does not fall into one of the Priority Development Project categories. Failure to apply the SUSMP requirements to such a project would not adequately meet the Phase II requirements to "address storm water runoff from new development and redevelopment projects that disturb greater than or equal to one acre" (40 CFR 122.34(b)(5)(i)). As such, the Tentative Order has been modified to add a requirement for development of a "catch-all" standard for application of SUSMP requirements, to be used in addition to the Priority Development Project categories included in the Tentative Order. The standard must at least require application of the SUSMP requirements to all new development projects greater than one acre in size. In choosing one acre as the maximum allowable development project size to be used as the "catch-all" standard, we rely on analysis conducted by USEPA in the preamble to the Phase II regulations. Such a standard can be expected to address runoff from 97.5% of developed acreage (USEPA, 1999b), which is reasonable considering that a sub-watershed level of imperviousness of 2-3% has been found to result in a stream channel morphology changes in southern California (Coleman, et al, 2005). However, it is also important to note that actual application of SUSMP requirements under the Tentative Order will greatly exceed the above USEPA estimate, due to the rigorous nature of the Priority Development Project Category criteria, which will remain in effect in conjunction with the catch-all standard.

Section: D **Sub-section:** D.1.d.(4)

Commenter(s): Natural Resources Defense Council

Comment: The proposed permit's framework for requiring low-impact site design BMPs in development projects defers MEP determinations in a manner federal courts have found unlawful under the Clean Water Act. Because site-design BMPs are a major component of the regulatory requirements governing new development and redevelopment projects, these requirements are substantive aspects of standards that must meet MEP in the permit. By leaving decisions regarding the scope—and ultimately the effectiveness—of site-design BMP implementation up to the Copermittees, the proposed permit's provision requiring implementation of these BMPs only "where determined to be applicable and feasible by the Copermittee" improperly leaves the decision of what constitutes MEP up to the regulated parties. In fact, the proposed permit

explicitly directs Copermittees to undertake the determination of what constitutes "applicable and feasible" under the site-design BMP requirement: "Each Copermittee shall develop and implement criteria to aid in determining Priority Development Project conditions where implementation of . . . site design BMP[s] . . . is applicable and feasible." This language openly indicates that the Copermittees—with no further direction or review from the Board—should decide for themselves what comprises MEP. This approach is not only ineffective, it constitutes a failure to regulate and is disallowed under the Clean Water Act, which requires NPDES permitting authorities to review permits "to ensure that the measures that any given operator . . . has decided to undertake will in fact reduce discharges to the maximum extent practicable."

In another example of the proposed permit's flawed and unlawful approach to the MEP standard, among the list of acceptable site-design BMPs is construction of "a portion of walkways, trails, overflow parking lots, alleys, or other low traffic areas with permeable surfaces." We support such language, as reducing impervious cover in development projects is a core LID concept. But as one Copermittee commented, "the requirement is unclear." Staff responded by indicating that "[i]t is at the discretion of the Copermittees to determine how much of a project's low traffic areas must be constructed with permeable surfaces. The Copermittees' determination must be based on the MEP standard." This approach effectively—indeed, explicitly—leaves MEP decisions to the regulated Copermittees, reflecting a fundamental misunderstanding by the staff of the requirement that the regulating agency determine what constitutes MEP in the permit and ensure that the Copermittees' storm water management programs meet the permit's MEP requirements.

Response: Modifications have been made to the Tentative Order to better assure LID site design BMP implementation will meet the MEP standard. Several LID site design BMPs that have been exhibited to be applicable and feasible under certain conditions are now mandatory. This includes routing of runoff from impervious areas to pervious areas and use of permeable surfaces for portions of low traffic areas. Previously, only one of these LID site design BMPs was required at a Priority Development Project; now both must be implemented under most conditions. Standard multi-family residential, small-scale single-family residential, restaurant, office building, large scale single-family residential, and retail commercial projects with typical San Diego County soil conditions have been shown to have sufficient pervious areas for significant infiltration onsite (Horner, 2006). In addition, use of permeable surfaces has been exhibited to be applicable and feasible for many projects' low traffic areas in San Diego County. Permeable surface use for low traffic areas in also supported by numerous case studies nationwide (Natural Resources Defense Council, 2006 and Puget Sound Action Team and CH2M Hill, 2004).

In addition, while some of the listed LID site design BMPs continue to be required on an applicability and feasibility basis, the term "as determined by the

Copermittee," used in reference to determination of applicability and feasibility, has been removed. This clarifies that determination of applicability and feasibility is not solely at the discretion of the Copermittees; the Regional Board also has discretion to provide input on applicability and feasibility of LID site design BMPs where necessary. In addition, the process for determining applicability and feasibility of LID site design BMPs has been strengthened. In conjunction with the requirements for the Copermittees to develop criteria to guide the determination of applicability and feasibility, project proponents are now required to "demonstrate applicability and feasibility, or lack thereof, for each LID site design BMP." This formalized process incorporated into the Tentative Order will ensure that each LID site design BMP will receive appropriate consideration by both the project proponent and the Copermittee. This increased formal consideration is reasonably expected to significantly improve implementation of the LID site design BMPs in question, due to the increased level of formal oversight. Such an approach is appropriate due to the relatively subjective nature of these LID site design BMPs. Since particular LID site design BMPs do not lend themselves to being easily measured or assessed, it is appropriate to assess their applicability and feasibility on a case by case basis in relation to pre-determined criteria.

Moreover, the amount of impervious surface runoff that must be routed to pervious areas has also been clarified, which will better ensure meaningful LID site design BMP implementation. The size of impervious areas draining to pervious areas must correspond to the size of the pervious areas. This helps prevent a situation where only a small portion of impervious areas is routed to pervious areas, even though the pervious area's capacity for receipt of runoff is large.

Section: D **Sub-section:** D.1.d.(4)

Commenter(s): Natural Resources Defense Council

Comment: LID requirements under the proposed permit are insufficient and uncertain. The weight of the evidence in the record unequivocally shows that effective development planning centers around broad implementation of site-design best management practices ("BMPs") based on LID strategies. The cornerstone of this critically-necessary approach is establishing low impact site-design BMPs as the default storm water management strategy for development projects by requiring that LID practices be the presumptive tool to meet the 85th percentile runoff event treatment standard. The proposed permit does represent an improvement in this area over the previous permit in that it requires a minimum level of low impact site-design BMPs. But by continuing to rely on a fatally vague "where feasible" approach to effectuate maximum low impact site-design BMP implementation, the proposed permit virtually guarantees the San Diego Region's continued failure to see broad utilization of site-design BMPs.

Moreover, the proposed permit continues to require that treatment-control BMPs, rather than site-design BMPs, be implemented to meet the 85th percentile runoff event treatment standard. This provision severely undermines the already weak language requiring low impact site-design BMPs. To achieve widespread implementation of LID practices, it is imperative that the Board adopt a permit revised to require that priority development projects meet the 85th percentile runoff standard using low impact site-design BMPs.

While the record presents virtually no evidence that the proposed permit, by virtue of its new and revised provisions, will adequately address water quality, viable solutions do exist—and were, in fact, presented along with supporting evidence in our June 20 submission. Of particularly strong relevance is the Horner study, which specifically evaluated storm water management in the San Diego region and addressed the effectiveness of low impact site design practices compared to other storm water management tools. Dr. Horner examined the effectiveness of typical conventional "treatment control" BMPs chosen from a large list provided in the previous permit, such as drain inlet inserts, continuous deflective separation units, extended detention basins, and filter strips, as well as low-impact site-design BMPs such as decreasing impervious surface area, enhancing soils, and harvesting roof runoff. The study found that across a wide variety of development types (e.g., large commercial, single-family residential, multi-family residential, restaurant, office, etc.), LID strategies are more effective than conventional tools—such as the basic treatment BMPs typically deployed in new development projects under the previous permit—in reducing pollutant loading and volume of storm water runoff. The take-away message from the Horner report—indeed, from the entire body of evidence in the record on storm water management practices—is that "[i]nfiltrating sufficient runoff to maintain pre-development hydrologic characteristics and prevent pollutant transport is the most effective way to protect surface receiving waters." While Board staff recognizes as much—the staff report notes that "USEPA finds including plans for a 'natural' site design and BMP implementation during the design phase of new development and redevelopment offers the most cost effective strategy to reduce pollutants loads to receiving waters" —the proposed permit falls short of requiring robust implementation of these strategies.

In a similar vein, numerous case studies across the country demonstrate the effectiveness and practicability of LID techniques in new development and redevelopment. These well-documented studies, many of which were included in the body of literature NRDC provided along with our June 20 letter, inform the MEP standard by establishing what storm water techniques are available, feasible, and effective—i.e., what is practicable. The proposed permit thus falls short of MEP by failing to include vigorous requirements for the use of LID techniques in new development and redevelopment projects.

By continuing to take a vague and ambiguous "where feasible" approach to site-design BMP requirements, the proposed permit's current language sets the

program up for failure and otherwise is untenable as a matter of administrative decision-making. Audits of several of the Copermittees' JURMP programs demonstrated that the "where feasible" approach to BMP requirements resulted in serious under-use in the previous permit cycle for BMPs generally, and particularly for site-design BMPs. Even though the proposed permit improves on the previous permit by providing a list of specific site-design BMPs and requiring the use of at least some site-design BMPs, it still relies on an implementation approach that the evidence in the record shows does not work. The changes in the revised document do not cure this fundamental defect. Compare the following provisions of the proposed permit:

•"Implement all site design BMPs . . . where determined to be applicable and feasible by the Copermittee";

•"Each Copermittee shall require each Priority Development Project to implement source control BMPs"; and

•"Each Copermittee shall require each Priority Development Project to implement treatment control BMPs. . . ".

By caveating the requirement for site-design BMPs, while using strict language to require implementation of source-control and treatment-control BMPs, the proposed permit takes away with one hand what it gives with the other—the presumptive requirement that Priority Development Projects fully employ site-design BMPs. Indeed, the new language—no doubt earnestly intended by Board staff to achieve broad low-impact site-design BMP implementation—is nearly identical, and has no discernibly different meaning, than the language in the Model SUSMP developed by the Copermittees under the previous permit, which required priority projects to "consider, and incorporate and implement [site-design BMPs] where determined applicable and feasible." Under that language, as the 2005 JURMP audit emphasized, "many of the SUSMP plans . . . did not adequately address site design." Even Board staff has emphasized the shortcomings of this approach, noting in the staff report that this "open-ended approach. . . . has proven to be ineffective in integrating site design BMPs in project designs."

Furthermore, the Copermittees themselves have described why the "where feasible" approach to site-design BMP implementation lacks effect: "if-feasible analys[e]s are time-consuming and contentious, and . . . soft standards are not widely accepted by the regulated community."

The bottom line is that that State Board policy calls for broad LID implementation and the proposed permit in its current form fails to deliver it. To comply with the letter and spirit of the State Board's LID policy, it is imperative that the new Phase I permit for the San Diego Copermittees require LID strategies as the presumptive tool to meet the 85th percentile runoff standard, rather than

continuing to rely on partial implementation—and, at that, only when the indeterminate "where feasible" approach is satisfied.

Response: While the Tentative Order requires significant and widespread implementation of LID site design BMPs, it has been modified to better ensure LID site design BMP implementation under those conditions where LID site design BMP implementation has already been demonstrated to be applicable and feasible. The primary reason for these modifications is the general effectiveness of LID site design BMPs in reducing pollutant discharges – pollutants in runoff which is infiltrated generally do not leave the site, and therefore do not reach receiving waters. Runoff volume reduction commensurately decreases pollutant mass loadings (Horner, 2006). LID site design BMPs also preserve pre-development hydrologic conditions, minimizing hydromodification impacts. In addition LID site design BMPs help maintain groundwater recharge.

Several modifications have been made to the Tentative Order to better ensure LID site design implementation. First, an objective for the LID site design BMP section has been added to the Tentative Order. The objective is to "minimize directly connected impervious areas and promote infiltration at Priority Development Projects." The addition of this objective in the Tentative Order serves to guide the Copermittees in their application of LID site design BMP requirements to Priority Development Projects. It helps ensure that the purpose of LID site design BMP implementation is clear, which can be expected to lead to more effective implementation.

Second, several LID site design BMPs that have been exhibited to be applicable and feasible under certain conditions are now mandatory. This includes routing of runoff from impervious areas to pervious areas and use of permeable surfaces for portions of low traffic areas. Previously, only one of these LID site design BMPs was required at a Priority Development Project; now both must be implemented under most conditions. Standard multi-family residential, small-scale single-family residential, restaurant, office building, large scale single-family residential, and retail commercial projects with typical San Diego County soil conditions have been shown to have sufficient pervious areas for significant infiltration onsite (Horner, 2006). In addition, use of permeable surfaces has been exhibited to be applicable and feasible for many projects' low traffic areas in San Diego County. Permeable surface use for low traffic areas in also supported by numerous case studies nationwide (Natural Resources Defense Council, 2006 and Puget Sound Action Team and CH2M Hill, 2004).

Third, the amount of impervious surface runoff that must be routed to pervious areas has also been clarified, which will better ensure meaningful LID site design BMP implementation. The size of impervious areas draining to pervious areas must correspond to the size of the pervious areas. This helps prevent a situation

where only a small portion of impervious areas is routed to pervious areas, even though the pervious area's capacity for receipt of runoff is large.

Fourth, while some of the listed LID site design BMPs continue to be required on an applicability and feasibility basis, the term "as determined by the Copermittee," used in reference to determination of applicability and feasibility, has been removed. This clarifies that determination of applicability and feasibility is not solely at the discretion of the Copermittees; the Regional Board also has discretion to provide input on applicability and feasibility of LID site design BMPs where necessary. In addition, the process for determining applicability and feasibility of LID site design BMPs has been strengthened. In conjunction with the requirements for the Copermittees to develop criteria to guide the determination of applicability and feasibility, project proponents are now required to "demonstrate applicability and feasibility, or lack thereof, for each LID site design BMP."

This formalized process requiring the creation of LID site design BMP criteria, as well as reporting and review in relation to the criteria, addresses the commenter's concerns about lack of sufficient LID site design BMP implementation under the current permit's regulatory approach. The current permit's approach contains no requirements for development of criteria or reporting and review of LID site design BMPs. The formalized process incorporated into the Tentative Order will ensure that each LID site design BMP will receive appropriate consideration by both the project proponent and the Copermittee. This increased formal consideration is reasonably expected to significantly improve implementation of the LID site design BMPs in question, due to the increased level of formal oversight. Such an approach is appropriate due to the relatively subjective nature of these LID site design BMPs. Since particular LID site design BMPs do not lend themselves to being easily measured or assessed, it is appropriate to assess their applicability and feasibility on a case by case basis in relation to pre-determined criteria. This approach also acknowledges the numerous different types of projects and their different site constraints.

Fifth, the Tentative Order has been revised to increase use of treatment control BMPs which incorporate LID techniques. One revision requires that LID techniques, such as soil amendments, be included in the design criteria for appropriate treatment control BMPs. This is required because of the ability of LID techniques to improve treatment control BMP performance (Horner, 2006). Incorporation of LID techniques in design criteria will help ensure increased use of LID techniques at Priority Development Projects. Another revision requires inclusion of LID BMPs that can be used for treatment to be included in local SUSMP lists of available BMPs. This also will help ensure increased use of LID techniques at Priority Development Projects.

Collectively, these modifications will result in widespread implementation of LID site design BMPs. The majority of projects are required to route runoff from

impervious areas to pervious areas, as wells as utilize permeable surfaces for low traffic areas. In addition, the process for utilization of other LID site design BMPs has been formalized to ensure meaningful consideration of the BMPs and implementation based on specific criteria. Moreover, use of LID techniques to treat urban runoff has been incorporated into the Tentative Order, which will increase the use of such techniques for treatment purposes. These requirements for widespread implementation of LID site design BMPs are consistent with the MEP standard.

The commenter contends that implementation LID site design BMPs for runoff treatment purposes is the only way to meet the MEP standard and protect water quality. This is not the case. As exhibited above, the Tentative Order's LID site design BMP requirements assure widespread LID site design BMP implementation consistent with the MEP standard. Moreover, the Tentative Order's approach of requiring LID site design BMPs, source control BMPs, and treatment control BMPs is sufficient to protect water quality without relying on a single methodology.

While LID site design BMPs can be more effective than other treatment control BMPs, this is not always the case. For example, USEPA reports that sand and other media filters can be more effective than grassed swales or vegetated filter strips in removing some pollutants from runoff (USEPA, 1999). Caltrans also finds that various media filtration BMPs or treatment trains can be more effective than typical LID site design BMPs for some pollutants (Caltrans, 2004). Depending on each project's pollutants of concern, LID site design BMPs may or may not be the most effective treatment control BMP choice. For this reason, the Tentative Order requires BMP implementation based on BMP effectiveness, rather than a single methodology that may not represent the most effective approach. The Tentative Order requires implementation of treatment control BMPs with at least a high or medium removal efficiency for a project's most significant pollutants of concern. The majority of the treatment control BMPs with high or medium removal efficiencies, such as biofilters, detention basins, infiltration basins, and wet ponds, are "soil-based" BMPs that incorporate LID techniques. Moreover, the Tentative Order has been modified to better assure that treatment control BMP options include LID BMPs and incorporate LID techniques (see discussion above).

It is worth noting that the "Horner study" cited by the commenter does not refute this combined approach of LID site design BMP implementation supported by implementation of effective "soil-based" treatment control BMPs which incorporate LID techniques. Indeed, the study's "LID analysis" contemplates just such an approach, assessing the "extent to which commonly used soil-based BMPs and low-impact site design strategies ameliorate runoff volumes and pollutant concentrations and loadings" (Horner, 2006). The study's central finding, that "developments implementing traditional basins and biofilters, and even more so low-impact post construction BMPs, achieve significant reduction

of pollutant loading and runoff volume" is consistent with the Tentative Order's combined approach of LID site design BMP and treatment control BMP implementation.

Each of the modifications made to section D.1.d addressing LID site design BMPs has been made in order to address specific comments made regarding the Tentative Order. As such, each of the modifications has been reasonably foreseeable and represents a logical outgrowth of the comment and response process. The modifications simply clarify the Tentative Order's pre-existing requirements, and therefore do not constitute significant changes to the Tentative Order.

Section: D **Sub-section:** D.1.d.(4)

Commenter(s): Natural Resources Defense Council

Comment: The Board is poised to find that the proposed permit "is based on . . . all applicable provisions of . . . Policies adopted by the State Water Resources Control Board." But by failing to include language that will ensure low impact site-design BMP implementation as the primary strategy for storm water management in priority development projects, the proposed permit in its current form does not live up to the State Board's January 2005 Low Impact Development-Sustainable Storm Water Management policy, which "adopt[s] sustainability as a core value" of storm water management. The State Board notes that "LID has been a proven approach in other parts of the country," and focuses on achieving broad implementation of LID practices as the cornerstone of its Sustainable Storm Water Management policy. The policy urges regional boards to move beyond traditional storm water management practices and to use LID "in all future policies, guidelines, and regulatory actions."

Response: The Tentative Order is consistent with any SWRCB guidance concerning LID. The webpage, or "policy," referred to by the commenter states: "The goal of LID is to mimic a site's predevelopment hydrology by using design techniques that infiltrate, filter, store, evaporate, and detain runoff close to the source of rainfall." The Tentative Order requires just that through its hydromodification requirements. It also requires LID site design BMPs to be implemented at all Priority Development Projects. Control of hydromodification impacts and implementation of LID site design BMPs at all Priority Development Projects meets the expectations of any guidance provided by the referenced webpage.

Section: D **Sub-section:** D.1.d.(4)(a)

Commenter(s): City of Chula Vista

Comment: While "conservation of natural areas, including existing trees, other vegetation, and soils" has been included in List 2 as a Site Design BMP requirement for individual development projects, it should be considered that the conservation of natural areas might be addressed at much larger scales through planned Open Space and MSCP planning areas. Similar in concept to area-wide or shared treatment control BMPs, provision for site design credit through such jurisdictional programs, requirements, and planning measures should be included with this permit language.

Response: Conservation of natural areas on a large scale, such as for the MSCP, should not be used to preclude conservation of natural areas on a project by project basis. Both large scale and small scale conservation can be effective in minimizing impacts to receiving waters from urban runoff. Therefore, the two approaches should be complimentary. Even with the MSCP in place, project scale opportunities for conservation of natural areas, such as conservation of natural drainages, should be taken advantage of. Therefore, site design "credit" for MSCP-type efforts is not appropriate. Moreover, it should be noted that the requirement for conservation of natural areas is one option on a list site design BMPs, and is not expressly required in all instances.

Section: D **Sub-section:** D.1.d.(4)(a)

Commenter(s): City of Chula Vista

Comment: List 2 also includes "minimize soil compaction" as a site design BMP. This language may be deleted from the permit, as soil compaction under paved, building areas, and slopes cannot be compromised, and soil compaction in unimproved or landscaped areas typically does not occur. Therefore, the minimization of soil compaction as a Site Design BMP appears to be redundant.

Response: Minimization of soil compaction under structures is not expected. However, soil compaction does often happen in areas that are ultimately landscaped. For example, entire housing pads are often compacted, though only a portion of the pads will be built upon. For this reason, minimization of soil compaction will remain as a site design BMP option in the Tentative Order.

Section: D **Sub-section:** D.1.d.(12)

Commenter(s): CCWHE, BIASDC, CELSOC, BIASC, CICWQ, BILD, CBIA

Comment: The Revised Tentative Order should be revised to allow for dry weather flows that have received treatment to reduce pollutants to be discharged to treatment control infiltration facilities.

Response: Dry weather flows that have received treatment to reduce pollutant loads below significant levels are allowed to be discharged to treatment control infiltration facilities. Section D.1.d.(12)(b) only prohibits infiltration of dry weather flows containing significant pollutant loads.

Section: D **Sub-section:** D.1.d.(12)

Commenter(s): CCWHE, BIASDC, CELSOC, BIASC, CICWQ, BILD, CBIA

Comment: Provisions requiring groundwater protection for infiltration facilities in the Revised Tentative Order should also be revised to allow for infiltration to treat bacteria because infiltration is one of most effective ways of treating bacteria; when such infiltration is accomplished bacteria does not affect ground water quality because infiltration treats the pollutant before it gets to groundwater.

Response: There is no specific restriction in the Tentative Order on infiltration of runoff containing bacteria. Runoff containing bacteria can be infiltrated provided it is pretreated and is not from one of several types of facilities that generate other pollutants that pose a threat to groundwater. Since the facilities for which infiltration of runoff is restricted are typically not significant sources of bacteria, infiltration restrictions pertaining to these facilities are not likely to impact infiltration of runoff containing bacteria.

Section: D **Sub-section:** D.1.d.(12)

Commenter(s): CCWHE, BIASDC, CELSOC, BIASC, CICWQ, BILD, CBIA

Comment: The Revised Tentative Order should be clarified to state that the conditions to protect groundwater quality applicable to hydromodification control BMPs apply only to infiltration facilities that are serving as water quality treatment control BMPs (treatment BMPs) and not to those that are functioning as volume reduction hydromodification control BMPs (volume control BMPs). Infiltration for volume control, after the flows up to the water quality treatment design event have received treatment in a treatment control BMP that addresses pollutants of concern for groundwater, should be allowed to be infiltrated without further water quality control restrictions. Such restrictions are not necessary to protect groundwater quality because the water infiltrated for volume control is fully treated urban runoff. Indeed, the imposition of restrictions might actually impede performance of infiltration facilities designed for hydromodification control.

Response: The infiltration restrictions only apply to treatment control BMPs. Infiltration BMPs intended to meet hydromodification requirements after treatment of runoff has already occurred are not considered treatment control

BMPs. Therefore, the infiltration restrictions do not apply to such BMPs. For this reason, no change to the Tentative Order is necessary.

Section: D **Sub-section:** D.1.g

Commenter(s): CCWHE, BIASDC, CELSOC, BIASC, CICWQ, BILD, CBIA

Comment: Hydromodification policy should be developed in a coordinated manner across the state. Indeed, the State Board is considering the degree to which hydromodification needs to be regulated to protect water quality and has already acted to undertake regulation of hydromodification. (Order No. 2004-0004-DWQ.) To inform its policy decisions about hydromodification policy, the State Board convened the Blue Ribbon Panel to evaluate, inter alia, advanced treatment, HMPs and Numeric Effluent Limits in its recommendations to the State Board.

The Blue Ribbon Panel also considered runoff volume and peak flow in its findings on the feasibility of numeric effluent limits applicable to municipal activities. The Blue Ribbon Panel looked at data charting exceedance frequencies for detention basins in Fort Collins, Colorado, and it noted that "[t]the peak flow frequency curve can be adjusted back to its predevelopment character by the proper application of runoff controls." (Blue Ribbon Panel Recommendations, p. 13.) It went on to state, "[b]ut while these controls restore the peak flow frequency to its natural regime, the duration of flows at the low end (but still channel "working") of the flow frequency curve is greatly increased, which raises potential for channel scour in stream channels with erosive soils." (See id.) The Blue Ribbon Panel's observations identify concerns associated with hydromodification.

As a matter of prudent public policy, the State Board should have the opportunity to review the Blue Ribbon Panel's recommendations and develop a state-wide policy or approach prior to the inclusion of HMP in this proposed permit. If the Regional Board includes HMP in the permit it ultimately adopts, it may be inconsistent with a State-wide approach or policy. Further, it does not appear that Regional Board staff has addressed the Blue Ribbon Panel's concerns and recommendations regarding hydromodification in its Responses to Comments.

Response: There are currently two other ongoing efforts to address hydromodification in California, in the San Francisco Bay Region and the Los Angeles Region. The hydromodification approach in the Tentative Order is consistent with both of these efforts. Therefore, the Tentative Order is consistent with hydromodification efforts statewide. Moreover, SWRCB Water Quality Order No. 2004-004-DWQ addresses the 401 Water Quality Certification Program, not the NPDES municipal storm water program. In any event, the SWRCB is well

aware of the hydromodification requirements in the Tentative Order and has expressed no concern regarding statewide consistency to the Regional Board.

Regarding the Blue Ribbon Panel, the Tentative Order directly addresses the Blue Ribbon Panel's concerns discussed in the comment. The Blue Ribbon expresses concern that control of flow rates only, without consideration of flow durations, can result in hydromodification. This is precisely why the Tentative Order requires control of both flow rates and durations, as opposed to control of just flow rates (section D.1.g.(1)(b)).

Section: D **Sub-section:** D.1.g

Commenter(s): CCWHE, BIASDC, CELSOC, BIASC, CICWQ, BILD, CBIA

Comment: The Revised Tentative Order requires flow duration control of project discharges and does not specifically allow for increase in project runoff discharge rates and durations if instream control measures are utilized to accomplish hydromodification control, and to protect stream habitat and any beneficial uses. This requirement directly contradicts the Southern California Coastal Water Research Project report, which specifically recommends that a suite of management measures be made available so as to adequately protect public safety, provide for flood control, control erosion and deposition, and provide for channel stability. (See Managing Runoff to Protect Natural Streams: The Latest Developments on Investigation and Management of Hydromodification in California (SCCWRP 2006).)

Response: The Tentative Order only requires control of flow rates and durations "Where the increased flow rates and durations will result in increased potential for erosion or other significant adverse impacts to beneficial uses, attributable to changes in the flow rates and durations" (section D.1.g.(1)(c)). Flow rates and durations also cannot "result in channel conditions which do not meet the channel standard" (section D.1.g.(1)(c)). Therefore, if instream measures are implemented under section D.1.g.(2), and those instream measures allow for increased flow rates and durations that are in compliance with the requirements of section D.1.g.(1)(c), then onsite flow rate and duration control is not required.

Section: D **Sub-section:** D.1.g

Commenter(s): CCWHE, BIASDC, CELSOC, BIASC, CICWQ, BILD, CBIA

Comment: The Revised Tentative Order does not make clear that Hydromodification Control Criteria will only be necessary to protect against increased erosion of channel beds, etc. due to erosive force, but rather the Revised Tentative Order seems to suggest that hydromodification control will

always be required. This type of requirement fails to take into account situations where hydromodification control is not necessary to protect against hydromodification impacts (e.g., trapezoidal reinforced channels).

Response: The Tentative Order clearly states at section D.1..g.(3) that hydromodification control criteria "does not apply to Development Projects where the project discharges storm water runoff into channels or storm drains where the pre-existing channel or storm drain conditions result in minimal potential for erosion or other impacts to beneficial uses."

Section: D **Sub-section:** D.1.g.(2)

Commenter(s): City of Chula Vista, CCWHE, BIASDC, CELSOC, BIASC, CICWQ, BILD, CBIA

Comment: The Revised Tentative Order should be revised to specifically allow for instream hydromodification control measures to be used if the provisions of D.1.g.(2) are met. Further, the Revised Tentative Order seems to allow for instream hydromodification control, although it does not do so specifically. The Revised Tentative Order prohibits the use of non-naturally occurring hardscape materials, such as concrete, rip rap, etc.. These materials, if used judiciously are an important component to instream hydromodification control measures such as grade control structures. In some circumstances, such as to provide for public health and safety, flood control, erosion and deposition controls, and channel stability, hardened materials are necessary. As noted above, this menu of management options must be available to allow for sufficient flexibility to accommodate the variety of circumstances. (SCCWRP 2006.)

Response: The Tentative Order essentially contains two options for preventing hydromodification: (1) control flows onsite (section D.1.g.(1)), or (2) restore the downstream channel to accommodate increased flows (section D.1.g.(2)). Since the purpose of the HMP requirements is the protection of the natural conditions of a channel, it is inappropriate to allow one of the options to incorporate non-natural hardscape materials which typically impact beneficial uses. If they are correctly designed to account for increased flows, restoration projects do not need to incorporate hardscape materials in order to be durable. In addition, if the restoration option cannot be utilized without hardscape materials, the option to control flows onsite is available. Finally, it should be noted that the requirement precluding the use of hardscape materials in restoration projects only applies to restoration projects conducted by new development in order to comply with the Tentative Order's hydromodification requirements; it does not apply restoration projects or flood control projects unrelated to the hydromodification requirements. In those instances, the option for use of hardscape materials may potentially be appropriate, provided all necessary permits are obtained.

Section: D **Sub-section:** D.1.g.(6)

Commenter(s): CCWHE, BIASDC, CELSOC, BIASC, CICWQ, BILD, CBIA

Comment: The Revised Tentative Order does not require that the Interim Hydromodification Criteria be reviewed by the Regional Board, and it does not provide for public availability and a public hearing. The Copermittees are required to design this substantive component of the Revised Tentative Order, and under the Ninth Circuit's holding in EDC, the mandatory agency review and public participation requirements under the Clean Water Act must be satisfied. (See EDC, supra, 344 F.3d at p. 856.) Thus, assuming it is appropriate to include Interim Hydromodification Criteria (which we do not believe to be the case), the Revised Tentative Order must be further revised to provide for agency review and public participation regarding the Interim Hydromodification Criteria.

Response: Regional Board review of the criteria developed by the Copermittees under the Interim Hydromodification Criteria requirements is not necessary or required. The requirements of the Tentative Order are sufficiently detailed to ensure both the form of the criteria and the outcome of the criteria. The form of the criteria is specified directly in the Tentative Order: "an interim range of flow rates for which Priority Development Project post-project runoff flow rates and durations shall not exceed pre-project runoff flow rates and durations." The outcome of the criteria is also directly specified: Changes in flow rates and durations shall not result in increased potential for erosion or other significant adverse impacts to beneficial uses. These detailed requirements provide adequate information regarding what is required and what the outcome of the requirements will be, negating the need for further review or public participation. It should be noted that the Interim Hydromodification Criteria is to be developed as part of the Copermittees' Jurisdictional Urban Runoff Management Programs. These programs are required to incorporate public participation components into their development and implementation processes (Tentative Order section D.6). Therefore, the Copermittees processes for development of the Interim Hydromodification Criteria will provide opportunity for public participation, in addition to the Regional Board's adequate public participation processes utilized during adoption of the Tentative Order.

Section: D **Sub-section:** D.1.g.(6)

Commenter(s): CCWHE, BIASDC, CELSOC, BIASC, CICWQ, BILD, CBIA

Comment: Regional Board staff acknowledges that it will take approximately three years to develop an adequate HMP for the region. (See Revised Tentative Order section J.2.a.) However, within 365 of the adoption of the Revised Tentative Order, the Copermittees must identify Interim Hydromodification

Criteria and require PDPs disturbing 50 acres or more to implement hydrologic controls to manage post-project runoff flows and durations as required by the Interim Hydromodification Criteria. (See id. at section D.1.g.(6).) The 365 day time-frame is not feasible because the same technical analysis required to develop a regional plan will also be required to develop the Interim Hydromodification Criteria for PDPs.

Further, the development and implementation of Interim Hydromodification Criteria for PDPs disturbing 50 acres or more is not appropriate. The Blue Ribbon Panel has recommended that an effective storm water strategy include control of energy discharges for channel forming events completed under a watershed management plan and not site-by-site. (See Blue Ribbon Panel Recommendations, p. 14.) The Interim Hydromodification Criteria would apply this type of controls on a site-by-site basis, rather than under a watershed management plan. Further, a jurisdiction-by-jurisdiction approach to development of hydromodification criteria will likely lead to confusion as different criteria are applied throughout the region. Given the infeasibility of developing Interim Hydromodification Criteria for PDPs in 365 days and the Blue Ribbon Panel's recommendation that this type of control be completed under a watershed management plan, the Regional Board should put PDPs disturbing 50 acres or more on the same schedule as other entities that will be covered by the regional HMP.

Response: The timeframe in the Tentative Order for development of Interim Hydromodification Criteria is based on the timeframe proposed by the Copermittees in their June 7, 2006 comment letter on the Tentative Order. This proposal by the Copermittees clearly exhibits that the Copermittees find the timeframe to be feasible. Since the Copermittees are charged with developing the criteria, consideration must be given to their proposal. In addition, because the Interim Hydromodification Criteria addresses large projects only, while the general hydromodification requirements address all projects, the level of analysis necessary for development of both need not be the same. Moreover, the general hydromodification requirements include development of a channel standard, while the Interim Hydromodification Criteria do not.

Regarding the findings of the Blue Ribbon Panel, the Interim Hydromodification Criteria is consistent with those findings. The Blue Ribbon Panel only suggests watershed level control for watersheds already largely built out, where remaining development is "smaller infill or otherwise smaller development" (2006). The Interim Hydromodification Criteria targets exactly the opposite types of development than those contemplated by the Blue Ribbon Panel. The criteria only applies to projects larger than 50 acres; it does not apply to infill or other small projects.

Section: D **Sub-section:** D.2

Commenter(s): Associated General Contractors of America

Comment: Current storm water regulations have resulted in increased costs for public agencies. These new proposals will further increase the cost for construction by making it more difficult for developers/contractors to comply with the hydromodification and advance treatment requirements and for agencies to comply with the increased inspection requirements.

Response: The requirements contained in the Tentative Order's construction component are not so dissimilar from the previous Order as to increase the cost of construction. Advanced treatment systems at construction sites have been used at several sites in the Central Valley where housing costs are less than that of the San Diego region. With proper knowledge of these proposed regulations and budgeting, the construction site developer can adequately plan and prepare their site for construction without extensive increases in cost. In an article of November 14, 2006 titled, "Home sellers' profits still big", the San Diego Union Tribune states "For all the concern about declining prices, recent San Diego County home sellers are still making huge profits, nearly doubling their investment in little more than five years, according to a study by an Orange County research firm that tracks real estate transactions." Give that the current storm water regulations have been in effect "little more than five years", it appears that storm water regulations have not severely impacted builders' profitability.

Section: D **Sub-section:** D.2.c.(2)

Commenter(s): CCWHE, BIASDC, CELSOC, BIASC, CICWQ, BILD, CBIA

Comment: Further, as we have previously commented, it appears that the only flocculent demonstrated to be safe, effective and feasible for advanced treatment of sediment at construction sites is a patented product called Chitosan. Regional Board staff has not provided any other examples of advanced treatment BMPs that are proved to be safe, effective and feasible. Thus, this requirement appears to be a facial violation of Water Code section 13360 which prohibits the issuance of waste discharge requirements which specify the design, location, type of construction or particular manner in which compliance may be had with those requirements. For this additional reason, the Copermittees should be given flexibility to determine whether advanced treatment is appropriate even in circumstances where the construction site may pose an "exceptional threat to water quality." Where advanced treatment is not feasible or safe, the Copermittees should be allowed to impose alternate BMPs.

Response: The Draft Order does not create a monopoly for any one product, because the Draft Order does not require that a specific advanced treatment product is used. The decision on what specific advanced treatment BMPs are used is left up to the construction site operator or the Copermittee. Safe, effective, and feasible advanced treatment systems depend on each individual construction site's conditions, as well as owners and operators. Further, as we have previously responded, a multitude of advanced treatment systems exist that may be safe, effective and feasible depending on each unique construction site's needs. This requirement is in full compliance with Water Code section 13360 because the requirement does not specify the design, location type of construction or particular manner in which compliance may be had with those requirements.

As we have previously responded, the Copermittees have sufficient flexibility to determine when advanced treatment is appropriate by considering site-specific conditions such as soil erosion potential, soil type, site slopes, project size, receiving water quality, proximity to receiving water quality, non-storm water discharges, ineffectiveness of other BMPs and any other relevant factors.

Section: D **Sub-section:** D.2.c.(2)

Commenter(s): CCWHE, BIASDC, CELSOC, BIASC, CICWQ, BILD, CBIA

Comment: As an additional matter of concern, the Revised Tentative Order fails to address whether a report of waste discharge must be filed pursuant to Water Code sections 13260(a)(1) and 13264 prior to the use of any advanced treatment at construction sites. The Revised Tentative Order should be amended to clarify whether such the waste discharge requirements apply to discharges from advanced treatment at construction sites. If the waste discharge requirements are applicable, the Revised Tentative Order should provide a procedure for obtaining the necessary permits. The Regional Board should not move forward with requiring advanced treatment at certain construction sites without providing an adequate regulatory framework to deal with the consequences of its regulation.

Response: A separate report of waste discharge does not need to be filed prior to the use of any advanced treatment at construction sites. As the title says, the Tentative Order is a waste discharge requirement; therefore discharges from advanced treatment systems at construction sites are regulated through the Tentative Order. The Tentative Order provides an adequate regulatory framework to deal with discharges from advanced treatment systems at construction sites . In Section A.1, the Tentative Order prohibits discharges into and from the MS4 in a manner causing, or threatening to cause, a condition of pollution, contamination, or nuisance in waters of the state. If a discharger chooses to use a chemical additive that could cause a condition of pollution,

contamination or nuisance in waters of the state, the discharger would have to ensure that adequate filtration is implemented. In no way do the advanced treatment requirements allow a construction site to pollute waters of the United States.

Section: D **Sub-section:** D.2.c.(2)

Commenter(s): CCWHE, BIASDC, CELSOC, BIASC, CICWQ, BILD, CBIA

Comment: Assuming that advanced treatment is a safe and effective BMP, which we do not believe it is, the requirements of the Revised Tentative Order are so vague and ambiguous as to make compliance impossible. The Revised Tentative Order requires implementation of advanced treatment for sediment at construction sites that are determined by the Copermittees to be an "exceptional threat to water quality." (See Revised Tentative Order section D.2.a.(2).) However, the Revised Tentative Order does so without sufficient technical information, without an adequate regulatory framework, and without providing the regulated community sufficient explanation as to what is required in order to comply with the advanced treatment provisions of the Revised Tentative Order.

While the Copermittees must consider eight factors in making the determination, the Revised Tentative Order provides no further definition of "exceptional threat to water quality." (See id.) The Blue Ribbon Panel has recognized that technical practicalities and cost-effectiveness may make active treatment technologies less feasible for smaller construction sites, including small drainages within a larger site. (See Blue Ribbon Panel Recommendations, p. 15.) The Blue Ribbon Panel also recognized that there is also the potential for an accidental large release of chemicals involved in active treatment technologies. (See id.) The provisions in the Revised Tentative Order regarding advanced treatment do not address these concerns.

While the Copermittees are given some flexibility in determining whether a construction site poses an "exceptional threat to water quality," the Revised Tentative Order does not give the Copermittees flexibility to decide whether advanced treatment should be applied even in cases where there is an "exceptional threat to water quality." The Copermittees should be given flexibility to determine whether advanced treatment is appropriate even in circumstances where the construction site may pose an "exceptional threat to water quality" given the feasibility and safety concerns regarding this type of treatment.

Response: The Tentative Order provides an adequate regulatory framework for determination of when advanced treatment is required. Consistent with common definitions, construction sites that are an exceptional threat to water quality are those sites that pose a high risk for polluting receiving waters. The Tentative Order provides further guidance for identifying such sites by listing the factors

that must be considered by the Copermittees during the identification process. These factors include “project size” and “other relevant factors,” which can include assessment of cost effectiveness on smaller sites. Moreover, any accidental release of chemicals involved in advanced treatment technologies is adequately addressed through the Tentative Order's discharge prohibitions, the statewide general construction storm water permit (Order No. 99-08-DWQ), and the Basin Plan prohibitions.

Section: D **Sub-section:** D.2.c.(2)

Commenter(s): CCWHE, BIASDC, CELSOC, BIASC, CICWQ, BILD

Comment: As a matter of prudent public policy, the State Board should have the opportunity to review the Blue Ribbon Panel’s recommendations and develop a state-wide policy or approach prior to the inclusion of advanced treatment in this proposed permit. If the Regional Board includes advanced treatment in the permit it ultimately adopts, it may be inconsistent with a State-wide approach or policy. Further, it does not appear that Regional Board staff has addressed the Blue Ribbon Panel’s concerns and recommendations regarding advanced treatment in its Responses to Comments.

Response: The commenter should address their desire for a state-wide policy on advanced treatment to the State Board. The commenter’s concern regarding potential inconsistencies is unfounded because a state-wide approach or policy does not exist. The Blue Ribbon Panel's concerns regarding advanced treatment have been addressed. In Section A.1, the Tentative Order does prohibit discharges into and from the MS4 in a manner causing, or threatening to cause, a condition of pollution, contamination, or nuisance in waters of the state. If a discharger chooses to use a chemical additive that could cause a condition of pollution, contamination or nuisance in waters of the state, the discharger would have to ensure that adequate filtration is implemented to prevent that chemical additive from discharging. No part of the advanced treatment requirements allows a construction site to pollute waters of the state.

Section: D **Sub-section:** D.3.a.(2)(c)

Commenter(s): CICWQ, BIASC, BIASDC, BILD, CELSOC

Comment: Provision D.3.a.(2)(c) requires Copermittees to evaluate feasibility of retrofitting existing structural flood control devices and retrofit “where necessary.” However, no standard is provided as to when retrofitting would be “necessary” under this Provision. Further, there is no guidance in the Revised Tentative Order as to how such retrofitting should be accomplished in compliance with the terms of the Permit. Thus, this Provision does not provide the regulated

community sufficient notice as to what is required in order to satisfy the Copermittees compliance obligations and thus raises serious due process concerns. This provision should be clarified.

Response: Section D.3.a.(2)(c) of the Tentative Order is directly based on 40 CFR 122.26(d)(2)(iv)(A)(4). This federal regulation requires evaluating existing flood control devices "to determine if retrofitting the device to provide additional pollutant removal from storm water is feasible." Therefore, the purpose of the requirement is to ensure that flood control device retrofit projects incorporate measures to improve pollutant removal capabilities where feasible.

USEPA expands on this provision with the following information: "Storm water management devices and structures that focus solely on water quantity are usually not designed to remove pollutants, and may sometimes harm aquatic habitat and aesthetic values" (1992). As flood control structures and other elements of the MS4 age and retrofitting becomes necessary, opportunities for water quality improvements arise. Conveyance systems which take water quality consideration into account (such as grassed swales, vegetated detention ponds, etc.) can often cost less to construct than traditional concrete systems. Evaluation of the applicability of such systems during retrofitting must occur to ensure that pollutants in urban runoff are reduced to the maximum extent practicable. USEPA supports utilizing BMPs for pollution reduction in flood management projects, stating that "The proposed management program must demonstrate that flood management projects take into account the effects on the water quality of receiving water bodies. […] Opportunities for pollutant reduction should be considered" (1992).

In order to more closely meet the intent of the federal regulations and guidance, the requirement has been modified. Please see section D.3.a.(2)(d) of the Tentative Order for this modification.

Section: D **Sub-section:** D.3.a.(3)(b)iii

Commenter(s): CICWQ, BIASC, BIASDC, BILD, CELSOC

Comment: Another example of this need for additional clarification and definition arises in Provision D.3.a.(3)(a)(iii), which requires that the Copermittees remove accumulated trash and debris "immediately" from any MS4 facility that is designed to be self-cleaning. It is unclear what "immediately" means in this context and how exactly a Copermittee can be expected to "immediately" discern whether a self-cleaning facility needs maintenance, as would be required to comply with this requirement as written. Further, as a practical matter, it is infeasible to identify and accomplish "immediate" removal of trash and debris within the MS4 system. While trash and debris can be identified as part of the mandated regular inspection program, and removed upon identification,

immediate removal does not allow the normal operation of the storm drain inspection and maintenance process otherwise specified in the Revised Tentative Order. Therefore, this Provision should be clarified.

Response: The term "immediately" is used in the Tentative Order in accordance with its common definition found in dictionaries. According to the American Heritage College Dictionary, "immediately" means "without delay". Because self cleaning systems are designed to discharge their contents, it is appropriate that trash and debris observed in these systems be removed immediately to prevent their discharge to receiving waters. Moreover, the Clean Water Act prohibits non-storm water discharges from entering the MS4. Therefore, such trash and debris observed in the MS4 must be removed immediately. Immediate removal of waste from self cleaning systems can be conducted in the following manner: (1) Inspect the structure; (2) observe waste; (3) proceed to remove waste from structure.

Section: D **Sub-section:** D.3.b

Commenter(s): Industrial Environmental Association

Comment: We support the underlined changes.

Response: Comment noted.

Section: D **Sub-section:** D.3.b.(1)

Commenter(s): Industrial Environmental Association

Comment: We support the addition of the word "segment."

Response: Comment noted.

Section: D **Sub-section:** D.3.b.(2)(a)

Commenter(s): Industrial Environmental Association

Comment: We support deletion of the word "effective."

Response: Comment noted.

Section: D **Sub-section:** D.3.b.(3)(b)

Commenter(s): Industrial Environmental Association

Comment: Add new bullet point to read "Base ranking on past inspections."

Response: We have declined to make the requested change of including a criteria of "base ranking on past inspections" due to Tentative Order section D.3.b.(3)(b)xiii addressing the facility's compliance history. Results of past inspections is included in a facility's compliance history.

Section: D **Sub-section:** D.3.b.(3)(b)

Commenter(s): Industrial Environmental Association

Comment: We would recommend iv being changed to "Pollutant discharge potential and spill history."

Response: We have declined to make the requested change of including "spill history" due to Tentative Order section D.3.b.(3)(b)xiii addressing the facility's compliance history. Spill history would be included as part of the facility's compliance history.

Section: D **Sub-section:** D.3.b.(3)(b)

Commenter(s): Industrial Environmental Association

Comment: We would recommend ii being changed to "Materials 'exposed' at the facility."

Response: We have declined to make the requested changes due to our experience that some materials used at a facility inadvertently become exposed although those materials are not intended to be exposed. Examples include storage of materials near doorways, spills of materials, and improper outdoor storage of materials. In addition, Tentative Order section D.3.b.(3)(b)xii includes assessing the area of a site exposed to rainfall and runoff.

Section: D **Sub-section:** D.3.b.(3)(b)

Commenter(s): Industrial Environmental Association

Comment: We would recommend iii being changed to "'Exposed' wastes generated."

Response: We have declined to make the requested changes due to our experience that some wastes generated at a facility inadvertently become exposed although those wastes are not intended to be exposed. Examples include storage of wastes near doorways, spills of wastes, and improper outdoor storage of waste. In addition, Tentative Order section D.3.b.(3)(b)xii includes assessing the area of a site exposed to rainfall and runoff.

Section: D **Sub-section:** D.3.b.(3)(d)

Commenter(s): CICWQ, BIASC, BIASDC, BILD, CELSOC

Comment: Similarly, Provision D.3.b.(3)(d) provides that third parties may only perform 30% of BMP inspections and that the Copermittees are responsible for performing the remaining inspections required by the provision. Precluding Copermittees from entering into cooperative agreements with third parties to perform maintenance, verification and/or inspection activities deprives the Copermittees of the ability to expand their water quality reach, and therefore constitutes poor water quality policy. If allowed to cooperate with third parties, like vendors, subcontractors, HOAs and COAs, with respect to maintenance, inspection and BMP implementation obligations, Copermittees will be able to implement more effective programs, which will result in greater water quality benefits. Thus, these provisions should be revised to allow sufficient flexibility for Copermittees to engage in partnerships with third parties to more effectively implement programs and achieve greater water quality benefits.

Response: For clarification, the use of the term "third party" in the Tentative Order refers to parties hired by outside entities, such as industrial sites; it does not apply to contractors hired and controlled by the Copermittee. For example, if a Copermittee arranges for an industry to hire its own inspector to inspect its site, that inspection is a "third party" inspection. Restrictions on "third party" inspections only apply to these types of inspections. Therefore, nothing in the Tentative Order limits a Copermittee's use of a contractor to meet its maintenance, verification, and inspection responsibilities. In fact, many Copermittees currently use contractors to conduct their industrial inspections. The Tentative Order does not place a limit on the amount of inspections that can be conducted by third parties hired by the businesses that are to be inspected. However, the Tentative Order does limit the number of third party of inspections that can satisfy a portion of a Copermittee's inspection requirements. This limit is fair and appropriate because third party inspections have yet to be proven effective. Moreover, there is the potential for conflicts of interest to exist with such inspections.

Section: D **Sub-section:** D.3.b.(3)(d)

Commenter(s): Industrial Environmental Association

Comment: Third party inspections need more definition to address whether the inspector is working on behalf of the Copermittee or whether an industrial facility can contract for a third party inspection. We support minimum standards for inspectors, an approved curriculum and certification. In addition audits should verify quality of inspections and not solely rely on the number of inspections performed.

Response: We agree with the commenter and have added a definition of "third party inspector" to Attachment C.

Section: D **Sub-section:** D.3.b.(3)(f)

Commenter(s): Industrial Environmental Association

Comment: We would suggest that the language read "To the extent that the Regional Board, the State Water Quality Control Board or the U.S. Environmental Agency has conducted an inspection of an industrial site during a particular year, the requirement for the responsible Copermittee to inspect this facility during the same year will be satisfied."

Response: We have declined to make the suggested change. The inspectors of the State Board or the USEPA may not have the same familiar working knowledge of the Tentative Order to satisfy the inspection requirements of Tentative Order section D.3.b.(3)(a). The State Board and USEPA rarely inspects commercial and industrial facilities in the San Diego Region. When the State Board or USEPA does inspect commercial and industrial facilities in the San Diego Region, the Regional Board accompanies them thus satisfying Tentative Order section D.3.b.(3)(f).

Section: D **Sub-section:** D.3.c.(2)(f)

Commenter(s): CICWQ, BIASC, BIASDC, BILD, CELSOC

Comment: Along similar lines, Provision D.3.c.(2)(f) in the Revised Tentative Order requires Copermittees to implement or require implementation of “additional controls” for residential areas and activities tributary to CWA Section 303(d) impaired water body segments and for those areas adjacent to coastal lagoons or other receiving waters within “environmentally sensitive areas.” It is unclear what additional controls would be required in order to comply with this Provision and other provisions similar that are found in other sections of the

Revised Tentative Order. See D.3.b.(2)(e); D.3.b(1)(c). It is also unclear whether the Copermittees must, themselves, implement additional controls for these areas in the event that there is a failure to comply with requirements adopted by the Copermittee mandating that others do so. As noted above, many of the terms in this Provision are vague and require additional clarification by the Regional Board to provide the regulated community with the notice required to satisfy due process.

Response: The language of section D.3.c.(2)(f) is clear regarding what is required. Additional controls beyond the standard BMPs are required to be implemented to protect sensitive water bodies. This requirement is nearly identical to a currently existing requirement in Order No. 2001-01 (see section F.3.d.(3)(c)). The Copermittees have not had trouble understanding the requirement to date. CWA section 303(d) water bodies are water bodies which are not achieving the water quality objectives necessary to protect their beneficial uses. As discussed in Finding C.7, urban runoff discharges from MS4s are a leading cause of receiving water quality impairment in the San Diego Region. Since discharges which cause or contribute to an exceedance of water quality standards must be controlled and are also prohibited (see section A.3 of Tentative Order No. 2006-0011), discharges to CWA section 303(d) water bodies of pollutants for which the waterbody is impaired must be controlled and prohibited. Therefore, residential areas and activities tributary to these water bodies must implement additional controls to ensure that they are not discharging the pollutants which are causing or contributing to the impairment of these water bodies.

Regarding coastal lagoons and other sensitive water bodies, additional controls are needed to protect these valuable and unique resources. In their Nonpoint Source Program Strategy and Implementation Plan, the SWRCB and California Coastal Commission support additional controls for critical coastal areas, stating "the State will seek to attain and maintain applicable water quality standards, and protect waters threatened by land uses, or by substantial expansion of existing land uses, by implementing additional management measures."

Additional controls can include additional ordinances, inspections, education, treatment control BMPs, etc. As the requirement states, the additional controls can be implemented by the resident or the Copermittee, but the Copermittee has ultimate responsibility for implementation.

Section: G **Sub-section:**

Commenter(s): City County Managers Association

Comment: First, we wish to thank you and your staff for its efforts in responding to comments made by copermittees. The new draft contains revisions that go a

long way toward meeting the copermittees' requests. The changes reflect your sincere willingness to listen carefully and search for solutions that strike a delicate balance among the many stakeholders and general public welfare for which you're responsible.

Response: Comment noted.

Section: H **Sub-section:**

Commenter(s): CCWHE, BIASDC, CELSOC, BIASC, CICWQ, BILD

Comment: With respect to numeric effluent limits, the subject of the Blue Ribbon Panel's recommendations, the Blue Ribbon Panel concluded that incorporation of such limits in municipal storm water permits was not feasible. (Blue Ribbon Panel Recommendations, p. 8.) However, the Regional Board has seemingly disregarded the Blue Ribbon Panel's recommendations in its incorporation of WQBELs into the Revised Tentative Order. The State Board, who convened the Blue Ribbon Panel, should have the opportunity to review the Blue Ribbon Panel Recommendations and determine how those recommendations should be developed into a state-wide policy prior to incorporation of numeric effluent limits into MS4 permits.

Response: The WQBELs used in the TMDL section of the Tentative Order are BMP-based, rather than numeric. Section H.1.a requires the Copermittees to "implement BMPs capable of achieving the interim and final diazinon Waste Load Allocation (WLA)." Section H.2.a requires the Copermittees to "implement BMPs to maintain a total annual copper discharge load of less than or equal to 30 kg copper / year." The WLAs included in the Tentative Order are performance standards for implemented BMPs, not effluent limitations. The WLAs are to be used to assess if additional BMPs are necessary. Moreover, the Interim TMDL Numeric Targets for diazinon do not constitute numeric effluent limits, since they are receiving water limitations. In that respect, they are similar to the receiving water limitations in section A.3 of the Tentative Order.

Because the TMDL requirements in the Tentative Order are BMP-based, they are not inconsistent with the findings of the SWRCB's Blue Ribbon Panel. Since the Tentative Order does not utilize numeric effluent limits, it is not necessary to wait for the SWRCB to develop a policy on numeric effluent limits prior to adoption of the Tentative Order's TMDL requirements.

Section: H **Sub-section:**

Commenter(s): CCWHE, BIASDC, CELSOC, BIASC, CICWQ, BILD, CBIA

Comment: The Revised Tentative Order includes Chollas Creek Diazinon Total Maximum Daily Load ("TMDL") Water Quality Based Effluent Limits ("WQBELs") and Shelter Island Yacht Basin WQBELs. (See Revised Tentative Order section H.) It is inappropriate to adopt TMDL waste load allocations as numeric WQBELs without conducting an evaluation under Water Code section 13241. Such provisions are properly adopted in water quality control plans under Water Code section 13240, et seq. In establishing water quality objectives in water quality control plans, the regional boards must consider factors including: (a) past, present and probable future beneficial uses of water; (b) environmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto; (c) water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area; (d) economic considerations; (e) the need for developing housing within the region; and (f) the need to develop and use recycled water. (See Water Code § 13241.) This analysis may not be avoided by adopting the Chollas Creek Diazinon TMDL WQBELs and Shelter Island Yacht Basin WQBELs in the Revised Tentative Order, rather than as amendments to the Water Quality Control Plan for the San Diego Basin.

It is inappropriate for the Regional Board to incorporate numeric effluent limits and other standards that go beyond the Clean Water Act mandated MEP standard into the Revised Tentative Order without undertaking the statutorily required analysis. Thus the Regional Board should eliminate all references to numeric effluent limits in the Revised Tentative Order and incorporate a finding that provides that an iterative approach, including implementation of BMPs, will achieve the applicable waste load allocation compliance schedules. An iterative approach to achieving waste load allocations is consistent with the following statement of the court in Building Industry Assn. of San Diego County, supra, 124 Cal.App.4th at p. 890 (emphasis added): "the Water Boards have made clear in this litigation that they envision the ongoing iterative approach as the centerpiece to achieving water quality standards." Such an approach to storm water regulation is also consistent with prior decisions of the State Board. (See Order WQ2001-15.)

The incorporation of numeric WQBELs as discharge limits for MS4 permits in the Revised Tentative Order is also contrary to the Storm Water Panel Recommendations to the California State Water Resources Control Board on The Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial and Construction Activities (June 19, 2006) ("Blue Ribbon Panel Recommendations") in which the Storm Water Blue Ribbon Panel ("Blue Ribbon Panel") concluded that the incorporation of numeric limits into storm water permits is not feasible.

In addition, the Regional Board, through the incorporation of WQBELs and additional inspection and enforcement requirements, has improperly attempted to begin implementation of a detection based approach to storm water regulation,

which not only goes beyond the requirements of the Clean Water Act so as to warrant analysis under Water Code section 13241, but is also inconsistent with the Clean Water Act's approach to municipal storm water regulation.

Response: The Regional Board must consider the factors outlined in section 13241 of the California Water Code when adopting water quality objectives. The numeric targets incorporated into TMDLs are not water quality objectives: "While a TMDL's numeric target is an interpretation of existing water quality standards, it is not a water quality standard itself, and therefore, the processes required when adopting such standards do not apply" (SWRCB, 2002). Since the provisions of section 13241 do not apply to the adoption of TMDLs themselves, likewise, the provisions of section 13241 do not apply to the application of TMDL numeric targets in permits.

Further, the California State Supreme Court has determined that the factors listed in section 13241 must only be considered during adoption of permits if the permit requirements exceed federal law. (City of Burbank v. State Water Resources Control Bd. (2005) 35 Cal. 4th 613). The federal NPDES regulations require NPDES permit requirements to be "consistent with the assumptions and requirements of any available wasteload allocation" (40 CFR 122.44(d)(1)(vii)). As such, the TMDL requirements of the Tentative Order are required by federal law, negating the need for consideration of the factors listed in section 13241 of the California Water Code.

In any event, the WQBELs used in the TMDL section of the Tentative Order are BMP-based, rather than numeric. Section H.1.a requires the Copermittees to "implement BMPs capable of achieving the interim and final diazinon Waste Load Allocation (WLA)." Section H.2.a requires the Copermittees to "implement BMPs to maintain a total annual copper discharge load of less than or equal to 30 kg copper / year." The WLAs included in the Tentative Order are performance standards for implemented BMPs, not effluent limitations. The WLAs are to be used to assess if additional BMPs are necessary. Moreover, the Interim TMDL Numeric Targets for diazinon do not constitute numeric effluent limits, since they are receiving water limitations. In that respect, they are similar to the receiving water limitations in section A.3 of the Tentative Order.

The TMDL requirements are consistent with the iterative process for achieving compliance with water quality standards. The Fact Sheet states as much: "Consistent with USEPA's recommendation, this section implements WQBELs expressed as an iterative approach capable of meeting the WLAs in accordance with the associated compliance schedule." The Tentative Order's TMDL requirements allow for the iterative process to be used to meet the WLAs, while also providing a reasonable endpoint for the iterative process by identifying a final date for compliance with the WLAs to be achieved.

Because the TMDL requirements in the Tentative Order are BMP-based, they are not inconsistent with the findings of the SWRCB's Blue Ribbon Panel. Nor do the requirements incorporate a detection-based approach to storm water regulation, for the same reason.

Section: I **Sub-section:** Multiple

Commenter(s): CICWQ, BIASC, BIASDC, BILD, CELSOC

Comment: The Program Effectiveness conditions in the Revised Tentative Order seem to require that when "water quality problems" are determined to exist, then the Copermittees must "correct" those problems, regardless of whether the water quality problems at issue are factually related to MS4 discharges, regardless of whether such conditions are a result of a failure of Copermittees to implement BMPs and water quality controls to the Maximum Extent Practicable standard ("MEP"), and regardless of whether there are additional water quality controls that are available and technologically feasible to implement. Further, the provisions of the Revised Tentative Order are inconsistent and conflict as to the standards that will be used to determine compliance with the Revised Tentative Order requirements, and as to the actions that Copermittees must take to address "correction" of receiving water quality problems as mandated by the Revised Tentative Order. See Provisions I.1.b.; I.2.b; I.3.b.; I.4.b. Specifically, it is unclear that the Copermittees' implementation of water quality control measures addressing discharges from the MS4 system to the MEP will be sufficient to establish Copermittees' compliance with the Order in the event that receiving waters continue to exhibit exceedances. Instead, the Revised Tentative Order appears to mandate nothing less than that Copermittees implement a solution for receiving water quality, whether or not the primary source of the receiving water quality problem is a proximate result of MS4 system discharges.

Response: The Tentative Order does not require the Copermittees to correct water quality problems not factually related to MS4 discharges. For example, Section I.1.b of the Tentative Order states "where monitoring data exhibits persistent water quality problems that are caused or contributed to by MS4 discharges, jurisdictional activities or BMPs applicable to the water quality problems shall be modified and improved to correct the water quality problems." The other requirements of the Tentative Order cited in the comment are similarly worded.

The Tentative Order requires that pollutants be reduced to the MEP and that MS4 discharges do not cause or contribute to a violation of receiving water quality standards. If the Copermittees are reducing pollutant discharges to the MEP and their discharges continue to cause or contribute violations of receiving water quality standards, they are not in compliance. In such instances, the

Copermittees must continue to implement the "iterative process" outlined in section A.3 until compliance with receiving water quality standards are achieved. This issue was directly addressed by the Court of Appeal, Fourth Appellate District in its decision on the current permit, Order No. 2001-01. The court concluded that "the Permit's Water Quality Standards provisions are proper under federal law." Moreover, the Court made clear that MEP is not a ceiling for Copermittee efforts to control their pollutant discharges, stating: "If the maximum extent practicable standard is generally 'less stringent' than another Clean Water Act standard that relies on available technologies, it would be unreasonable to conclude that anything more stringent than the maximum extent practicable is necessarily impossible. In other contexts, courts have similarly recognized that the word 'practicable' does not necessarily mean the most that can possibly be done."

Section: J **Sub-section:** J.3.a

Commenter(s): San Diego Copermittees

Comment: Tentative Order section J.3.a.(2) requires that Copermittees submit Unified JURMP Annual Reports by September 30 of each year beginning in 2008. The Copermittees request that this timeframe be extended to October 31 of each year beginning in 2008. We believe an additional month is needed to complete the Unified JURMP Annual Reports. This would provide a more realistic timeframe for receiving and consolidating reporting data and information.

Response: Keeping the due date for Jurisdictional Urban Runoff Management Program Annual Reports at September 30 is needed so that review and necessary program corrections can be conducted in a timely manner. This helps ensure that problems with program implementation do not occur over an extended period of time. Prompt correction of program implementation problems leads to improved water quality quicker - an important benefit of the September 30 due date. In addition, the September 30 due date is necessary to provide the Regional Board with adequate time to review the annual reports and provide comments to the Copermittees prior to receipt of the Watershed Urban Runoff Management Program Annual Reports. The Regional Board cannot begin work on the annual reports until they annual reports are received. The Copermittees, on the other hand, do not need to wait until the end of the reporting period to begin work on the annual reports. Significant portions of the reporting effort can be conducted prior to the end of the reporting period. Therefore, the Copermittees have significantly more time to work on the annual reports than the three months between the end of the reporting period and the September 30 date due date. The September 30 due date provides both the Copermittees and the Regional Board with adequate time necessary to conduct their reporting and review duties.

Section: Attachment **Sub-section:** Attachment D

Commenter(s): San Diego Copermittees

Comment: Tentative Order Attachment D requires that Copermittees submit a description of the "various monitoring program components" described in Tentative Receiving Waters and Urban Runoff Monitoring and Reporting Program ("Monitoring and Reporting Program") Section III.A.3 by July 1, 2007. The Copermittees request that this date be modified to "365 days after adoption of the Order."

Assuming the earliest possible Order adoption date of December 13, 2006, the Copermittees would have a maximum of 6 1/2 months to develop and submit a comprehensive package of monitoring programs that includes the following new elements: trash monitoring, pyrethroids monitoring, MS4 outfall monitoring, and source identification monitoring. The Copermittees do not consider this to be sufficient time to develop and implement these new programs.
First, the general requirements of the adopted Order must be translated to a more detailed program design. While this flexibility is appreciated, it places a significant responsibility on the Copermittees to develop detailed, implementable work plans in a short period of time that could be further compressed if the Order is not adopted in December 2006. The final Order should allow the time needed to consider all relevant factors and to produce useful, well thought-out programs. Second, regional and watershed level coordination are both needed in the development of the programs. Once an overall study design and technical standards and guidelines are developed regionally, numerous details must then be fleshed out and implemented out at the watershed scale. For example, dry weather monitoring and coastal outfall sampling points will need to be reviewed and updated by each Copermittee individually, and then reviewed collectively by each of the nine WURMP workgroups to ensure that watershed-specific and regional objectives are met. These updates should ideally reflect additional review of results of the Copermittees' Long Term Effectiveness Assessment, the soon to be updated 303(d) list, and updated WURMP priorities.

While the Tentative Order provides considerable flexibility in the content of new programs, the compression of timelines needed to complete this work may undermine that process by necessitating that they be put together hastily. Extending that timeline to 365 days after adoption would provide needed time for program development, as well as for Copermittees to integrate these new programs with other modifications to their dry weather programs which are due 365 days after adoption of the Order.

Response: The due date for the monitoring programs will stay fixed at July 1, 2007, with an exception for the source identification monitoring program. The new due date for the source identification monitoring program will be changed to

July 1, 2008. We expect that the Order will be adopted on December 13, 2006. If the adoption is after December 13, 2006, the Regional Board will reconsider the timelines for the monitoring programs.

Assuming the adoption date of December 13, 2006, the Copermittees will have 6½ months to develop and submit a comprehensive monitoring program. The Regional Board believes that the time will be sufficient to develop such a program for the following reasons discussed below.

Most of the monitoring program components have already been developed under the Order No. 2001-01 or during development of the Report of Waste Discharge. We understand that four new programs need to be developed under the Tentative Order. Because the due date for the source identification monitoring program is extended until July 1, 2008, only three new programs have to be fully developed and submitted by July 1, 2007.

(1) Trash monitoring:
There is currently trash monitoring conducted in Los Angeles County. Trash monitoring is required there because of the adopted Ballona Creek and Wetland Trash TMDL. These already existing trash monitoring plans can be reviewed and adapted by the Copermittees. This will save the Copermittees time, making it feasible to develop and submit a trash monitoring program July 1, 2007.

(2) Pyrethroids monitoring
There is currently pyrethroid monitoring conducted in different parts of California (e.g. Central Valley) and there is an existing method for pyrethroid analysis available (EPA method 8270). These monitoring programs can be reviewed and adapted by the Copermittees. For this reason, we believe that the time provided is sufficient to develop and submit a pyrethroid monitoring plan by July 1, 2007.

(3) Monitoring program to characterize pollutant discharge from MS4
The Copermittees are already monitoring the MS4 outfalls during dry weather. Therefore the locations of most of the MS4 outfalls are known to the Copermittees. Also, data about the flow of the MS4 outfalls are available to the Copermittees through the Dry Weather Monitoring. Based on this data, the due date (July 1, 2007) for development of a monitoring program to characterize pollutant discharges from MS4 outfalls is considered to be sufficient.

The Regional Board will change the due date for the source identification monitoring program to July 1, 2008. We understand that the input from the monitoring program to characterize pollutant discharge from MS4 is needed to develop the source identification monitoring program.

Section: Monitoring **Sub-section:**

Commenter(s): Joe Purohit

Comment: Sufficient data must be disclosed by each co-permittee based on which independent third parties can conduct the same level of analysis as the regulated entities for permit compliance. The following data items are proposed for submission by each co-permittee, though the SDRWQCB may wish to include others: Wet and dry weather water quality data (chemistry, pollutions, metals, etc.) at each monitoring location; Bioassessment data; Regulated industrial and construction sites - all important data that the co-permittee will use for its compliance with the permit; and an electronic submission of Excel spreadsheets to SDRWQCB each reporting cycle by each co-permittee is sufficient.

Response: Each Copermittee submits the required reports in hardcopy and as PDF to the Regional Board due to amount of data the Regional Board receives every year. The Regional Board has requested original data under certain conditions in an easily exportable format (e.g. Excel) in the past and the Copermittees have provided the data. In addition, the Regional Board has the discretion under California Water Code Section 13627 to ask for original data from the Copermittees. For these reasons, the Tentative Order does not have to be changed in order to receive data in easily exportable format (e.g. excel) from the Copermittees.

Section: Monitoring **Sub-section:**

Commenter(s): San Diego Copermittees

Comment: Monitoring and Reporting Program Section III.A.6 requires that, following completion of an annual cycle of monitoring, Copermittees make monitoring data and results available to the Regional Board upon request. While the Copermittees agree that there may be instances where RWQCB staff accessibility to data is needed prior to the scheduled submittal of monitoring reports, such requests should be subject to reasonable limitations. First, quality assurance / quality control should be completed in accordance with applicable requirements of the Order prior to the required submission of data. Second, only raw data and results should be required, i.e., analysis (trends, box plots, etc.) should be included only in the scheduled submittals.

The Copermittees recommend that this language be modified as follows:

“Following completion of an annual cycle of monitoring in October, the Copermittees shall after thorough quality assurance/quality control, make the monitoring data and results available to the Regional Board at the Regional Board’s request.”

Response: The language in the Monitoring and Reporting Program Section III.A.6. will be modified based on the comments of the Copermittees:

"Following completion of an annual cycle of monitoring in October, the Copermittees shall make the monitoring data and results available to the Regional Board at the Regional Board's request."

In the event that the Regional Board requests data and results from the Copermittees, the Regional Board will acknowledge that the data might not have been through the process of quality assurance and quality control. Trend analyses, box plots, and other similar statistical analyses will not be required through an early request for data by the Regional Board, unless other regulatory mechanisms are utilized. Therefore the language has been modified.

Section: Monitoring **Sub-section:** Multiple

Commenter(s): San Diego Copermittees

Comment: Monitoring and Reporting Program Section II.A.1.k requires that Copermittees:

"shall collaborate to develop and implement a program to assess the presence of trash (anthropogenic litter) in receiving waters. The program shall collect and evaluate trash data in conjunction with collection and evaluation of analytical data."

Monitoring and Reporting Program Section II.B.3.c.(7) requires that Copermittees:

"assess the presence of trash in receiving waters and urban runoff at each dry weather screening or analytical monitoring station."

It additionally requires that:

"Assessments of trash shall provide information on the spatial extent and amount of trash present, as well as the nature of the types of trash present."

The trash assessment language is inconsistent in these two sections. Copermittees recommend that the wording used in II.A.1.k be modified as follows and used in II.B.3.c.(7):

"The Copermittees shall collaborate to develop and implement a program to assess the presence of trash (anthropogenic litter) in urban runoff. The program

shall collect and evaluate trash data in conjunction with collection and evaluation of analytical data."

Response: The language in the Monitoring and Reporting Program Section II.B.3.c.(7) will not be changed and will say the following:

"Assess the presence of trash in receiving waters and urban runoff at each dry weather field screening or analytical monitoring station. Assessments of trash shall provide information on the spatial extent and the amount of trash present, as well as the nature of the types of trash present".

In the Monitoring and Reporting Program Section II.A.1.k. the Copermittees are required to assess the presence of trash in the receiving waters at the mass loading stations. This means that trash could only be assessed twice during the dry weather flows and twice during wet weather events. The monitoring on the mass loading stations will give information about the trash generated close to the mass loading station, as well as trash that is deposited throughout the watershed and transported to the mass loading stations during storm events.

In Monitoring and Reporting Section II.B.3.c.(7), assessments of trash are required in receiving waters and urban runoff at each dry weather field screening or analytical monitoring station. It is important assess trash in urban runoff at each dry weather field screening or analytical monitoring station because this will give the Copermittees detailed information on where the trash is generated in the watershed. Several studies for the Ballona Creek TMDL in Los Angeles have shown that urban runoff is the dominant source of trash. This information is important for detecting major problem areas of trash in the watersheds.
The Regional Board also requires assessing trash in the receiving waters at each dry weather field screening or analytical monitoring station because trash can accumulate in urban runoff, but during storms the trash will be transported into the receiving waters. Without this information, trash assessments might not indicate any presence of trash although trash might have been deposited in receiving waters by earlier flows.

The information on the spatial extent and amount of trash, as well as the nature of the types of trash present is necessary to determine trash loading rates and the characterization of the trash. Based on this information, optimal BMPs can be developed and implemented for trash reduction.

Section: Monitoring **Sub-section:** Multiple

Commenter(s): San Diego Copermittees

Comment: The Monitoring and Reporting Program Section of the Tentative Order requires that Copermittees initiate four new monitoring programs no later than the 2007-2008 monitoring year. These are:

•A monitoring program to assess the presence of trash in receiving waters (Section II.A.k);
•A monitoring program to assess the presence of pyrethroids in receiving waters (Section II.A.7);
•A monitoring program to characterize pollutant discharges from MS4 outfalls in each watershed during wet and dry weather (Section II.B.1); and
•A source monitoring program to identify sources of discharges of pollutants causing priority water quality problems within each watershed (Section II.B.2).

The requirement to implement these programs in the 2007-2008 monitoring year was initially established in the March 10, 2006 draft of the Tentative Order, but the anticipated adoption date of the August 30, 2006 draft has since slipped at least five months, quite possibly longer. To provide a realistic timeframe for program development and implementation to occur, these schedules should be modified accordingly. The Copermittees therefore request that the effective date for the first three of these provisions be modified to the 2008-2009 monitoring year, and for the last provision to the 2009-2010 monitoring year.

Additional time is needed to complete the development of these new monitoring elements. This will consequently require that their implementation dates also be amended. Extension of this timeline will provide time needed to develop monitoring protocols, and to coordinate implementation amongst individual Copermittees and watershed groups. An additional year (i.e., the 2009-2010 monitoring year) is also requested to implement the source monitoring requirements because the development and implementation of this element will require data input from the new MS4 outfall monitoring programs.

Response: The due date for the monitoring programs will stay fixed at July 1, 2007, with an exception for the source identification monitoring program. The new due date for the source identification monitoring program will be changed to July 1, 2008. We expect that the Order will be adopted on December 13, 2006. If the adoption is after December 13, 2006, the Regional Board will reconsider the timelines for the monitoring programs.

Assuming the adoption date of December 13, 2006, the Copermittees will have 6½ months to develop and submit a comprehensive monitoring program. The Regional Board believes that the time will be sufficient to develop such a program for the following reasons discussed below.

Most of the monitoring program components have already been developed under the Order No. 2001-01 or during development of the Report of Waste Discharge. We understand that four new programs need to be developed under the

Tentative Order. Because the due date for the source identification monitoring program is extended until July 1, 2008, only three new programs have to be fully developed and submitted by July 1, 2007.

(1) Trash monitoring:
There is currently trash monitoring conducted in Los Angeles County. Trash monitoring is required there because of the adopted Ballona Creek and Wetland Trash TMDL. These already existing trash monitoring plans can be reviewed and adapted by the Copermittees. This will save the Copermittees time, making it feasible to develop and submit a trash monitoring program July 1, 2007.

(2) Pyrethroids monitoring
There is currently pyrethroid monitoring conducted in different parts of California (e.g. Central Valley) and there is an existing method for pyrethroid analysis available (EPA method 8270). These monitoring programs can be reviewed and adapted by the Copermittees. For this reason, we believe that the time provided is sufficient to develop and submit a pyrethroid monitoring plan by July 1, 2007.

(3) Monitoring program to characterize pollutant discharge from MS4
The Copermittees are already monitoring the MS4 outfalls during dry weather. Therefore the locations of most of the MS4 outfalls are known to the Copermittees. Also, data about the flow of the MS4 outfalls are available to the Copermittees through the Dry Weather Monitoring. Based on this data, the due date (July 1, 2007) for development of a monitoring program to characterize pollutant discharges from MS4 outfalls is considered to be sufficient.

The Regional Board will change the due date for the source identification monitoring program to July 1, 2008. We understand that the input from the monitoring program to characterize pollutant discharge from MS4 is needed to develop the source identification monitoring program.

Section: Monitoring **Sub-section:** Monitoring
II.A.6.b.(4)

Commenter(s): City of San Diego

Comment: This section requires copermittees to re-sample and conduct investigations in the storm drain system where samples exceed the AB 411 or Basin Plan REC1 water quality standards during routine monitoring. The City does not believe it is appropriate to apply receiving water standards within storm drains or apply REC1 standards to storm water in storm drains prior to storm water reaching receiving waters. Investigations should not be required if only the storm drain exhibits an exceedance of AB 411 or Basin Plan standards.

Response: The language of the Monitoring and Reporting Program Section II.A.6.b. (4) will not be changed and will say the following:

"If re-sampling is conducted under section (3) above exhibits continued exceedances of a AB 411 or Basin Plan standards in either the storm drain or the receiving water, investigations of sources of bacterial contamination shall commence within one business day of receipt of analytical results."

The Regional Board believes that it is important to have trigger levels in the Order that determines when an investigation has to be conducted. The Regional Board also believes that the levels of AB 411 or Basin Plans are the correct standards which should be applied for both receiving waters and storm drains. If the receiving water does not show any exceedances, and only the storm drain shows exceedances, the storm drain might still be the source of pollution for the receiving waters. The receiving water conditions might have changed temporally (e.g. currents, tides) so that the contamination does not show in the receiving waters for a period of time. However, in order to avoid unnecessary investigations, the Copermittees have the right to determine the extent of the investigation conducted. If the exceedance levels dramatically decrease in the storm drain, and if there are no exceedances found in the receiving water after re-sampling, less vigorous investigations might be appropriate.

Section: Monitoring II.A.6.b.(4) **Sub-section:** Monitoring

Commenter(s): San Diego Copermittees

Comment: Monitoring and Reporting Program Sections II.A.6.b.(3) and (4) prescribe conditions for conducting re-sampling and conducting source investigations in response to coastal storm drain monitoring results. Section II.A.6.b, establishes general conditions under which coastal storm drain discharge and coastal waters must be conducted.

As drafted Monitoring and Reporting Program Section II.A.6.b.(4) is overly complex and may lead to confusion during implementation. The Copermittees recommend that it be modified as follows:

"(4) If re-sampling exhibits continued exceedances, investigations of sources of bacterial contamination shall commence within one business day of receipt of analytical results."

This simplification of language would make it much easier to understand the Copermittees' obligations to conduct investigations. It should also be noted that removing the reference to Monitoring and Reporting Program Section II.A.6.b.(3) above would not change the requirements for re-sampling, or their relationship to

investigations. This would also be consistent with the requirements of the current Coastal Storm Drain Monitoring Program.

Response: The language of the Monitoring and Reporting Program Section II.A.6.b. (4) will not be changed and will say the following:

"If re-sampling is conducted under section (3) above exhibits continued exceedances of a AB 411 or Basin Plan standards in either the storm drain or the receiving water, investigations of sources of bacterial contamination shall commence within one business day of receipt of analytical results."

The intent of the language in the Monitoring and Reporting Program Section II.A.6.b. (4) is to avoid confusion about when to conduct investigations. First, it is necessary to have the phrase "conducted under section (3) above" in the Order so it is clear that Section II.A.6.b.(4) is related to both Sections II.A.6.b.(3)(a) and II.A.6.b.(3)(b). Second, it is important to have trigger levels in the Order that determine when an investigation has to be conducted. The Regional Board believes that the levels of AB 411 or Basin Plans are the correct standards which should be applied. Third, the Regional Board requires that an investigation be conducted when the re-sampling exhibits continued exceedances of a AB 411 or Basin Plan standards in either storm drain or receiving water.

In order to avoid unnecessary investigations, the Copermittees have the right to determine the extent of the investigation conducted. If the exceedance levels dramatically decrease in the storm drain, and if there are no exceedances found in the receiving water after re-sampling, less vigorous investigations might be appropriate.

Section: Monitoring **Sub-section:** Monitoring II.B.1

Commenter(s): City of San Diego

Comment: The requirement states that its intent is to characterize pollutant discharges from MS4 in each watershed and, although the language "outfalls to be monitored shall be representative of the outfalls in each water", was stricken, the City remains concerned that the number of outfalls that will need to be monitored exceeds the numbers of samples that can be logistically collected during the region's limited wet weather days (the City has approximately 6,000 storm drain outfalls). The City suggests that the Regional Board establish a cap on the number of storm drain outfalls to be monitored during wet weather based on the level of characterization desired.

Response: The Copermittees have to develop a monitoring program to characterize pollutant discharges from MS4 outfalls in each watershed during wet and dry weather. After submission to the Regional Board, the Regional Board

will accept the monitoring programs if the selection of outfalls to be monitored is reasonable. The Regional Board understands that only monitoring plans which are logistically feasible will be submitted.

Section: Monitoring **Sub-section:** Monitoring II.B.3

Commenter(s): San Diego Copermittees

Comment: Monitoring and Reporting Program Section II.B.3.a provides criteria by which Copermittees must select dry weather field screening and analytical monitoring stations. As drafted, it appears that these criteria are applicable in all instances. However, this is inconsistent with RWQCB staff's August 30, 2006 response to Copermittees comments (see p. 249), which indicated that "Under the Tentative Order Dry Weather Field Screening and Analytical Monitoring, the Copermittees have the discretion to locate sample stations using the methods of their choice. The Tentative Order provides each Copermittee with discretion to randomly select stations that are either major outfalls or other outfall points or to select stations non-randomly using a method of choice that meets, exceeds, or provides equivalent coverage to the requirements for station selection." This flexibility is initially provided in Monitoring and Reporting Program Section II.B.3.a, but the last sentence of that paragraph and the list that follows it create an inconsistency by establishing more restrictive guidelines and criteria to be followed in establishing stations. This text should either be removed or the last sentence of the paragraph amended as follows:

"The dry weather analytical and field screening monitoring stations may be established using the following guidelines and criteria."

Response: The language in the section II.B.3.a. in the Monitoring and Reporting Program Section has been changed to avoid confusion about the discretion to locate sample stations using the methods of choice (random and non-random selection). The new language clearly shows that one of two methods shall be selected for determination of the locations of the dry weather field screening and analytical monitoring stations. Different guidelines and criteria apply to the two different methods.

If the random method is chosen, the Tentative Order explains which guidelines need to be applied (1a-1c) . If the non-random approach will be selected, certain criteria and guidelines need to be followed for site selection (2a-2d).

Section: Monitoring **Sub-section:** Monitoring II.B.3

Commenter(s): San Diego Copermittees

Comment: Monitoring and Reporting Program Section II.B.3.c.(4) requires that field screening at dry weather monitoring stations include analysis for dissolved copper. This reflects a modification that was made in response to a recommendation in the Copermittees' Report of Waste Discharge that dissolved copper be analyzed using field test kits instead of analytical procedures. At the request of the City of San Diego, this recommendation has been re-evaluated by the Copermittees. Review of available test kits indicates that a visual test kit using the bathocuproine method could reach a method detection limit of 0.05 ppm. However, the reporting limit will be higher than the method detection limit and therefore, not appropriate to meet a dry weather action level ranging from 0.038 to 0.05 ppm, depending on the hardness of the water (300 ppm to 400 ppm and higher). Based on this re-assessment, the Copermittees request that dissolved copper be removed from the list of required field screening analytes and added back to those required for laboratory analysis (Monitoring and Reporting Program Section II.B.3.c.(3)).

Response: Based on the comment from the Copermittees, dissolved copper will be removed from the list of required field screening analytes and added back to those required for the laboratory analysis in the Monitoring and Reporting Program Section II.B.3.c.(3).

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Attachment A

Additional Responses to Legal Comments Received on the Initial Tentative Order No. R9-2006-0011 Dated March 10, 2006

Comment: Municipalities contend that local governments lack the authority to levy service charges, fees or assessments sufficient to pay for the mandated increased level of service.

Response: Municipalities have ample governmental authority to levy service charges, fees, or assessments to pay for storm water management programs that reduce pollutants to the maximum extent practicable (MEP); municipalities also have the authority to levy taxes to provide adequate funding for storm water management programs; lack of political determination to impose taxes or fees for storm water management does not constitute lack of authority. In addition, the level of service mandated by the proposed National Pollutant Discharge Elimination System (NPDES) requirements for municipal separate storm sewer systems (MS4s) in San Diego County does not constitute an "increased level of service." The proposed NPDES requirements mandate the same level of service as the existing NPDES requirements: reduction of pollutants in MS4 to the MEP.

Federal regulations that implement the storm water provisions of the Clean Water Act require municipalities to ensure appropriate funding for compliance with requirements for discharges of storm water in MS4s. Municipalities' applications for waste discharge requirements that implement the NPDES regulations for storm water must include assurances that the municipalities can provide adequate funding to reduce pollutants in MS4 in accordance with the MEP performance standard. [40 C.F.R. 122.26, implementing subdivision (p) of Clean Water Act Section 402; 33 U.S.C. 1342(p)].

The proposed MS4 requirements do not mandate that municipalities levy service charges, fees, or assessments to pay for their storm water management programs; however, the requirements do require municipalities to demonstrate their ability to implement effective programs that will achieve pollutant reduction to MEP by providing assurances of fiscal resources sufficient for that purpose.

The requirements in the current proposed renewal do not mandate an increased level of service. The performance standard applicable to MS4 has remained the same since subdivision (p), extending "point source" regulation to storm water discharges was added to Section 402 of the Clean Water Act in 1987. The San Diego Regional Water Quality Control Board (Regional Board) has issued two iterations of requirements implementing this performance standard, each with incrementally greater detail to provide municipalities with guidance regarding elements of municipal storm water management programs that are practicable, and therefore, appropriate components for compliance with the performance standard. However, despite the incrementally increasing levels of detail, the

fundamental requirement that municipalities reduce pollutants in MS4s to the MEP remains the cornerstone of the mandate imposed upon municipalities by the federal Clean Water Act and implementing NPDES regulations for storm water.

Comment: Municipalities contend that the proposed renewal of NPDES requirements for MS4s in San Diego will increase the level of service required of municipalities. Municipalities recognize that municipalities are required to bear the cost of whatever level of service will be necessary to comply with federal mandates. However, municipalities contend that any increase in the level of service required to satisfy requirements that are based exclusively on state law, above and beyond federal mandates, are subject to reimbursement by the State of California. By implication, the municipal dischargers contend that some provisions of the proposed NPDES requirements for MS4s in San Diego exceed the mandate of the Clean Water Act that discharges of pollutants to MS4s be reduced to the MEP.

Response: No portion of the proposed MS4 requirements exceed the level of "governmental service" (*i.e.*, performance) necessary to reduce pollutants to the MEP as mandated by Section 402(p)(3)(B)(iii) of the Clean Water Act [33 U.S.C. 1342(p)(3)(B)(iii)]. While, technically, all NPDES requirements issued by the regional water boards "fall under the legal authority of the state" because they are promulgated in waste discharge requirements issued pursuant to Sections 13260 and 13263 of the Water Code, requirements issued for discharges of pollutants from point sources to navigable waters of the United States, including requirements for discharges of storm water in MS4s, implement the provisions of the federal Clean Water Act and the federal NPDES regulations, as contemplated by Chapter 5.5 of the Porter-Cologne Water Quality Control Act (Section 13370, *et seq.*). Therefore, nothing in the proposed order renewing NPDES requirements for discharges in San Diego County MS4 exceeds the scope of regulation necessary to implement NPDES regulations for MS4.

Comment: Environmental interest groups contend that all Runoff Management Programs should be incorporated into the NPDES requirements for MS4s in San Diego County as effluent limitations and must be subject to public review and comment.

Response: Such incorporation is not necessary for the San Diego MS4 NPDES requirements. Urban Runoff Management Plans are not "effluent limitations" established by the state; they are strategic compliance plans prepared and implemented by municipal dischargers responsible for MS4s to comply with NPDES requirements to develop and implement BMPs to reduce pollutants to the MEP. The applicable "effluent limitation" is the requirement that municipalities reduce pollutants in their MS4s to the MEP. The proposed requirements include clearly articulated and explicit performance criteria for municipal dischargers and detailed descriptions of the elements that must be

included in the various plans that municipal dischargers must develop under the MS4 requirements, but this does not make the plans "effluent limitations."

The environmental interest groups' rationale for demanding that the Regional Board incorporate dischargers' management plans into NPDES requirements reflects circumstances unique to the manner in which "small MS4s" and some categories of industrial storm water dischargers are regulated, which have provided the context in which courts have called for plans to be incorporated explicitly into NPDES permits. In these cases, dischargers are covered by broadly generic "general" requirements for the preparation and implementation of management plans of various sorts; however, specific detailed provisions for the plans are not included in the "general" requirements. Accordingly, in a case involving general NPDES permits for small MS4s, the Court held that, since most of the substantive conditions governing the dischargers' compliance with the NPDES permit were articulated only in the storm water management plans, the plans were, in effect, the permit conditions and would have to be subjected to the same public participation as other NPDES permit conditions.

This rationale is not applicable to the proposed renewal of NPDES requirements for MS4s in San Diego County because the requirements contain detailed provisions prescribing the scope and content of the municipal dischargers' various storm water management plans. The proposed NPDES requirements provide ample detail regarding the municipal dischargers' obligations to reduce pollutants to the MEP and the elements that the municipal dischargers must include in any Runoff Management Plan for their MS4.

Comment: Environmental Interest Groups contend that Runoff Management Programs are enforceable by citizens.

Response: This assertion, which is not a comment regarding, or a request for modification of, the Tentative NPDES requirements for MS4s in San Diego County, reflects the desire of environmental interest groups to have within the NPDES requirements for MS4s explicit provisions for specific compliance by municipal dischargers that will lend themselves to enforcement by individual citizens in the absence of governmental action in the event of violations. It will prove to be true or false when tested by a citizens' suit seeking to enforce the provisions of a runoff management program against a municipality subject to the NPDES requirements for MS4, in San Diego County or elsewhere. See responses to prior comments regarding the need for incorporation of runoff management programs into NPDES requirements for MS4.

Waste discharge requirements for discharges subject to the Clean Water Act and NPDES are enforceable by individuals under the citizen suit provisions in section 505 of the Clean Water Act [33 US.C. 1365]. The Tentative NPDES requirements for MS4 in San Diego County include requirements for the development and implementation of various runoff management programs (e.g.,

Jurisdictional Urban Runoff Management Programs, etc.), including requirements that the programs include certain elements and components; failure of a municipality subject to the requirements to develop and implement required programs with the requisite components to reduce discharges of pollutants to MS4s would be a violation of the Tentative NPDES requirements and would subject the deficient municipality to enforcement by the Regional Board or, in the absence of "diligent prosecution" of "a civil or criminal action in a court of the United States, or a State to require compliance with the [NPDES requirements]," by individual citizens. [33 U.S.C. 1365, see subdivisions (a) and (b)(1)(B).]

Unless the Regional Board incorporates runoff management plans into the NPDES requirements for MS4, as demanded by environmental interest groups, it is not clear that the provisions of a runoff management plan would be specifically enforceable by citizens. However, failure of a municipal discharger to develop and implement appropriate and effective runoff management programs that comply with the NPDES requirements for MS4s would subject the municipal discharger to enforcement by the Regional Board, and potentially by citizens. The burden of proving the deficiency of the runoff management programs would be defined by the provisions describing the necessary elements of the program, and by the extent to which the program reduces pollutants in the MS4.

Comment: Environmental interest groups contend that the Tentative NPDES requirements for MS4s in San Diego fail to prohibit new discharges of pollutants into waterways that are not in compliance with applicable water quality standards and that the final order must ensure compliance with all applicable water quality standards.

Response: On the contrary, the tentative NPDES requirements for MS4s in San Diego do prohibit all discharges of pollutants into waterways that are not in compliance with applicable water quality standards, as will any final NPDES requirements for MS4s in San Diego. Receiving water limitations in section A.3 require compliance with all applicable water quality standards, whether numeric or narrative, despite the fact that, in contrast to the assertion of these environmental interest groups, Section 402(p) of the Clean Water Act does not compel such compliance. [*Defenders of Wildlife v. Browner;* U.S.C.A., 9th cir., 1999; 191 F.3d 1159, 1999 Daily Journal D.A.R. 9661, 99 Cal. Daily Op. Serv. 7618, 1999 Daily Journal D.A.R. 12,369, 30 Envtl. L. Rep. 20,116.]

The tentative NPDES requirements in fact do prohibit discharges of pollutants that would cause or contribute to violation of water quality standards. The tentative NPDES requirements impose on the municipalities responsible for MS4 the obligation of ensuring, through the development and implementation of appropriate BMPs, that discharges of storm water runoff from MS4s to waters whose ambient water quality has been identified as impaired pursuant to Section 303(d) of the Clean Water Act [33 U.S.C. 1313(d)] will not cause or contribute to existing conditions of pollution by reducing discharges of pollutants from the MS4

to the MEP. The tentative NPDES requirements include a "compliance restoration module," sometimes referred to as the "iterative process," that requires constant, iterative, adjustment of BMPs implemented by municipalities to reduce pollutants to the MEP in order to identify and correct ineffective BMPs and eliminate discharges that cause or contribute to violation of applicable water quality standards. Failure to reduce discharges of pollutants to the MEP, or municipalities' failure to reduce pollutants enough to avoid contributing to water quality impairment will, eventually, lead to the imposition of load reductions where Total Maximum Daily Loads and load allocations are calculated for waters with impaired water quality. Meanwhile, municipalities that fail to reduce discharges of pollutants from their MS4 to the MEP, or that routinely cause or contribute to violation of receiving water standards are subject to discretionary enforcement action by the Regional Board under the authority of the Porter-Cologne Water Quality Control Act, (including administrative orders requiring compliance with NPDES requirements or abatement of existing or threatened conditions of pollution or nuisance, administrative assessment of civil liability for violations, or referral to the Attorney General for judicial enforcement, or referral to the District Attorney for criminal enforcement [*e.g.*, Chapter 5, commencing with 13300, of Division 7 of the Water Code; Sections 13385 and 13386 of Chapter 5.5) or by citizens under the citizens' suit provisions of Section 505 of the Clean Water Act [33 U.S.C. 1365].

Comment: Environmental interest groups contend that the tentative NPDES requirements for MS4s in San Diego County fail to adhere to either federal or state anti-degradation provisions.

Response: The tentative NPDES requirements for MS4s in San Diego County implement both federal and state anti-degradation policies. Federal NPDES regulations establish anti-degradation requirements for discharges subject to regulation under the Clean Water Act (40 C.F.R. 131.12); the state's Statement of Policy with Respect to Maintaining High Quality Waters in California (State Water Board Resolution No. 68-16). Both restrict regulatory actions that would allow degradation of water quality that is higher than the minimum necessary to support the designated beneficial uses of waters and preclude degradation that would unreasonably impair the water quality needed to support beneficial uses. The Regional Board has the burden of establishing both the necessity for and the adequacy of NPDES requirements for MS4, as pointed out by the citation to *Oklahoma v. EPA* (908 F.2d at 629; 10th Cir., 1990). However, this burden does not preclude the Regional Board from relying on the expectation that municipalities subject to the NPDES requirements for MS4s will develop and implement storm water management plans that will reduce pollutants to the MEP and are protective of water quality. This is consistent with expectations of the United States Environmental Protection Agency (USEPA), which states in the Preamble to the Phase II NPDES storm water regulations that it "anticipates that a permit for a regulated small MS4 operator implementing BMPs that satisfy the six minimum control measures will be sufficiently stringent to protect water

quality, including water quality standards. While the Regional Board does not anticipate that the tentative NPDES requirements for MS4s in San Diego will eliminate all degradation of water quality as a result of urban storm water runoff immediately, the Regional Board's conclusion that the proposed NPDES requirements will, ultimately, promote such an outcome is not unreasonable, given USEPA's findings and the successes achieved within the San Diego region and elsewhere by communities that have embraced the need to take aggressive steps to use their full panoply of police power and land use planning authorities to reduce pollutants to the MEP.

Comment: Environmental interest groups assert that the Clean Water Act prohibits discharges of pollutants into waterways that do not meet applicable water quality standards.

Response: This comment, if interpreted as an objection to the tentative NPDES requirements for MS4 in San Diego County, reiterates the erroneous assertion that the tentative NPDES requirements are deficient because they do not prohibit such discharges. As stated in response to the prior comment, the tentative NPDES requirements for MS4s in San Diego do prohibit all discharges of pollutants into waterways that are not in compliance with applicable water quality standards. Receiving water limitations in section A.3 require compliance with all applicable water quality standards, whether numeric or narrative, despite the fact that, in contrast to the assertion of these environmental interest groups, Section 402(p) of the Clean Water Act does not compel such compliance. [*Defenders of Wildlife v. Browner;* U.S.C.A., 9th cir., 1999; 191 F.3d 1159, 1999 Daily Journal D.A.R. 9661, 99 Cal. Daily Op. Serv. 7618, 1999 Daily Journal D.A.R. 12,369, 30 Envtl. L. Rep. 20,116.]

Comment: Municipalities contend that, Section C.2 of the Tentative NPDES requirements for MS4 in San Diego County infringes upon the attorney-client relationship between municipalities and their counsel by requiring each jurisdiction's chief legal counsel to certify that each jurisdiction has taken the "necessary steps to obtain and maintain full legal authority to implement and enforce each of the requirements contained in 40 C.F.R. 122.26(d)(2)(i)(A-F) and the Order."

California Rules of Professional Conduct, Rule 3-100(A), provides that "[a] member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client, or as provided in paragraph (B) of this rule." It is also the duty of an attorney to counsel or maintain only those actions or proceedings as appear to him or her legal or just. Bus. & Prof. Code § 6068(c). An attorney must employ, for the purpose of maintaining the causes confided to him or her, only those means as are consistent with truth, and never seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law. Bus. & Prof. Code.

Response: Nothing in Section C.2. of the Tentative NPDES requirements for MS4s in San Diego County requires Copermittee counsel to reveal information protected from disclosure under the attorney-client privilege, or any other privilege [California Rules of Professional Conduct, Rule 3-100(A)], or to maintain any action or proceeding that are not legal or just. Consistent with the obligation of every attorney to employ only those means as are consistent with truth, and never to seek to mislead any judicial officer by an artifice or false statement of fact or law [Bus. & Prof. Code § 6068(c) and (d)], Section C.2. simply requires each jurisdiction to have its legal authority to implement an appropriate and effective storm water management program under the Clean Water Act reviewed and confirmed by the opinion of its chief legal counsel, just as the state of California must provide USEPA with analogous certification that it has adequate legal authority under state statutes and administrative rules to implement and enforce the federal Clean Water Act and NPDES regulations.

Section C.2. does not require a jurisdiction's chief legal counsel to report any deficiencies in the local jurisdiction's legal authority to the Regional Board; nor does it require, or permit, legal counsel for a regulated entity to misrepresent the extent of legal authority available to the regulated entity.

If the chief legal counsel for a regulated entity cannot certify the adequacy of the legal authority available to the jurisdiction, the obligation to correct that deficiency rests within the discretion of the regulated entity.