CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, SAN DIEGO REGION

Response to Comments IV

Section X.4 of the Fact Sheet / Technical Report for

Tentative Order No. R9-2009-0002

July 01, 2009

A. Background

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

The revised Tentative Order was distributed on March 13, 2009. This is the fourth version of the Tentative Order. The original Tentative Order was distributed on February 9, 2007. Three previous responses to comments documents (RTC I, II and III) have addressed comments from the prior comment periods.

This document summarizes and responds to written comments received between March 13, 2009 and May 15, 2009 on the fourth revised Tentative Order. A public workshop was held on April 3, 2009 at the City of Mission Viejo. At the request of the Copermittees, Regional Board staff met separately with them on April 16, 2009, April 20, 2009, and May 12, 2009. Further public meetings were held on May 6, 2009 and May 26, 2009.

B. Contents of This Document

A total of 18 commenters submitted over 300 comments. Commenters included members of the public, representatives of the MS4 Copermittees, governmental and non-governmental organizations, and businesses. Every written comment received has been reviewed and considered. Responses to specific comments are provided within this document for comments received. Each specific comment has been assigned a comment number, and comments are generally ordered according to commenter. A legend for commenters can be found on the

coversheet and in Table 1(below).

Comments received were concerned with a variety of topics in the Tentative Order. Some comments reiterated concerns that were previously addressed in RTC I, II and III. Some comments requested changes that had already been made in RTC I, II and III. New responses have not been drafted for repeat comments that lacked sufficient new information. Many comments have already been addressed by Regional Board staff in response to comments from the public and Copermittees during the meetings following the distribution of the Tentative Order on March 13, 2009. Consideration of written and oral comments has resulted in proposed revisions to the requirements in the Tentative Order and can be found in the Tentative Errata Sheet and updated Tentative Supplemental Fact sheet.

In this document, the comments have not been summarized or paraphrased. When comments received from one commenter were similar to other comments received, the Regional Board response usually references back to a previous comment number in order to minimize redundancy.

C. Order Adoption

The California Regional Water Quality Control Board, San Diego Region (Regional Board) is tentatively scheduled to consider adoption of the Tentative Order on October 14, 2009.

Table 1. Commenter Legend.

Commenter	Commenter Number
Michael Beanan	1
South Laguna Civic Association	2
Charlotte Masarik	3
County of Orange	4
City of Dana Point	5
National Resources Defense Council	6
City of Lake Forest	7
City of Laguna Beach	8
Fire Protection Services	9
Rancho Mission Viejo	10
Riverside County Flood Control District	11
City of San Diego	12
City of Laguna Niguel	13
Jim Fitzpatrick Pronto Car Wash	14
City of Laguna Hills	15
United States Environmental Protection Agency	16
Armando Baez	17
City of Mission Viejo	18

Draft Response to Comments R9-2009-0002

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
1	1	Hydromod	F.1	The MS4 System of the Aliso Watershed represents a failed engineering design. Too much water from storm events and dry weather nuisance flows are systematically directed to Aliso Creek and coastal receiving waters under the regulatory responsibility of the SDRWQCB. Remediation must first re-engineer anthropogenic induced flows to remain within the residential development boundaries utilizing a variety of Low Impact Development practices. Peak storm flows can be re-conceptualized as a critical resource in a drought stricken, semi-arid ecology and source of revenues from local rainwater capture techniques. Each gallon of rainwater captured for beneficial reuse saves on costly repairs to Aliso Creek and surrounding infrastructure. Rainwater polished for local reuse will also generate funding for operations and maintenance of filtration equipment.	The draft Tentative Order Errata sheet includes changes to the permit language that require low impact development practices to retain onsite and/or biofilter the volume of runoff produced from a 24-hour 85th percentile storm event. Onsite retention may be accomplished through BMPs that infiltrate, evapotranspirate or as the commenter suggests harvest the rainwater for reuse. Due to the current drought conditions and the natural semi arid environment in Southern California, development and redevelopment proponents should consider rainwater harvest and reuse projects. In addition, the draft Tentative Order requires the Copermittees to examine opportunities for retrofitting existing development projects. Rainwater harvesting for reuse can be as simple as installing a rainbarrel on existing rain gutters. The Copermittees also may require new development and redevelopment projects that are unable to implement the required LID BMPs to contribute to a mitigation fund that may be used as incentives for retrofitting existing development. Nothing in the permit expressly prohibits an agency or community from implementing a larger watershed based water harvesting project provided all necessary permits are obtained.
2	2	LID	F.1	While immediate interventions with a sense of the imperative are urgently in need of support from the SDRWQCB and other regulatory agencies, new developments and redevelopments including residential remodels can benefit from incorporation of Low Impact Development (LID) Standards and Strategies. Immediate, short term interventions coupled with LID Standards can restore the natural semi-arid ecology of the Aliso Watershed.	The draft Tentative Order and Errata has updated Low Impact Development requirements for new development and redevelopments. Low Impact Development practices can prevent pollutant discharges and minimize hydromodification impacts. Where a watershed is experiencing impacts from hydromodification, Low Impact Development practices should be considered to alleviate those impacts prior to in stream measures that further degrade beneficial uses.
3	2	LID	F.1	SDRWQCB interventions can include: Strategic capture of MS4 discharges for filtration and local beneficial reuse until Copermitees demonstrate measurable results over the next 3 to 10 years capable of removing dry weather urban runoff for beneficial reuse and water/energy conservation mandates.	While strategic capture of MS4 discharges for filtration and local beneficial reuse may be protective of water quality, the Copermittees are required to prohibit non-storm water illicit discharges into, through and thus from the MS4 (40 CFR 122.26(d)(iv)(B) and 55 Fed Reg 47995). Furthermore, the Regional Board cannot dictate the manner that Copermittees capture and/or reuse non-storm water discharges that are exempted (and not a source of pollution) or that are covered under a separate NPDES permit.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
4	2	LID	F.1	Relative to Low Impact Development (LID): A. Expand the definition of "Priority Development Project" to include all new development and redevelopment projects. B. Adopt a standard of 3% maximum allowable Effective Impervious Area (EIA) in all Priority Development Projects and Redevelopment Projects C. Identify all LID BMPs as the principle storm drain management strategy for development and redevelopment projects D. Require a three month timeline for Copermitees to develop guidelines for LID strategies	The definition of Priority Development Project has been expanded to be consistent with other Southern California MS4 permits. The modified definition of Priority Development Project includes any development greater than 10,000 square feet. Through discussions with the Copermittees and the interested parties, a metric using Effective Impervious Area (EIA) was not included in the Tentative Order's requirements. In lieu of the EIA metric, the draft Tentative Order requires Low Impact Development BMPs to retain and/or biofilter the volume of runoff produced from the 24 hour 85th percentile storm. A three month timeline for Copermittees to develop guidelines for LID strategies is unreasonable. The Copermittees will need longer than three months to adequately develop the LID guidelines. The draft Tentative Order allows the Copermittees up to 2 years to develop the LID guidelines. This timeframe coincides with the hydromodification management plan due date in order to expedite public review and staff resources.
5	2	LID	F.1.	Treatment BMP Review: The Copermittees must review and update the BMPs that are listed in their local SUSMPs as options for treatment control during the first year of implementation of this Order. At a minimum, the update must include removal of obsolete or ineffective BMPs and replacement with LID BMPs that can be used for treatment, such as bioretention cells, bioretention swales, cisterns, etc. Promote cisterns networks in hydrologic sub units scaled to receive all dry weather flows, first flush events and peak flows to measurably reduce creek erosion and to create a local water supply for beneficial reuse and mandated water conservation purposes.	We agree with the commenter that Copermittees must review and update the BMPs that are listed in their local SUSMPs as options for treatment control. The draft Tentative Order allows the Copermittees two years to accomplish this review along with inclusion of LID BMPs, substitution programs and the hydromodification management plan. The modified Low Impact Development language requires onsite retention and/or LID Biofiltration of the volume of runoff produced from a 24-hour 85th percentile storm event. Onsite retention may be accomplished by the Copermittees through a network of cisterns in hydrologic sub units.
6	1	General	General	Built settings must be rebuilt to correct past deficiencies. An improperly wired house will not be permitted for occupancy by any city until remediation of deficiencies is implemented. Likewise, when cities accept significant increases in the property tax base from large-scale residential developments they are obliged to insure these revenue sources are properly built to eliminate negative environmental impacts to downstream habitats, communities and recreational users. Environmental justice requires the SDRWQCB to enforce measures capable of immediate clean-up and abatement of nonpermitted flows. The absences of full enforcement throughout the present permit cycle by the SDRWQCB to demand cessation of dry weather nuisance flows with known pollutants is among the primary causes for the past seven years of habitat degradation and ocean pollution. Over 1.5 billion gallons each year of dry weather flows are illegally discharged at the mouth of Aliso Creek allowing Co-permitees to economically benefit from pollution by avoiding basic expenditures for point source controls.	The San Diego Regional Board has a long history of progressive enforcement throughout the region. For example in the past year, the Regional Board has assessed civil liabilities greater than $200,000 for violations of non-stormwater discharge permits. The Regional Board has a progressive enforcement policy with multiple levels to ensure fair, firm and consistent enforcement. The possible enforcement actions at the Regional Board's discretion range from a verbal warning, staff enforcement letter, notice of violation, cleanup and abatement order, cease and desist order, time schedule order, referral to the State of California's attorney general's office, and assessment of civil liability up to $10,000 per day per violation. When considering what enforcement action to take, the Regional Board examines the nature, extent and gravity of the violation, the magnitude of the violation, the water quality impacts resulting from the violation, and the compliance history of the violator.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
7	1	General	F.1	The costs associated with educating and savings in water conservation offsets enforcing wise water management. Moreover, the expensive restoration of damaged ecosystems, loss of safe and healthy recreation opportunities and, eventually, diminished property values from polluted water tax strained public revenue sources. The right to live in South Orange County carries the responsibility to respect the rights of others, including natural wildlife and sealift communities, to live in a non-polluted, healthy environment. The SDRWQCB cannot allow use of wildlife mitigation parks and natural creeks as flood control channels for the residential development industry's liquid waste.	The Regional Board agrees that the use of mitigation areas to compensate for impacted creeks should be minimized and that natural creeks should not be used strictly as flood control channels for runoff. The Tentative Order contains several provision to reduce or eliminate "liquid waste," or excess runoff. Please see the response to Comment No. 21.
8	1	Hydromod	F.1	The MS4 System of the Aliso Watershed represents a failed engineering design. Too much water from storm events and dry weather nuisance flows are systematically directed to Aliso Creek and coastal receiving waters under the regulatory responsibility of the SDRWQCB. Remediation must first re-engineer anthropogenic induced flows to remain within the residential development boundaries utilizing a variety of Low Impact Development practices. Peak storm flows can be re-conceptualized as a critical resource in a drought stricken, semi-arid ecology and source of revenues from local rainwater capture techniques. Each gallon of rainwater captured for beneficial reuse saves on costly repairs to Aliso Creek and surrounding infrastructure. Rainwater polished for local reuse will also generate funding for operations and maintenance of filtration equipment.	Please see response to comment #1.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
9	1	Monitoring	Attachment E	Extensive monitoring activities waste precious limited local revenues needed for infrastructure repairs. Rather than monitoring an obviously distressed and dying watershed, funds should be reallocated to support clean up and abatement initiatives. A "Zero tolerance" dry weather discharge policy with dramatic, punitive penalties and fines can reduce reporting requirements to a minimum while advancing immediate solutions to water pollution. With over 20 years of monitoring data, the SDRWQCB can identify subwatershed residential developments with special needs in relation to waste water. "Special need" communities must be required to intercept, treat and promote beneficial reuse of low flows at individual residential, neighborhood and development levels of analysis. Copermitees must upgrade and commit funds for installation; operations and maintenance over the prescribed five year permit timeframe. Funding can be derived from fines, subwatershed "Urban Runoff Special Districts for Gross Dischargers" within specific residential development boundaries, runoff/capture/reuse revenues and bond funding among rainwater utility districts are among potential capital resources. Simple low flow diversion inserts consisting of stormdrain T-fittings and shallow dry wells can transport non-permitted flows to centralized package treatment plants or POTW facilities.	Comment noted. Storm water monitoring is required in order to assess watershed pollutant loading, measure effectiveness of Best Management Practice (BMP) selection and implementation, and identify areas which require additional and/or better tailored BMPs to reduce storm water pollutants to the maximum extent practicable as part of the iterative process. The goal of the iterative process is to reduce storm water pollutants discharged from the MS4 to meet applicable water quality standards. Thus, the Regional Board feels that storm water monitoring should not be eliminated. Current regulations (see Code of Federal Regulation 40 CFR 122.26(d)(2)(I) and (iv) require that non-storm water discharges into the MS4 system be prohibited unless specifically exempted. Exempted discharges are allowable unless identified as a source of pollutants to the United States. Dry weather monitoring is conducted by the Copermittees to identify illicit discharges, illegal connections and exempted categories of pollutants that are a source of pollution. Thus, the Regional Board feels elimination of dry weather monitoring is not warranted. The federal Clean Water Act (CWA) requires States to identify and make a list of polluted surface water bodies. These water bodies, referred to in law as "water quality limited segments," do not meet water quality standards even after discharges of wastes from point sources have been treated by the minimum required levels of pollution control technology. Wastewater treatment plants, a city's storm drain system, or a boat yard, are a few examples of point sources that discharge wastes to surface waters. States are required to compile these water bodies into a list, referred to as the "Clean Water Act Section 303(d) List of Water Quality Limited Segments" (List). States must also prioritize the water bodies on the List and develop Total Maximum Daily Loads (TMDLs) to improve the water quality. Monitoring conducted has contributed to identifying "water quality limited segments" and Copermittees are required to use monitoring information to identify areas in the watershed that are "special need" and implement BMPs to the MEP for storm water flows. It is expected that Low Impact Development (LID) requirements for new and existing development will intercept, treat and promote beneficial reuse of storm flows. The Regional Board is not involved with funding determinations of the Copermittees.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
10	1	Economic	General	The SDRWQCB has access to funding mechanisms to promote wise water management. Co-permitees should be provided with incentives and prompt, efficient technical assistance to acquire state and federal funding in remediating impacts caused by failed engineering projects and infrastructure within the watershed.	The Regional Board manages grant projects that receive funding through public proposition bonds. The Copermittees are encouraged to apply for grants when available. The Copermittees have received grant funding for projects in the past. For example, the Municipal Water District of Orange County received a grant to retrofit up to 12 urban subwatersheds with smart landscape irrigation controllers, irrigation distribution improvements and/or landscape modifications to reduce nuisance runoff and reduce bacteria/nutrient pollutant loads discharged to receiving waters. Other projects funded through grants in Southern Orange County include, the South Orange County IRWM plan, Munger Storm Drain Filtration basin in Aliso Creek, Bell, Dove, and Tick Creek Water Reclamation and Habitat Restoration projects, Upper Sulphur Creek Restoration, Wetland Capture & Treatment Network, and Heisler Park ASBS Protection and Preservation Project. The Regional Board will continue to support worthy Copermittee projects in the grant competition process.
11	2	NEL	B	The SLCA joins other environmental organizations and responsible citizen groups demanding immediate cessation of illegal MS4 Discharges to creek and coastal receiving waters and adoption of Low Impact Development (LID) Standards for all new development and redevelopment projects along with other Recommended Actions as previously submitted.	The Code of Federal Regulations (40 CFR 122.26(d)(iv)) requires Copermittees to prohibit through ordinance, order or similar means, illicit (illegal) discharges and connections to the MS4 system. It is expected that non-storm water dry weather numeric effluent limitations will evaluate whether discharges from the MS4 into creek and coastal receiving waters are causing or contributing to a condition of pollution. This would indicate an illicit discharge of waste is occurring into the MS4 system, a currently exempted non-storm water discharge needs to be removed from the exempted list and prohibited, and/or an existing discharge is exceedeing its NPDES permit (other than the MS4 Permit) limitations for its discharge into the MS4.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
12	2	Legal	Legal	The proposed Draft MS4 Permit is inappropriate and improper in that it violates laws and regulations pertaining to enforcement of Cleanup and Abatement Orders (California Water Code Section 13304); the SWRCB Water Quality Enforcement Policy (February 19, 2002; pages 3,4,11,26, 39,42); the Porter-Cologne Clean Water Act; and is a discriminatory violation of the State of California definition governing Environmental Justice (Government Code Section 65040.12 and Public Resources Code Section 72000).	Although the California Water Code authorizes the Regional Board to issue Cleanup and Abatement Orders, the enforcement action is taken at the discretion of the Regional Board. As the Enforcement Policy states, "Every violation deserves an appropriate enforcement response. However, because resources are limited, the RWQCBs must continuously balance the need to complete non-enforcement program tasks with the need to address violations. Within available resources for enforcement, the RWQCBs must then balance the importance or impact of each potential enforcement action with the cost of that action. Informal enforcement actions are usually very cost effective and are therefore the most frequently used enforcement response. Most formal enforcement actions are relatively costly and must therefore be targeted to the RWQCB's highest priority violations." We fail to understand how the Regional Board can be in violation of the water code by not conducting a discretionary enforcement action. The accusation that the proposed draft MS4 permit is a discriminatory violation of the Environmental Justice code is vague. It clearly is not the intent of the Regional Board to violate the Environmental Justice code. Without more specific information detailing this accusation, the Regional Board cannot address this comment. All references to the use of Cleanup and Abatement Orders to implement TMDLs have been deleted from the Tentative Order.
13	2	General	General	The pattern of negligence and waste characterizing systematic failed measures by Copermitees demands intervention by the SDRWCB to institute Cleanup and Abatement measures aimed at numerical reductions of contaminated flow rates in a prompt, specific timetable at known inland MS4 facility "point sources".	The Regional Board has the discretion to issue Cleanup and Abatement Orders after considering all aspects of the violation. The Regional Board has yet to issue a cleanup and abatement order for the alleged violations. Nevertheless, the draft Tentative Order does include dry weather non-stormwater numeric effluent limits.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
14	2	General	General	To encourage compliance with basic water quality protection measures, mandatory citations must be issued against Copermitees for creating and perpetuating an attractive public nuisance by knowingly allowing inland dry weather MS4 discharges to accumulate and pollute a coastal estuarine wetland, Aliso Beach and the South Laguna Beach State Marine Park.	Comment Noted. The inclusion of non-storm water dry weather numeric effluent limits will require all non-storm water discharges from the MS4 to meet effluent limits that are based upon applicable water quality criteria (Basin Plan Objective, California Toxic Rule, etc.). Thus, any non-storm water discharge from the MS4 that is in compliance with effluent limitations will not be causing a condition of pollution in the downstream receiving waters. Copermittees are currently required to prohibit all non-storm water discharges (see response to Comment No. 77), and must have a program in place to educate the public regarding such illicit discharges. The Copermittees must also conduct active investigative monitoring, maintain a public reporting hotline and inspect for illicit non-storm water discharges. Furthermore, the identification and subsequent removal of landscape and lawn irrigation water as a source and conveyance of pollutants by the Copermittees will require Copermittees to prohibit said irrigation water entering their MS4 system.
15	2	General	General	SDRWQCB interventions can include: Diversions to inland SOCWA facilities for treatment and reuse as reclaimed water. The City of Laguna Beach received SDRWQCB Approvals for 13 dry weather/first flush diversions to the Coastal Treatment Plant for beneficial reuse as reclaimed water. The Aliso Watershed, as the largest watershed in the City, has yet to receive approvals for any diversions. The inconsistent application of regulatory actions raises issues of fairness and legal propriety. The Aliso Watershed must target proximate historic natural flow regimes to achieve any reasonable restoration of the habitat: creeks, canyons, coast and ocean.	The Regional Board to date has yet to receive an application for a waste discharge requirement, NPDES permit, or CWA section 401 certification regarding a diversion for reuse in the Aliso watershed. Therefore, the Regional Board cannot take an action without an application. It should be noted that diversion from the MS4 to the sanitary sewer for treatment is allowable from a Regional Board perspective, provided the effluent from the sewage treatment facility can meet its NPDES requirements. Any diversion of in-stream flows for reuse is subject to review and approval by the State Board Division of Water Rights and is not addressed under a NPDES MS4 permit. A CWA Section 401 Water Quality Certification will be required if a federal permit (e.g. 404 or Section 10) is needed. The City of Laguna Beach's dry weather diversions from the MS4 did receive funding from proposition 84 - Areas of Special Biological Significance grant program. The commenter is encouraged to apply for funding from future grant programs.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
16	2	General	General	SDRWQCB interventions can include: Immediate fines levied against offending subwatersheds, cities, homeowner associations, golf courses and others with elevated dry season discharge rates detected during monitoring activities at known point sources. Fines levied against offending inland water districts for failing to control urban runoff (i.e." imported water byproduct") through monitoring, punitive pricing structure and more aggressive recycled water programs.	Except for mandatory minimum penalties, the assessment of civil liability is at the discretion of the Regional Board. The Regional Board has a progressive enforcement policy with multiple levels to ensure fair, firm and consistent enforcement. The possible enforcement actions at the Regional Board's discretion range from a verbal warning, staff enforcement letter, notice of violation, cleanup and abatement order, cease and desist order, time schedule order, referral to the State of California's attorney general's office, and assessment of civil liability up to $10,000 per day per violation. When considering what enforcement action to take, the Regional Board examines the nature, extent and gravity of the violation, the magnitude of the violation, the water quality impacts resulting from the violation, and the compliance history of the violator. Assessment of civil liability is a possible enforcement action at the Regional Board's disposal. Since, the MS4 permit only directly regulates the Copermittees, any enforcement action due to violations of the MS4 permit would be issued to the offending Copermittee. Although homeowner associations, private golf courses, and water districts may be indirectly regulated through the MS4 permit, enforcement of the MS4 permit would not be directly on those entities. The Copermittee is expected to conduct any necessary enforcement using their jurisdiction.
17	2	Legal	Legal	During the current permit period, Copermitees have failed to achieve measurable reductions in MS4 discharges. SDRWQCB must exercise authority and assume control over the present, clearly defective watershed management programs. Private subcontractor services can be retained with stipulations for numerical reductions of flows and constituents within time certain performance parameters. Funds for such services can be recovered by reallocating funds presently wasted by failed Copermitee watershed management practices.	The California Water Code does not provide the Regional Board the powers to assume control over defective watershed management programs, nor can it require that the discharges hire private subcontractors to implement the MS4 permit. The water code does provide the Regional Board with a suite of enforcment actions to induce compliance with permits.
18	2	General	General	As mitigation for a pattern of failed watershed management programs that flood creek and coastal waters, Copermitees should be directed to restore the Aliso Coastal Estuary Wetlands to 1970 water levels for the reintroduction of the federally listed tidewater goby (designated "Potential Reintroduction Site" – US Fish and Wildlife Service, South Coast Recovery Unit: Sub-Unit SC 1 (Eastern Half), 2005).	The Regional Board is aware of the status of and the possibility of re-introduction of the tidewater goby. While the Tentative Order regulates discharges from the MS4, the comment is unclear as to what "water levels" are/were. The Tentative Order does not require mitigation for failed Best Management Practices, but does require additional and better tailored BMPs be implemented to treat storm water pollutants to the MEP. It is expected that municipal action levels and non-storm water numeric effluent limits will attain water quality that will fully support re-introduction of the tidewater goby. The Basin Plan for the San Diego Region currently does not have water quality objectives or criteria for maintaining or reducing "water levels" if "water levels" are referring to the amount of flow within receiving waters.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
19	2	Monitoring	Attachment E	In support of recommended action C.2., revise timeframes to require each Copermittee, beginning no later than the First not 3rd year following adoption of this Order, shall begin the non-storm water dry weather numeric effluent monitoring as described in Attachment E of the Order.	Comment noted. The Regional Board has made a concerted effort to maintain consistency between the Copermittees existing non-storm water IC/ID monitoring program and that required under the Tentative Order to determine compliance with numeric limits. It is expected, however, that some changes will be required, and the Regional Board recognizes that time may be needed to implement such changes. This does not, however, exempt Copermittees from prohibiting non-storm water discharges into the MS4, conducting IC/ID investigations, nor identifying any additional exempted discharges that are a source of pollution.
20	2	Legal	E.	Relative to item E.1. f., Utilize aggressive enforcement mechanisms to require compliance with Copermittee storm water ordinances, permits, contracts, or orders; To save municipal funds for staff enforcement, provide rewards and bountys to citizen monitors for information leading to identification of prohibited runoff discharges to MS4 infrastructure.	The Regional Board has a progressive enforcement policy with multiple levels to ensure fair, firm and consistent enforcement. The possible enforcement actions at the Regional Board's discretion range from a verbal warning, staff enforcement letter, notice of violation, cleanup and abatement order, cease and desist order, time schedule order, referral to the State of California's attorney general's office, and assessment of civil liability up to $10,000 per day per violation. When considering what enforcement action to take, the Regional Board examines the nature, extent and gravity of the violation, the magnitude of the violation, the water quality impacts resulting from the violation, and the compliance history of the violator. The Regional Board does not have the authority or resources to provide rewards and bounties to citizen watchdog groups.
21	2	Hydromod	F.	Throughout the Order, water quantity is rarely mentioned or given adequate consideration as it relates to transportation of pollutants and erosion of local receiving waters.	Scientific data and knowledge is increasingly aware that water quantity is an issue intimately related to water quality. Importing water from other areas can cause harm to beneficial uses in those areas due to pumps and water diversions. Imported water containing high dissolved salts can have a negative impact on groundwater supplies and native beneficial uses. Excess water quantity can cause a habitat type change from saline or brackish habitat to freshwater. Excess water quantity can cause devastating hydromodification impacts. To that end, the draft Tentative Order contains several provisions to address water quantity. First, the draft Tentative Order has removed over-irrigation from the list of non-storm water discharges exempted from prohibition. Second, the draft Tentative Order has requirements for the Copermittees to draft and implement a hydromodification management plan. Third, the draft Tentative Order requires priority development projects to implement low impact development BMPs that retain onsite and/or biofilter the volume of runoff from the 24 hour 85th percentile storm event. Lastly, the draft Tentative Order requires the Copermittees to examine retrofitting opportunities within their jurisdiction.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
22	2	General	General	Twenty years and $20 million represents too much time and too much money wasted on mismanagement of dry weather urban runoff pollution contaminating Aliso Creek, Aliso Beach and the South Laguna Beach State Marine Park. According to Stream Gage Information (Appendix D, Aliso Creek Watershed Chapter), “Data consisting of periodic discharge measurements was measured at one site on Aliso Creek between the years of 1932 and 2002….Historically (pre-urbanization), Aliso Creek was an ephemeral creek”. Water quality laws and regulations are not intended to be implemented for the convenience of Copermitees, inland Water Districts and their cohorts among the Residential Development and Building Industries. Dry weather MS4 discharges are directly attributable to the collective practices of these entities and constitutes an industrial wastewater by product from known point sources. Arguments to perpetuate and allow ongoing water pollution based upon “Maximum Extent Practicable”, while being a scientifically imprecise concept, does not on balance take into account “practical” protection of irreplaceable coastal wetlands and ocean resources unnecessarily flooded by dry weather MS4 discharges. Nor does this argument account for the “unpractical” and costly poisoning of local sea mammals, birds and humans with water borne illnesses. The San Diego Watershed Treatment System, supervised by the Santa Ana Regional Water Quality Control Board, demonstrates the effectiveness of strategic interventions sited among known inland point sources. Removing harmful dry weather urban runoff water quality constituents and elevated flows is possible through aggressive leadership by Regional Boards.	The draft Tentative Order includes numeric effluent limits for non-storm water dry weather discharges. In addition, since over-irrigation has been identified by the Copermittees as a source and conveyance of pollutants, the draft Tentative Order now prohibits over-irrigation discharges. These two measures show leadership by the San Diego Regional Board in addressing pollutants in the MS4 discharge. Treatment devices within receiving waters are not allowed by the draft Tentative Order. As the discussion of Finding E.7 in the fact sheet states: "Allowing polluted runoff to enter receiving waters prior to treatment to the MEP will result in degradation of the water body and potential exceedances of water quality standards, from the discharge point to the point of dissipation, infiltration, or treatment. Furthermore, the construction, operation, and maintenance of a pollution control facility in a water body can negatively impact the physical, chemical, and biological integrity, as well as the beneficial uses, of the water body. This requirement is supported by federal regulation 40 CFR 131.10(a) and USEPA guidance. According to USEPA,146 “To the extent possible, municipalities should avoid locating structural controls in natural wetlands. Before considering siting of controls in a natural wetland, the municipality should demonstrate that it is not possible or practicable to construct them in sites that do not contain natural wetlands… Practices should be used that settle solids, regulate flow, and remove contaminants prior to discharging storm water into a wetland.”

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23	3	General	General	Instead of damming up the creek as proposed by the SUPER Project, I wholeheartedly support you in your efforts to tighten the MS4 Permit so that the 6 cities upstream and Laguna Beach downstream are forced to significantly reduce their toxic run-off. I believe that as a result of this we do not need the SUPER Project (or any other Army Corps of Engrs flood control for that matter) which will destroy our wilderness park in Aliso Canyon. Besides the destruction of our wilderness park at the very most the SUPER Project will only clean the bacteria at the outflow of the creek not in the wilderness park and the chemical effluents will remain as a nasty soup flowing into the ocean. Furthermore, based on our research, we have found that the clean up area proposed for the end of the creek will be the first item to be cut from the project. If that should happen, the SUPER Project will have done nothing but destroy our wilderness park and leave the water quality as an unresolved major issue. I have grandchildren that I would like to see be assured of swimming, skim boarding and surfing in clean ocean water not the toxic mess that exists today because of the Upstream Cities and my own city's inability to support the MS4 Permit. Laguna Beach should be working with the 6 Upstream Cities to bring them on board, not acting as just another deterrent to a much needed strengthening of the MS4 Permit. We need the 6 Upstream Cities to take responsibility one by one to contain and drastically reduce their urban run-off and by tightening the MS4 Permit will demand that they do so.	Comment noted. The SUPER project will be subject to the MS4 permit where applicable. The SUPER project will require a Clean Water Act Section 401 water quality certification from the Regional Board. The Regional Board plans on a closer review of the SUPER project through the 401 certification process.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
24	4	General	General	Last February, the Copermittees took from your closing remarks a commitment that your staff would look at consistency with existing and draft MS4 permits, including those from the Regional Water Quality Control Boards (RWQCBs) for the Santa Ana and Los Angeles regions. At the same time, USEPA also expressed an interest in seeing greater permitting consistency between RWQCBs. More recently, the final report of the Little Hoover Commission identified the lack of consistnecy between RWQCBs as a critical area of concern with respect to the ability of the State to deliver on its water quality protection mandates. It is also a key issue for the Orange County Stormwater Program which is subject to the jurisdiction of two RWQCBs. Nonetheless, and in spite of precious assurances and concerns, the March 13, 2009 Tentative Order is fundamentally different from the current draft MS4 permit for North Orange County (Tentative Order R8-2009-0030) in many key programmatic areas. While your staff has acknowledged that they will likely incorporate the North Orange County permit's land development provisions, they are reluctant to eliminate other areas of inconsistency. This disinclination erodes the credibility of the regulatory framework for stormwater in California and serves to confound the ability of local government and the regulated community to effectively address a key environmental mandate at a time of unprecedented fiscal constraint. It is therefore necessary for us to continue to seek revisions to the Tentative Order supportive of a cohesive and cogent alignment of the North and South County permits on the basis that consistency is important to the credibility of our respective efforts to manage urban runoff and is vital to sustaining the obvious cost effectiveness of a single and coordinated Countywide program in Orange County.	It is important to note that consistency between permits does not imply that permits be identical. The San Diego Regional Board's draft Tentative Order for MS4 discharges in Southern Orange County does meet a level of consistency to allow those few cities and the County of Orange who are in both Regions to develop a comprehensive program that is protective of the unique water quality standards in Southern Orange County. In addition, nothing in the draft Tentative Order is in conflict or contradicts the municipal permit recently adopted by the Santa Ana Regional Board. Requirements for low impact development, and the definition of a priority development project are particularly consistent if not identical to the requirements in the Riverside Regional Board's recently adopted MS4 permit for North Orange County. The San Diego Regional Board staff met several times in 2008 to seek consistency with staff from the Los Angeles Regional Board, Riverside Regional Board, State Board and the USEPA. Consistency, unfortunately, was not much of an issue for the other Regional Boards due to a lack of comments or requests to be consistent from their stakeholders. Consistency among all MS4 Permits in Southern California is beyond the San Diego Regional Board's authority due to the semi-autonomous Regional Board system established by State law. Nevertheless, we are sensitive to the Copermittee's concerns of consistency and have sought to write the draft Tentative Order to protect Water Quality and allow the County and those affected Cities to develop a single program. First and foremost, the draft Tentative Order is consistent with the Clean Water Act, Code of Federal Regulations and USEPA guidance. These federal regulations are the driving force behind the requirement for the MS4 permit and this reissuance. To reach consistency with the federal regulations, several changes are in the draft Tentative Order, namely, the removal of the term "urban runoff," prohibition of over-irrigation discharges, and the numeric effluent limitations for dry weather non-storm water discharges. In addition, the draft Tentative Order must comply with the anti-backsliding requirements found in 40 CFR 122.44(l): "[W]hen a permit is renewed or reissued, interim effluent limitations, standards or conditions must be at least as stringent as the final effluent limitations, standards, or conditions in the previous permit." The draft Tentative Order has to be consistent with the San Diego Regional Board's Basin Plan. The Basin Plan defines the unique water quality objectives and beneficial uses in Southern California that the draft Tentative Order is seeking to protect and restore. South Orange County is unique from North Orange County in several aspects. Besides the obvious differences of land use, population density, cultural makeup and geology, several receiving waters in Southern Orange County have been identified as having Warm and Cold habitat

beneficial uses. Receiving waters in Northern Orange County have not been identified as having Warm and Cold habitat beneficial uses.

The Regional Board also has to be concerned about consistency with other MS4 permits issued by the San Diego Regional Board. The Regional Board has three separate MS4 permits to write and enforce. To have a fair and consistent enforcement policy implemented by the Regional Board, the MS4 permits issued by the Regional Board need to be consistent. The difficulty for Regional Board staff to understand, review reports and adequately enforce inconsistent MS4 permits puts an unnecessary strain on the Regional Board's limited resources.

The County of Orange's criteria for consistency cannot be a hindrance to improvements in the science and regulation of water quality. Some might argue that to be truly consistent would be a return to the regulations and water quality observed in 1990 when the first NPDES permit was issued for MS4 discharges. This progressive increase in water quality science and knowledge is supported in USEPA guidance. For example, in its "Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits" (61 FR 43761), USEPA states, "In cases where adequate information exists to develop more specific conditions or limitations to meet water quality standards, these conditions or limitations are to be incorporated into storm water permits, as necessary and appropriate."

Even with these constraints on consistency, the draft Tentative Order is consistent with the Santa Ana Regional Board's North Orange County MS4 permit, especially in regard to the requirements for Low Impact Development at Priority Development Projects. While being consistent, this draft Tentative Order is also implementing the USEPA's policy on watershed permitting. At this point in time, adopting an identical permit to that in a separate watershed could be construed to be in violation of USEPA's stated policy on implementing NPDES permitting activities on a watershed basis.

The state's water quality protection requirements within the Tentative Order are authorized by Federal Law, are necessary to meet the federal MEP standard, and are not unfunded mandates. Please see comments #155 and 165.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
25	4	MAL	D.	The Permittees' concerns with the imposition of Municipal Action levels (MALs) and Numeric Effluent Limits (NELs) have been presented to your staff. The Permitees' fundamental concern is that the method of application is clearly inconsistent with the definitive guidance in this area, specifically the State Water Board's Blue Ribbon panel report on the feasibility of numeric effluent limits. In June 2006, this panel concluded that it is not feasible at this time to set numeric effluent criteria for municipal BMPs and in particular urban discharges. In 2009, this conclusion continues to be the published position of USEPA on this issue. Clearly, both the RWQCBs and the Permittees have a keen interest in being able to demonstrate and report the effectiveness of their stormwater protection and management efforts. However, this effort by your staff to include MALs as the basis for compliance with the MEP standard in the permit is inappropriate on both technical and legal grounds. Likewise, the water quality based NELs established for non-stormwater discharges are legally and regulatorily unsupported. Nonetheless, we recognize the value of action levels and will continue to seek provisions that support the better application of published guidance on program effectiveness assessment including the development and application of benchmarks. Indeed, the Permittees commend the Dry Weather Reconnaissance Program to you as the model application of water quality benchmarks in a manner entirely consistent with the recommendations of the BlueRibbon Panel.	The Regional Board has reviewed and taken into consideration the findings from the Blue Ribbon report: The Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial and Construction Activities, dated June 14, 2006. The report, written specifically for discharge of storm water, finds it infeasible to establish numeric effluent limitations and recommends utilizing action levels based upon a nationwide and/or localized dataset. TheTentative Order has included action levels, or Municipal Action Levels (MALs), which are not numeric effluent limitations. Language in the updated errata has been changed and a MAL exceedance no longer creates a presumption that MEP is not being met. Thus, MALs are not representative of the MEP standard, but shall be used by Copermittees to determine priorities for BMP implementation (see response to Comment 33 for further discussion). In regards to the non-storm water numeric effluent limits (NELs), the Blue Ribbon report was specifically written to address discharges of storm water. Non-storm water discharges are not addressed by the report. While the dry weather reconnaissance program has established benchmarks and successfully detected, investigated and eliminated illicit discharges, the discharges of non-storm water from the MS4 are causing or have the reasonable potential to cause excursions above applicable water quality standards. Thus, in order to protect the Beneficial Uses of the waters of the State, numeric effluent limits for these non-storm water discharges have been proposed. Inclusion of numeric effluent limits is consistent with other adopted Orders for non-storm water discharges (see response to Comment 39 for further discussion).

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
26	4	General	General	At the inception of the Stormwater Program, the County of Orange, as Principal Permittee, and the Permittees developed a Drainage Area Management Plan (DAMP) to serve as the principal policy and programmatic guidance document for the Program. Since 1993, the DAMP has been modified through an adaptive management process to reflect the needs of the Permittees, ensure Permittee accountability, and deliver positive water quality and environmental outcomes. The DAMP now provides definitive guidance to each Permittee in the development of its Local Implementation Plan (LIP) which specifically describes how the Program will be implemented on a city/jurisdiction basis. It also includes Watershed Action Plans (WAPs) for each of the six South Orange County watersheds targeting pathogen indicator bacteria. Concurrently, the annual progress report has been developed into a systematic assessment of program effectiveness at jurisdictional, watershed and countywide levels of resolution, using program effectiveness assessment guidance from the California Stormwater Quality Association (CASQA) and a comprehensive environmental quality dataset. Nevertheless, the Tentative Order seeks to impose additional planning requirements including jurisdictional workplans, a business plan and additional planning efforts that might be triggered by exceedances of a water quality action level. The Permittees believe that strategically adjusting the existing planning processes, rather than simply creating additional planning requirements, should be the basis of the Tentative Order's programmatic requirements. Such an approach also offers the additional potential benefit of identifying opportunities to reduce rather than increase the administrative burden of the Program for both the RWQCB and for the Permittees.	While the DAMP may play an important role in aiding the Copermittees in their development of effective local programs, its development is not required in the Tentative Order. It generally serves as a collection of model program components from which the Copermittees have chosen to base their own individual programs. The DAMP and Report of Waste Discharge (ROWD) submitted to the Regional Board in August 2006 constitute the application for reissuance of the municipal storm water permit. The Regional Board is not obligated to accept the proposed program as the equivalent of the NPDES requirements. Instead, the Regional Board has the responsibility of requiring measures that are reasonable and necessary to protect water quality objectives in the Permit area. While the Copermittees may elect to incorporate elements of the DAMP into their local programs, certain requirements in the Tentative Order must be specific enough to ensure that the local programs will reduce discharges of storm water pollutants from municipal separate storm sewer systems (MS4s) to the maximum extent practicable (MEP) and effectively prohibit non-storm water discharges (unless exempted or covered by a separate permit). The DAMP is not an enforceable document by the Regional Board. When Copermittees choose to follow the DAMP, ultimately the individual Copermittee has a responsibility to comply with the draft Tentative Order whether or not the DAMP guides them in compliance. Therefore, the draft Tentative Order allows each individual Copermittee the flexiblity to tailor their programs to their individual needs through the Local Implementation Plan and jurisdictional work plans. Please note that the requirements for a business plan have been removed from the Tentative Order.
27	4	SUSMP	F.1	With land development projects, the installation and subsequent maintenance of treatment controls certainly needs to be verified. However, self certification is already a verification mechanism being used by Permittees and it and other third party verification mechanisms should not be precluded by the Tentative Order in exclusive favor of [Cop]ermittee inspection. The current opportunity to strategically re-consider the use of inspection resources should be used to target and focus these activities rather than simply expand their scope. Furthermore, given the current state of the economy, the [Cop]ermittees, like all municipalities, are facing shrinking budgets. Consequently the RWQCB should give great weight to the best use of limited resources in achieving water quality objectives.	The requirements to track and annually inspect high priority post-construction BMPs is in response to findings from the 2005 audits and from USEPA guidance. The 2005 audits found that the Copermittees were not adequately tracking post-construction BMPs. The final audit report recommended that each city should develop a system to verify implementation and track post-construction BMPs to ensure adequate maintenance. The draft Tentative Order does not preclude the Copermittees from using self certification or other equally effective approaches for low or medium priority post construction BMPs. Inspections are required for high priority BMPs due to their threat to water quality. Inspections are more reliable than self-certifications in verifying compliance. Inspections can also be a means of checking on the accuracy of self-certifications. The requirements in the draft Tentative Order are consistent with the requirements in the adopted San Diego County MS4 permit, Order No. R9-2007-0001.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
28	4	Overirrigation	B.	The prescribed prohibition on irrigation runoff also needs to be very carefully considered. Project Pollution Prevention, the public education and outreach initiative of the Program, is already targeting overwatering as a residential practice of concern. Moreover, the effectiveness of the overall public education effort has been validated by public opinion surveys that show incremental and statistically significant increases in public awareness of stormwater issues, as well as positive changes in protective behaviors. In light of this progress, implementation of the prohibition would risk eroding general public support for a Program that is successfully fostering a stewardship ethic in residential environments. There is also concern that the provision would force the expenditure of scarce resources on an issue that is already being addressed by water districts dealing with water conservation imperatives.	The Regional Board disagrees that removing the exemption for irrigation-related discharges from the non-storm water prohibition will erode the public from fostering and stewarding their residential environments. Several citizens at recent public meetings have voiced their support for this action. Furthermore, the removal of the exemption is required by federal law. Section 402(p)(3)(B)(ii), permit requirements for municipal discharges, states that municipal storm water NPDES permits: "shall include a requirement to effectively prohibit non-storm water discharges into the storm sewers." The Federal Register (55, page 48037) and 40 CFR 122.26(d)(iv)(B) clarifies that certain components and categories of discharges are not required to be prohibited. The Code of Federal Regulations requires the discharger have: "…a program, including inspections, to implement through ordinance, orders or similar means to prevent illicit discharges to the municipal separate storm sewer system; this program shall address all types of illicit discharges, however, the following category of non-storm water discharges or flows shall only be addressed where such discharges are identified by the municipality as sources of pollutants to the United States: water line flushing, landscape irrigation, diverted stream flows, rising ground waters, uncontaminated groundwater infiltration (as defined at 40 CFR 35.2005(20) to separate storm sewers, uncontaminated pumped groundwater,…" As such, the identification of any of these categories as a source of pollutants requires them to be addressed as illicit discharges, which are not authorized under the CWA, and are required to be "effectively prohibited" via ordinance, order or similar means. Therefore, the prohibition on irrigation runoff is required by the federal regulations since the Copermittees have identified irrigation runoff as a source and conveyance of pollutants (as identified in the Supplemental Fact Sheet). It is encouraging to hear that the County believes their overall public education effort is showing improvements in public awareness and changes in protective behavior. Therefore, the overirrigation prohibition will dovetail into their already effective public education programs. As public agencies, the Copermittees must be aware and address their public concerns and the Copermittees are expected to use appropriate discretion through their education and enforcement mechanisms to alleviate those public concerns. As long as the Copermittees have a program in place to effectively prohibit over-irrigation runoff from entering the MS4, they are likely to be in compliance with this Tentative Order. Coordination with the water districts is an acceptable and preferred method of compliance.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
29	4	Existing Development	F.3.	The last area of prescribed new regulatory oversight is mobile businesses. The Permittees have already produced educational materials for these businesses, cooperatively developed wash water disposal options with Orange County's sewering agencies, and coordinated on enforcement. The further required regulation of these businesses is a potentially resource intensive undertaking that currently appears to lack a strong technical rationale.	Mobile businesses have been identified as sources of pollutants in storm water runoff. The current MS4 Permit lists mobile businesses as one category for which BMPs must be developed. Separation of BMP implementation for Mobile Businessess in the Tentative Order is not a significant change from the existing Order. It is appropriate to segregate mobile businesses from fixed location businesses in the reissued Permit, because of the unique difficulties associated with regulating mobile businesses. The language in the Tentative Order is intended to provide broad flexibility to the Copermittees to account for the individual make-up of each municipality and for the difficulties with identifying and communicating with mobile business operators. Understandably, identifying mobile businesses within each jurisdiction and enforcing storm water regulations on those mobile businesses is a challenge. The draft Order's requirement for Mobile Businesses provides flexibility in dealing with these difficulties by allowing the Copermittees to coordinate and share mobile business inventories. The mobile business section includes the option for the Copermittees to share mobile business inventories, BMP requirements, enforcement action information, and education methodologies. Sharing this type of information would save resources.
30	4	LID	F.1	More recently the County provided the Santa Ana RWQCB with a more detailed conception of a framework for land development. It predicates permit compliance on management of the 85th percentile storm volume. presumes the application of LID BMPs based upon a prioritized consideration of infiltration, capture and re-use, evapotranspiration, and bio-retention/biofiltration, and requires treatment of residual runoff volumes for which the application of LID BMPs has been determined to be infeasible at site, sub-regional and regional scales. The framework also integrates options for water quality credits and provides for alternate compliance approaches including participation in a watershed project and contributions to an "in-lieu~ fund. It also explicitly recognizes bio-retention/bio-filtration BMPs as LID BMPs and the continued and entirely legitimate contribution of effective structural BMPs such as constructed wetlands and detention ponds to the practice of stormwater quality management. The [Cop]ermittees believe that it is imperative that there be a uniform countywide development standard for water quality protection. Consequently, the framework language that is currently being supported by both the North Orange County Permittees and staff of the Santa Ana Regional Board should be the starting point for discussion with respect to the subject Tentative Order.	The draft Tentative Order and errata sheet has updated LID language that is consistent with the recently adopted Riverside Regional Board (Region 8) MS4 permit for North Orange County. The updated language has provisions for the inclusion of LID biofiltration while protecting water quality. The LID language also provides an individual city the freedom and flexibility to implement development standards independent of the County that are more protective of water quality and more suited for the unique conditions found in their city.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
31	4	General	General	In advance of preparing the Report of Waste Discharge (ROWD) the Permittees undertook a detailed program assessment drawing upon prior annual report findings, a comprehensive environmental quality database, audit findings, facilitated workshops, and the CASQA Program Effectiveness Guidance, This assessment provided a strong technical basis for the further improvements to the Orange County Stormwater Program recommended in the ROWD, these improvements have been subsequently validated in later annual progress reports, These informational resources and, in particular, the environmental quality database, have been compiled at great expense and provide unique and site specific information on the state of Orange County's surface waters and the performance of the Orange County Stormwater Program, To the extent that the Tentative Order prescribes requirements supplemental to the ROWD recommendations they need to be explicitly supported by a strong technical justification that is developed from the information that has been compiled over the last 18 years by the [Cop]ermittees. New requirements also need to be consistent with the federal stormwater regulations and within the scope of the Clean Water Act.	The Regional Board appreciates and respects the expertise of the Copermittees in implementing local programs. The commenter, however, incorrectly restricts the Regional Board to using information compiled only by the Copermittees in the last 18 years. In addition, to the data provided by the Copermittees, the fact sheet cites technical information from federal guidance, State plans and policies, and independent studies. The draft Tentative Order is consistent with the federal stormwater regulations and within the scope of the Clean Water Act. Several changes to the draft Tentative Order were made to be consistent with the federal regulations including the removal of the term "urban runoff," inclusion of non-stormwater dry weather numeric effluent limits, and the prohibition on over irrigation water.
32	4	MAL	D.	Contrary To Established Federal Law, the Tentative Order Would Require Permittees to Meet Numeric Effluent Limits for Discharges from the MS4 A. Basing Permit Compliance on Municipal Action Levels is Inconsistent with Federal and State Guidance and Not Required by the Clean Water Act. The March 13, 2009 draft of the Tentative Order imposes on Permittees for the first time the concept of “Municipal Action Levels” or “MALs.” Beginning in the fourth year after adoption of the permit, discharges from the MS4 that exceed the MALs (which are numeric concentration levels for designated pollutants) would give rise to a presumption that the Permittee was not complying with the MEP standard. In other words, the Permittee would be presumed to be in violation of the permit. The County objects to this significant new requirement for several reasons.	MAL language has been changed and new language is located in the Updates to the Tentative Order. Langauge has been changed so the exceedance of a MAL does not give rise to the presumption that the Copermittee is not complying with the MEP standard. Please see full response to Comment 33.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
33	4	MAL	D	1. As Proposed, the Municipal Action Levels for Discharges from the MS4 Could Be Considered Numeric Effluent Limits Not Required by Federal Law First, to the extent the MALs are considered numeric effluent limitations, they are not required by the Clean Water Act. The Clean Water Act defines “effluent limitation” as “any restriction established by a State or [the U.S. EPA] on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources…” CWA § 502; 33 U.S.C. § 1362(11). The proposed MALs meet this definition. Because an exceedance of a MAL may result in a permit violation, the MALs represent a restriction on concentrations of designated constituents discharged from the MS4. Because they are expressed numerically rather than through narrative, they would be considered numeric effluent limitations.	The MAL language has been updated to reflect that an excursion above a MAL does not create a presumption that MEP is not being met. Instead, a MAL exceedance is to be used by the Copermittee as an indication that the MS4 storm water discharge point is a definitive "bad actor," and the result from the monitoring needs to be considered as part of the iterative process for reducing pollutants in storm water to the MEP. A MAL is not a restriction on a quantity, rate or concentration, but is a level at which actions that further reduce pollutants from that discharge point need to be evaluated in order to reduce storm water pollutants to the MEP. Thus, MALs are not effluent limitations as defined by the CWC or CWA. This is further discussed in the updated Supplemental Fact Sheet. The approach of using "action levels" is consistent with recommendations made by USEPA in their Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits, dated August 26, 1996: "Under the Clean Water Act(CWA) and NPDES regulations, permitting authorities may employ a variety of conditions and limitations in storm water permits, including best management practices, performance objectives, narrative conditions, monitoring triggers, action levels (e.g., monitoring benchmarks, toxicity reduction evaluation action levels), etc., as the necessary water-quality based limitations, where numeric water quality based effluent limitations are determined to be unnecessary or infeasible". As such, these action levels are not considered numeric water quality-based effluent limits. It should be noted that a purpose of monitoring, required under this and previous Orders, is to aid in the evaluation of implemented programs and BMPs in reducing pollutants in storm water discharges to the MEP. The tentative Monitoring and Reporting Program states: A. This Receiving Waters and Urban Runoff Monitoring and Reporting Program is intended to meet the following goals: 2.Measure and improve the effectiveness of the Permittees’ urban runoff management programs; 3.Assess the chemical, physical, and biological impacts to receiving waters resulting from runoff discharges; 4.Characterize runoff discharges; 5.Identify sources of specific pollutants; 6.Prioritize drainage and sub-drainage areas that need management actions; 9.Provide information to implement required BMP improvements The state's water quality protection requirements within the Tentative Order are authorized by Federal Law, are necessary to meet the federal MEP standard, and are not unfunded mandates. Please see comments #155 and 165.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
34	4	MAL	D	The Clean Water Act does not require that MS4 permits include numeric effluent limitations. Instead, MS4 permits "shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods…" CWA § 402(p)(3)(B)(iii); 33 U.S.C. § 1342(p)(3)(B)(iii). In other words, discharges from the MS4 must meet the so-called "MEP" standard. Unlike other technology-based standards, the MEP standard is not defined in the Clean Water Act or in federal regulations. It is intended to be flexible, to allow the development of site-specific permit conditions based on the best professional judgment of the permit writer. See, e.g., 55 Fed. Reg. 47989, 48038 (Nov. 16, 1990); 64 Fed. Reg. 68721, 68754 (Dec. 8, 1999); U.S. EPA Region IX, Storm Water Phase I MS4 Permitting: Writing More Effective, Measurable Permits (February 2003).	Please see response to comment 33.
35	4	MAL	D	The Clean Water Act also provides that MS4 permits include "other provisions as [U.S. EPA] or the State determines appropriate for the control of [ ] pollutants" discharged from the MS4. CWA § 402(p)(3)(B)(iii); 33 U.S.C. § 1342(p)(3)(B)(iii). Case law has interpreted this language to allow, but not require, U.S. EPA or a State to impose requirements in MS4 permits that go beyond the MEP standard, such as numeric effluent limits. See, e.g., Defenders of Wildlife v. Browner, 191 F.3d 1159, 1166-67 (9th Cir. 1999); Building Industry Association of San Diego County v. State Water Resources Control Board, 124 Cal.App.4th 866, 885-86 (2005). In other words, the MEP standard is the statutory floor for MS4 permits. MS4 permits must require that discharges from the MS4 meet the MEP standard. The Clean Water Act allows, but does not require, MS4 permits to include requirements more stringent than the MEP standard. Therefore, to the extent the MALs are considered numeric effluent limitations, more stringent than what is required by the MEP standard, they are not required by the Clean Water Act.	Please see response to comment 33. The state's water quality protection requirements within the Tentative Order are authorized by Federal Law, are necessary to meet the federal MEP standard, and are not unfunded mandates. Please see comments #155 and 165.
36	4	MAL	D	2. Defining MEP in Terms of the MALs is Inconsistent with Established State and Federal Guidance. To the extent the MALs are defining MEP rather than imposing requirements that go beyond MEP, they also are inappropriate. As proposed, the Tentative Order provides that if a discharge exceeds a MAL, it will be presumed that the Permittee has not met the MEP standard. In other words, at a minimum, the MAL for a given pollutant represents MEP. This is inconsistent with federal and state guidance on the MEP standard.	Please see response to comment 33.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
37	4	MAL	D	As discussed above, the MEP standard is not defined by the Clean Water Act or by U.S. EPA. After its initial experience with the MEP standard as implemented through the Phase I MS4 permits, U.S. EPA provided additional guidance as to the standard in the preamble to its Phase II regulations for small MS4s: EPA has intentionally not provided a precise definition of MEP to allow maximum flexibility in MS4 permitting. MS4s need the flexibility to optimize reductions in storm water pollutants on a location-by-location basis. EPA envisions that this evaluative process will consider such factors as conditions of receiving waters, specific local concerns, and other aspects included in a comprehensive watershed plan. Other factors may include MS4 size, climate, implementation schedules, current ability to finance the program, beneficial uses of receiving water, hydrology, geology, and capacity to perform operation and maintenance. The pollutant reductions that represent MEP may be different for each small MS4, given the unique local hydrologic and geologic concerns that may exist and the differing possible pollutant control strategies. . . . EPA envisions application of the MEP standard as an iterative process. MEP should continually adapt to current conditions and BMP effectiveness and should strive to attain water quality standards. Successive iterations of the mix of BMPs and measurable goals will be driven by the objective of assuring maintenance of water quality standards. . . . 64 Fed. Reg. at p. 68754.	Please see response to comment 33. Furthermore, proposed changes to the Tentative Order include a requirement to update MALs to include end-of-pipe storm water montoring data, thus creating a more localized dataset, which is the approach preferred by the 206 Blue Ribbon report. It is expected that utilizing local data will create MALs that more closely reflect the MEP standard for Copermittees, which may result in MALs that are higher and/or lower based upon local conditions.
38	4	MAL	D	Similarly, the State Water Board has not defined the MEP standard. However, it too has provided guidance that emphasizes the flexible nature of the standard: If, from [a] list of BMPs, a permittee chooses only a few of the least expensive methods, it is likely that MEP has not been met. On the other hand, if a permittee employs all applicable BMPs except those where it can show that they are not technically feasible in the locality, or whose cost would exceed any benefit to be derived, it would have met the standard. MEP requires permittees to choose effective BMPs, and to reject applicable BMPs only where other effective BMPs will serve the same purpose, the BMPs would not be technically feasible, or the cost would be prohibitive. State Water Board Order WQ 2000-11 at p. 20. In light of this state and federal guidance, it is inappropriate for the Tentative Order to attempt to define MEP for a given pollutant with a numeric concentration, i.e., a MAL. For the above reasons, the County requests that Section D be removed from the next draft of the Tentative Order.	Please see response to comment 33.

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39	4	NEL	E	B. The Proposed Numeric Effluent Limits For Discharges of Non-Stormwater From The MS4 Are Not Supported By Federal Law. 1. The Clean Water Act Requires That MS4 Permits Include Requirements To "Effectively Prohibit" Discharges Of Non-Storm Water Into The MS4 And Controls To Reduce The Discharge Of Pollutants From The MS4 To The Maximum Extent Practicable; The Act Does Not Require That Non Stormwater Discharges From The MS4 Meet Numeric Effluent Limitations. The Tentative Order would explicitly impose numeric effluent limits (NELs) on discharges from MS4s. Section C incorporates NELs for non-stormwater dry weather discharges into receiving waters. The Tentative Order provides no legal authority for imposing this new and significant requirement. The Supplemental Fact Sheet simply states that because Permittees' past efforts at controlling pollutants in non-stormwater discharges have been ineffective, NELs on those pollutants are necessary. To the extent there is legal authority for imposing NELs on nonstormwater discharges from the MS4, it is not found in the Clean Water Act.	The Clean Water Act (CWA) employs the strategy of prohibiting the discharge of any pollutant from a point source unless the discharger of the pollutant(s) obtains a NPDES permit pursuant to Section 402 of the Clean Water Act. The discharge of storm water and non-storm water from an MS4 system is considered a discharge from a point source. In 1987 the CWA was amended to include provisions that specifically concerned NPDES permitting requirements for storm sewer discharges from the MS4. Section 402(p), for Municipal and Industrial Stormwater Discharges, regulates the discharge of storm water from a point source (e.g. the municipal separate storm sewers). Storm water means storm water runoff, snowmelt runoff, and surface runoff and drainage (related to precipitation events, see 40 CFR 122.26(b)(13) and 55 Fed Reg 47995-96). Section 402(p)(3)(B), permit requirements for municipal discharges, states that municipal storm water NPDES permits: "(i) may be issued on a system- or jurisdiction-wide basis; (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and (iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants." Thus, non-storm water discharges into, through and thus from the MS4 are not covered under 402(p)(3)(B)(iii), as they are required to be effectively prohibited, not reduced to the maximum extent practicable. This is, in effect, a narrative prohibition of discharge. The Federal Register (Vol. 55, No. 222, page 47995) provides further clarification regarding non-storm water discharges, defined as "Illicit Discharges": "Today's rule defines the term "illicit discharge" to describe any discharge through a municipal separate storm sewer system that is not composed entirely of storm water and that is not covered by an NPDES permit. Such illicit discharges are not authorized under the Clean Water Act. Section 402(p(3)(B) requires that permits for discharges from municipal separate storm sewers require the municipality to "effectively prohibit" non-storm water discharges from the municipal separate storm sewer…Ultimately, such non-storm water discharges through a municipal separate storm sewer must either be removed from the system or become subject to an NPDES permit." The Federal Register (47995-47996) goes on to state that: "Congress did not intend that the term storm water be used to describe any discharge that has a de minimis amount of pollutants, not did it intend for section 402(p) to be used to provide a

moratorium from permitting other non-storm water discharges."

Those wishing to continue non-storm water discharges into (and thus through and from) the MS4 are required to obtain coverage under a separate NPDES permit, pursuant to section 402, not 402(p). The federal regulations (40 CFR 122.26(d)(vi)(2)(B)) require that the municipal separate storm sewer discharger: "Prohibit through ordinance, order or similar means, illicit discharges to the municipal separate storm sewer."

However, the Federal Register (55, page 48037) and 40 CFR 122.26(d)(iv)(B) clarifies that certain components and categories of discharges are not required to be prohibited. The Code of Federal Regulations requires the discharger have: "…a program, including inspections, to implement through ordinance, orders or similar means to prevent illicit discharges to the municipal separate storm sewer system; this program shall address all types of illicit discharges, however, the following category of non-storm water discharges or flows shall only be addressed where such discharges are identified by the municipality as sources of pollutants to the United States: water line flushing, landscape irrigation, diverted stream flows, rising ground waters, uncontaminated groundwater infiltration (as defined at 40 CFR 35.2005(20) to separate storm sewers, uncontaminated pumped groundwater,…" As such, the identification of any of these categories as a source of pollutants requires them to be addressed as illicit discharges, which are not authorized under the CWA, and are required to be "effectively prohibited" via ordinance, order or similar means.

Separate permits for discharges to the municipal storm sewer system can be obtained. The Federal Register (55, page 48037) states that: "Permits for such discharges must meet applicable technology-based and water quality-based requirements of Sections 402 and 301 of the CWA. If the permit for a non-storm water discharge to a municipal separate storm sewer contains water quality-based limitations, then such limitations should generally be based on meeting applicable water quality standards at the boundary of the State established mixing zone (for States with mixing zones) located in the receiving waters of the United States." The Regional Board and State Board have issued multiple permits for non-storm water discharges into MS4 systems, including R9-2008-0002 (extracted groundwater), R9-2002-0020 (hydrostatic discharge) and 2006-008 DWQ (utility vaults), pursuant to section 402 of the CWA. These discharges are required to meet limitations upon discharge into the MS4 system.

The Federal Register (55, page 48037) provides additional clarification on how non-storm water discharges from the MS4 are to be regulated: "Conveyances which continue to accept other "non-storm water" discharges (e.g. discharges without an NPDES permit) with the exceptions

noted above (exempted discharges that are not a source of pollutants) do not meet the definition of municipal separate storm sewer and are not subject to 402(p)(B) of the CWA unless such discharges are issued separate NPDES permits. Instead, conveyances which continue to accept non-storm water discharges which have not been issued separate NPDES permits are subject to sections 301 and 402 of the CWA."

As such, non-storm water discharges that occur are not subject to the MEP standard under 402(p), as 402(p) is for storm water discharges. Any non-storm water discharges from the MS4 that occur are:
i) illicit discharges;
ii) exempted categories that are not a source of pollution; and/or
iii) discharges subject to a separate NPDES permit under section 402 of the CWA.
Owners and operators of the MS4 (dischargers) cannot passively receive discharges from third parties (Federal Register 68766) and thus are responsible for the discharge of non-storm water from their MS4, and the discharge of non-storm water from the MS4 that is a source of pollutants is considered an illicit discharge, which is not authorized under the CWA. Such discharges are required to be prohibited or subject to a NPDES permit under section 402 of the CWA. They are not to be reduced to the maximum extent practicable under 402(p)(B)(iii).

For the last 19 years, Southern Orange County NPDES permits for discharges of runoff (non-storm water and storm water) have required Copermittees (dischargers) to prohibit non-storm water discharges into (thus through and from) their MS4 systems, implement a program to prevent illicit discharges, and monitor to identify illicit discharges and exempted discharges that are a source of pollution. These measures are considered Best Management Practices (BMPs), are required under 402(p), and are considered by USEPA to be an interim approach to permitting non-storm water discharges from the MS4 in accordance with section 402 of the CWA.

For NPDES permits under 402 of the CWA, the Code of Federal Regulations (122.44(k)) clarify that a discharger may utilize BMPs to control or abate the discharge of pollutants when:
"(1) Authorized under section 304(e) of the CWA for the control of toxic pollutants and hazardous substances from ancillary industrial activities;
(2) Authorized under section 402(p) of the CWA for the control of storm water discharges;
(3) Numeric limits are infeasible; or
(4) The practices are reasonably necessary to achieve effluent limitations and standards or to carry out the purposes and intent of the CWA."

As BMPs have been utilized by the discharges for the past 19 years, the Regional Board has evaluated (in accordance with 40 CFR 122.44(d)(1)) past and existing controls (BMPs), non-storm water effluent monitoring results, the sensitivity of the species in receiving waters (e.g. endangered species), and the potential for

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					effluent dilution, and has determined that BMPs are not sufficient to protect water quality standards as non-storm water discharges from the MS4 continue to cause, have the reasonable potential to cause, or contribute to excursions above applicable water quality criteria. Thus, numeric effluent limitations have been established in accordance with federal regulations under 40 CFR 122.44 to control the discharge of pollutants to protect water quality standards (see the updated Supplemental Fact Sheet for further information).
40	4	NEL	E	The Clean Water Act very clearly defines the discharge requirements for permits for discharges from municipal storm sewers (i.e., MS4s permits). Such permits may be issued on a system or jurisdiction-wide basis, must include a requirement to effectively prohibit non-stormwater discharges into the storm sewer, and must require controls to reduce the discharge of pollutants from the storm sewer to the maximum extent practicable. CWA § 402(p)(3)(B); 33 U.S.C. § 1342(p)(3)(B). It is the discharge of pollutants from the MS4, regardless of whether they are in stormwater or non-stormwater, which must be reduced to the maximum extent practicable. Section 402(p) of the Clean Water Act does not distinguish between wet weather and dry weather discharges. Thus the Clean Water Act does not require or provide authority for imposing NELs on the discharge of non-stormwater from MS4s.	Please see response to comment 39. As detailed in the response to comment no. 39, CWA § 402(p) pertains to 'storm water.' The very title of the section is "Municipal and Industrial Stormwater."
41	4	NEL	E	2. The Federal Stormwater Regulations Implement the Clean Water Act's "Effective Prohibition" Requirement. Nor do the federal stormwater regulations impose separate requirements on discharges of nonstormwater from the MS4. Instead, tracking the Clean Water Act language, the federal regulations and preamble impose specific requirements as to how Permittees are to address non-stormwater discharges into the MS4 (i.e., "effectively prohibited"). The regulations use the term "illicit discharge," which means any discharge to the MS4 that is not composed entirely of stormwater, except discharges pursuant to a separate NPDES permit and discharges resulting from fire fighting activities. 40 C.F.R. § 122.26(b)(2). Permittees must have a program to prevent illicit discharges into the MS4. 40 C.F.R. § 122.26(d)(2)(iv)(B)(1). The regulations also require Permittees to address "improper disposal" into the MS4 of used oil and toxic materials through educational activities on the proper management and disposal of these materials. 40 C.F.R. § 122.26(d)(2)(iv)(B)(6).	Section 402(p) of the Clean Water Act is specifically for municipal and industrial storm water discharges (see response to Comment 39). Section 402(p) does include a requirement that permits include a limitation on non-storm water discharges into the MS4 (zero discharge), unless those discharges into the MS4 are covered under a separate NPDES permit under Section 402 of the Clean Water Act, or are exempted and not a source of pollutants (40 CFR 122.26(d)). As discussed in the updated Supplemental Fact Sheet, non-storm water discharges from the MS4 are likely to contain pollutants that cause or threaten to cause an exceedance of the water quality standards, as outlined in the Regional Board's Water Quality Control Plan for the San Diego Basin. As such, to prevent the discharge of non-storm water from causing or contributing to a condition of pollution in the receiving waters, appropriate limitations have been included that ensure the effective prohibition of non-storm water discharges into the MS4 and identify any exempted discharges that are a source of pollution and need to be addressed as illicit discharges through prohibition.

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42	4	NEL	E	U.S. EPA (and presumably Congress) was very aware of the problem that discharges of nonstormwater into the MS4 could create. However, rather than imposing on MS4 owners and operators (e.g., Permittees) numeric limits on the discharge of non-stormwater from the MS4, the federal scheme requires that the owners/operators of such non-stormwater discharges obtain NPDES permits to discharge into the MS4. Permits for such discharges must meet applicable technology-based and water-quality based requirements of the Clean Water Act. By comparison, as part of the MEP standard applicable to discharges of all pollutants from the MS4 (regardless of whether in stormwater or non-stormwater), the owner/operator of the MS4 must develop a program to prevent illicit discharges into the MS4.	The Regional Board acknowledges that USEPA (and presumably US Congress) was indeed aware of the problem that non-storm water discharges into the MS4 could create. The Regional Board contends that the federal regulations under 40 CFR 122.26(d) are clear, and any discharge of non-storm water that is a source of pollutants is required to be addressed as an illicit discharge. Such discharges are not subject to MEP. Please see response to Comment 39 and the Supplemental Fact Sheet for further discussion.
43	4	NEL	E	The Supplemental Fact Sheet suggests that 40 C.F.R. § 122.44(k) somehow requires the imposition in MS4 permits of NELs for the discharge of non-stormwater from the MS4. That is not correct. As discussed above, the only standard applicable to discharges from an MS4 is the Clean Water Act-mandated MEP standard. Section 122.44(k) simply provides that BMPs are to be included in NPDES permits generally when authorized under Clean Water Act section 402(p) or when NELs are infeasible. It says nothing about requiring NELs in MS4 permits.	The supplemental fact sheet has been clarified to explain that Copermittees are using Best Management Practices to attain the requirement of effective prohibition (zero discharge) for non-storm water illicit discharges into, through and from the MS4 system. Discharges of non-storm water from the MS4 are not subject to the MEP standard under 402(p), which is specifically for discharges of storm water from the MS4 (see response to Comment 39 and Supplemental Fact Sheet). Instead, discharges of non-storm water to waters of the United States are regulated under Section 402 of the Clean Water Act. Thus, federal regulations under 40 CFR 122.44(k) are applicable to non-storm water discharges. The state's water quality protection requirements within the Tentative Order are authorized by Federal Law, and are not unfunded mandates. Please see comments #155 and 165.

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44	4	NEL	E	3. Non-Stormwater Discharges Into The MS4 May Be Controlled By Separate NPDES Permits For The Discharger Of The Non-Stormwater. To the extent discharges of non-stormwater into the MS4 are permitted under separate NPDES permits, the Permittees likely have no control over the pollutants, or pollutant concentrations, discharged from the MS4. Depending on the terms of the non-stormwater NPDES permits, the discharge from the MS4 may or may not meet the proposed effluent limits in Section C of the Tentative Order. Permittees cannot be held strictly responsible for meeting numeric limits when they have no control over such discharges. For the above reasons, the County requests that Section C be removed from the next draft of the Tentative Order.	As owners and operators of the MS4 system, the Copermittees are required to prohibit non-storm water discharges, can prohibit exempted discharges and can prohibit discharges subject to a separate NPDES permit from entering their MS4 system. Copermittees have control over such discharges into their MS4 and cannot passively receive discharges from third parties (Federal Register 68766). Non-storm water point source discharges, including those into MS4s, are subject to Section 402 of the Clean Water Act. For example, Order R9-2008-0002, for discharges of groundwater into surface waters, requires water-quality based effluent limitations be met for discharges entering surface waters, including via the MS4 system, and requires the groundwater discharger to obtain permission from the owner and operator of the MS4 prior to discharge into, and thus from, the MS4 system. This Order (R9-2008-0002) applies to multiple non-storm water discharges that are currently exempted at 40 CFR 122.26(d). Discharges that are subject to a separate NPDES permit are required to discharge into the MS4 as if that MS4 is a surface water with associated water quality standards. Thus, the Copermittees resulting non-storm water discharge, from allowing the non-storm water discharge under a separate NPDES permit to enter the MS4, should result in a MS4 discharge at a level which will not cause excursions above effluent limitations in the Tentative Order. Those limitations are based upon the same water quality standards under CWA 402. The requirements of Section C.1 of the Tentative Order recognize that other, permitted sources could be discharging into the MS4. That is why the section is written to provide for an investigation of the source of the discharge to occur after an exceedances of an NEL is found. Please see response to Comment 39 and the Supplemental Fact Sheet for further discussion.
45	4	Retrofitting	F.3	T.O. Section F.3.d. As drafted, Permittees could meet the new retrofitting requirements of Section F.3.d and still be in violation of the Order if, among other things, they didn't also solve chronic flooding problems.	Comment noted, the language has been changed to "address chronic flooding problems". Although considered a goal of the retrofitting requirement, the draft Tentative Order does not set an enforceable timeframe to achieve this goal in Section F.3.d.

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46	4	Retrofitting	F.3.	Aside from the breadth of the new requirements, the County objects to the retrofit provision to the extent it would be impracticable and incredibly onerous (if possible at all) to implement and is not required by the Clean Water Act. To the extent such a provision is appropriate in an MS4 permit, it must be clear that Permittees may have no means of compelling private property owners to retrofit their existing developments.1 Proposed section F.3.d.(3), which says that Permittees "must" require select developments to implement retrofitting activities, and section F.3.d.(4), which talks about "requiring retrofitting on existing development," should be revised accordingly. And since Permittees cannot force owners to retrofit their developments, it makes little sense to require Permittees to identify existing developments that are sources of pollutants and then evaluate and rank them to prioritize retrofitting as sections F.3.d(1) and (2) would do. Without legal support for the retrofitting requirement and unless the requirement is substantially revised to reflect that it would be largely a voluntary program, the County requests that Section F.3.d be removed from the next draft of the Tentative Order.	The requirement to retrofit is consistent with the federal regulations and the Clean Water Act. The Clean Water Act in section 402(p)(3)(B)(ii-iii) states "Permits for discharges from municipal storm sewers shall require controls to reduce the discharge of pollutants [in storm water] to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants." Retrofitting existing development is an appropriate management practice and control technique that includes design and engineering methods. Since this provision seeks to reduce impacts from storm flows, the permiit language has been modified to reflect the maximum extent practicable standard. The Regional Board realizes that Copermittees cannot force owners to retrofit their developments, hence the inclusion of section F.3.d.(4). By identifying these sites, the Copermittees are prepared to reach out to the landowners and prioritize their program for education, demonstration projects, public and private partnerships, and subsidized retrofitting projects. Also by identifying these privately held areas for retrofitting, the Copermittees are prepared in the event that the landowner decides to retrofit, or to reach out to the new landowner in the event that the property changes ownership. The key word in Section F.3.d.3 is the word "select." The Copermittees must only consider a retrofit project in that years work plan after conducting the evaluation and rankings of Section F.3.d.4. If a retrofit project ranks as one of the top work plan priorities in the process identified in Sections G.3 and J.4 the Copermittees must implement the selected retrofit project. Section F.3.d.3 is revised to reflect this intent.

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47	4	Urban Runoff	General	Without explanation, the Tentative Order universally deletes the word “urban” from everywhere it formerly modified the word “runoff” (and sometimes the term “Stormwater”). Thus Jurisdictional Urban Runoff Management Plans (JURMPs) are now simply Jurisdictional Runoff Management Plans (JRMPs). The Standard Urban Storm Water Mitigation Plan or SUSMP is now just the Standard Stormwater Mitigation Plan or SSMP. Staff has indicated that this universal change was intended to clarify that Permittees are responsible not just for urban runoff that is discharged from their MS4s, but all runoff. Even if “urban runoff” is not defined in the Clean Water Act or federal stormwater regulations, it is clear that it is urban runoff that is the problem the federal regulations seek to address. Stormwater runoff from natural, undeveloped land generally does not create water quality problems. Regulation of stormwater has always focused on urban runoff. After the 1972 amendments to the Federal Water Pollution Control Act (aka the Clean Water Act) began regulating point source discharges of industrial process wastewater and municipal sewage, “it became evident that more diffuse sources (occurring over a wide area) of water pollution, such as agricultural and urban runoff were also major causes of water quality problems.” 55 Fed. Reg. at p. 47991. Because agricultural stormwater discharges are statutorily exempt from the NPDES program, the focus turned to urban runoff. Id. “[I]t is the intent of EPA that [stormwater] management plans and other components of the programs focus on the urbanized and developing areas of the county.” Id. at p. 48041.	The supplemental fact sheet explains the rationale behind the removal of the term "urban runoff." Among other reasons, this is consistent with federal regulations (40 CFR 122.26). The Copermittees are responsible for all discharges from their MS4 whether from an urban, suburban, or semi-rural land use. By owning and operating the MS4 system, the Copermittee is responsible for the discharge from the MS4 and cannot passively receive discharges from third parties (Federal Register 68766). We agree that storm water runoff from natural, undeveloped land generally does not create water quality problems. The draft Tentative Order does regulate discharges from the Copermittee's MS4 system, as such, the Copermittee's cannot simply blame the nature of their discharge on upstream contributions outside of their control; again, the Copermittees cannot passively receive discharges from third parties. The Copermittees are required to address storm water discharges from third parties to the MEP. The term "urban runoff" was well known to the authors of the Clean Water Act and the federal storm water regulations as evidenced in the discussion of the final rule for the phase 1 regulations (Federal Register Vol. 55, No. 222, November 16, 1990) and the discussion of the final rule for the phase 2 regulations (Fed. Reg. Vol. 63, No. 235, December 8, 1999). Yet, the regulatory authors deliberately chose not to use the term "urban runoff" in the codified Phase 1 regulations (40 CFR 122.26). The term "urban" has been legally defined by the US Census Bureau as an area with a population density of at least 1,000 people per square mile (55 FR 42592, October 22, 1990). The phase 2 regulations for MS4 discharges use this definition of "urban" in determining permittees in urbanized areas. Contrary to phase 2, the phase 1 MS4 discharge regulations require NPDES permits for all MS4 discharges in the defined regulatory areas, including Orange County. The discussion in the federal register makes clear that the intent is to regulate all MS4 discharges and not just MS4 discharges from urban areas. Although, the Commenter quoted the federal register as saying "[I]t is the intent of EPA that [storm water] management plans and other components of the programs focus on the urbanized and developing areas of the county." The full text of the Federal Register states, "While permits issued for these municipal systems will cover municipal systems discharges in unincorporated portions of the county, it is the intent of EPA that management plans and other components of the programs focus on the urbanized and developing areas of the county." (Fed. Reg. Vol. 55, No. 222, November 16, 1990, 48041) Although the Tentative Order does cover all MS4 discharges, including discharges not in an urban area, the Regional Board expects the Copermittees to focus on the urbanized and developing areas within their

jurisdiction. This focus will be a natural outgrowth of their program, because the urbanized areas will have more population and development that will require more education, BMPs, and complaint response.

The federal register goes on in several places clarifying that the intent of the regulations is to cover all MS4 discharges within the permitted area. "[The regulations] will result in discharges from separate storm sewer systems serving State highways and other highways through storm sewers … in unincorporated portions of specified counties being included as part of the large or medium municipal separate storm sewer systems, since all municipal separate storm sewers within the boundaries of these political entities are included." (55 FR. 48041) and "The definition [of MS4] provides that all systems within a geographical area including highways and flood controls will be covered, thereby avoiding fragmented and ill-coordinated programs." (ibid 48043)

The removal of the term "urban runoff" is consistent with the code of federal regulations regarding storm water. In addition, removing the term "urban runoff" is consistent with the Los Angeles Regional Board's recently adopted MS4 permit for Ventura County and consistent with the State Board's MS4 permit for the California Department of Transportation.

Furthermore, this change is supported by the USEPA (please see Comment No. 306).

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48	4	Urban Runoff	General	This emphasis on urban runoff is reflected in the foreword to the 1982 Final Report of EPA's Nationwide Urban Runoff Program (NURP): The possible deleterious water quality effects of nonpoint sources in general, and urban runoff in particular, were recognized by the Water Pollution Control Act Amendments of 1972. Because of uncertainties about the true significance of urban runoff as a contributor to receiving water quality problems, Congress made treatment of separate stormwater discharges ineligible for Federal funding when it enacted the Clean Water Act in 1977. To obtain information that would help resolve these uncertainties, the Agency established the Nationwide Urban Runoff Program (NURP) in 1978. This five year program was designed to examine such issues as: • The quality characteristics of urban runoff, and similarities or differences at different urban locations; • The extent to which urban runoff is a significant contributor to water quality problems across the nation; and • The performance characteristics and the overall effectiveness and utility of management practices for the control of pollutant loads from urban runoff. NURP Report at p. iii. According to the NURP Report, as early as 1964 the federal government had become concerned about identified pollutants in urban runoff and concluded that there may be significant water quality problems associated with stormwater runoff. NURP Report at p. 2-1.	Please see further discussion on comment 47.
49	4	Urban Runoff	F.3	The focus on urban runoff also is reflected in U.S. EPA's website where, on its NPDES Stormwater FAQ page, U.S. EPA states that the "NPDES stormwater permit regulations, promulgated by EPA, cover the following classes of stormwater discharges on a nationwide basis: • Operators of MS4s located in "urbanized areas" as delineated by the Bureau of the Census, • Industrial facilities in any of the 11 categories that discharge to an MS4 or to waters of the United States; all categories of industrial activity (except construction) may certify to a condition of "no exposure" if their industrial materials and operations are not exposed to stormwater, thus eliminating the need to obtain stormwater permit coverage, • Operators of construction activity that disturbs 1 or more acres of land; construction sites less than 1 acre are covered if part of a larger plan of development. See U.S. EPA's web page at http://cfpub.epa.gov/npdes/faqs.cfm?program_id=6#302 (emphasis added).	The USEPA website mentioning "urbanized areas" is referencing the text of the Phase 2 MS4 regulatory language in CFR Section 122.32: "As an operator of a small MS4, am I regulated under the NPDES storm water program? (a) … you are regulated if you operate a small MS4, … , and (1) Your small MS4 is located in an urbanized area …" The draft Tentative Order is a phase 1 permit therefore the referenced language does not apply to the draft Tentative Order. Instead, the phase 1 regulations require permits for all MS4 discharges within the designated area of Orange County." Please see response to Comment No. 47.

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50	4	Urban Runoff	F.3	Finally, the urban runoff focus also is reflected in the San Diego Board's own Basin Plan which discusses the problem of stormwater runoff in terms of urbanization and cites to the NURP report. See Basin Plan at pp. 4-78 &79. Because the focus of stormwater regulation is urban runoff and because the Tentative Order provides no compelling reason to remove the term "urban" from the permit (e.g., improved water quality), the County requests that the term be restored in the next draft of the Tentative Order.	The term "urban runoff" in the Basin Plan is used in a general sense as previously defined in MS4 permits, as being all flows in a storm water conveyance system and consists of the following components: (1) storm water (wet weather flows) and (2) non-storm water illicit discharges (dry weather flows). In this definition of the term, it is not used to limit or distinguish between urban and non-urban MS4 systems; but rather only as a collective term regarding the discharge from such MS4 systems whether they be in a urban or non-urban area. The term is not used in a strict regulatory capacity, as it would convey if used in the draft Tentative Order or the Code of Federal Regulations. Please see response to Comment No. 47 for more discussion.
51	4	FETD	F.3.	The previous drafts of the Tentative Order proposed to regulate so-called FETDs – Facilities that Extract, Treat and Discharge to waters of the U.S. The current draft of the Tentative Order mentions these so-called FETDs but does not regulate them.2 To the extent such facilities discharge non-stormwater to the MS4, the County believes it is appropriate to regulate them as a category of non-stormwater discharges in Section B. of the Order. Under Section B, to the extent the discharge from a FETD is not a significant source of pollutants to waters of the U.S., Permittees would not be required to effectively prohibit the discharge. The following language, from the Santa Ana Regional Board's current draft North County MS4 permit, could be added as Section B.5 of the Tentative Order: 5. Permittees shall effectively prohibit discharges from FETDs to the MS4 unless the following conditions are met: a. The discharge must not contain pollutants added by the treatment process or in greater concentration than in the influent; b. The discharge must not cause or contribute to downstream erosion; c. The discharge must be in compliance with Section 404 of the Clean Water Act; and d. Permittees conduct monitoring of the FETD discharge in accordance with the Monitoring and Reporting Program in Attachment E. The County requests the above language be included in the next draft of the Tentative Order.	The Regional Board disagrees with the comment, which states that FETDs are not a source of pollutants and thus should be included as an exempted non-storm water discharge under Section B of the Order. Section B of the Order requires that Copermittees prohibit discharges into the MS4, unless the discharge is specifically exempted (and not a source of pollutants) or subject to a separate NPDES permit. FETDs extract from waters of the U.S., treat the extracted water and then return the treated water to waters of the U.S. The activities from FETDs do not involve discharges into the MS4 system and thus are not subject to exempted categories. FETDs are further discussed in the updated Supplemental Fact Sheet. The requirements suggested by the County are almost exactly the same as those contained in the previous version of this permit (no. R9-2008-0001). It was those very same provisions that the County argued were 'prohibitive' at the Feb 2008 meeting. Further, in written comments submitted on Jan 24, 2008, the County states that "...these requirements are not supported by law and will impose unnecessary burdens…" and that …"there is no basis for regulating FETDs under the federal NPDES permit program…" The Counties Jan 08 letter again requested that "… the FETD requirements be deleted." In partial response to these types of comments, the Regional Board Executive Officer informed the Board that FETDs be removed from the tentative Order and regulated either individually or in a separate general permit specific to FETDs. Discharges from FETDs must meet water quality standards, including numeric water objectives for applicable beneficial uses in the receiving waters. The Regional Board has consistenly stated that regulating these discharging facilites as BMPs is an interim measure and that eventually a non-MS4 NPDES permit will be needed. Any entity that withdraws water from a stream has total responsibility for the water's quality upon discharge to receiving waters. If a FETD operator wants to discharge to a stream, that water, like any other water, needs to be treated to a quality that supports all the stream's beneficial uses and will not cause the Basin Plan objectives for surface waters to be exceeded.

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52	4	Overirrigation	B	Finding C.14 of the Tentative Order says that the Permittees have identified landscape irrigation, irrigation water, and lawn water as sources of pollutants to waters of the U.S. These three categories are exempt non-stormwater discharges under the current permit. Section B.2 of the Tentative Order removes these three categories from the list of exempt non-stormwater discharge categories. Removing the three categories would be inconsistent with the federal stormwater regulations. The federal stormwater regulations include a list of categories of "exempt" non-stormwater discharges or flows. 40 C.F.R. § 122.26(d)(2)(iv)(B)(1). Permittees' illicit discharge and illegal disposal program must address these discharges or flows when they have been identified by Permittees as sources of pollutants to waters of the U.S. Id. The preamble to the federal regulations make clear that the illicit discharge program is meant to implement the Clean Water Act's mandate that stormwater permits include a requirement to effectively prohibit nonstormwater discharges to the MS4. 55 Fed. Reg. at pp. 48037 and 48055. The preamble also makes clear that Permittees' illicit discharge program need not prevent discharges of the "exempt" categories into the MS4 "unless such discharges are specifically identified on a case-by-case basis as needing to be addressed." 55 Fed. Reg. at 47995. In other words, individual discharges within exempt categories must be addressed when the particular discharge is a source of pollutants to waters of the U.S. The federal regulations do not allow for removing entire categories of exempt non-stormwater discharges. U.S. EPA confirmed this case-by-case approach in its Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems (November 1992) ("Part 2 Guidance Manual") where it states: If an applicant knows . . . that landscape irrigation water from a particular site flows through and picks up pesticides or excess nutrients from fertilizer applications, there may be a reasonable potential for a storm water discharge to result in a water quality impact. In such an event, the applicant should contact the NPDES permitting authority to request that the authority order the discharger to the MS4 to obtain a separate NPDES permit (or in this case, the discharge could be controlled through the storm water management program of the MS4.) Part 2 Guidance Manual at p. 6-33 (emphasis added). Accordingly, the County requests that the landscape irrigation, irrigation water, and lawn water non-stormwater categories be restored in the next draft of the Tentative Order.	The Regional Board disagrees with the comment that: "The federal regulations do not allow for removing entire categories of exempt non-stormwater discharges." The Federal Register (as referenced in the above comment), in discussion of exempted categories of non-storm discharges states: "in general, municipalities will not be held responsible for prohibiting some specific components of discharges or flows listed below through their municipal separate storm sewer system, even though such components may be considered non-storm water discharges, unless such discharges are specifically identified on a case-by-case basis as needing to be addressed." (55 Fed Reg 47995). The Regional Board maintains that 40 CFR 122.26(d)(2)(iv)(B)(1) and the Federal Register are clear in discussion of "components" and "categories" of non-storm water discharges, and that the exempted components and categories of non-storm water discharges are required to be addressed through prohibition on a case-by-case basis, not on a discharger by discharger basis. The Federal Register further clarifies that once a category of exempted non-storm water discharges has been identified and prohibited, "operators of such non-storm water discharges need to obtain NPDES permits for these discharges under the present framework of the CWA..." as "such illicit discharges are not authorized under the CWA" (55 Fed Reg 47995, see response to Comment 39). This is consistent with existing NPDES permits applicable to categories of discharges. Furthermore, in addition to the regulations under 40 CFR 122.26(d), the Federal Register (55 Fed Reg 48037) clearly states that "the Director may include permit conditions that either require municipalities to prohibit or otherwise control any of these types of discharges where appropriate." The state's water quality protection requirements within the Tentative Order are authorized by Federal Law, and are not unfunded mandates. Please see comments #155 and 165.

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53	4	Finding	Finding	“Runoff from an MS4” is inaccurate and likely confusing. It would be more accurate to describe runoff into an MS4 and a discharge from the MS4. The permit should track the language of the Clean Water Act, which requires that MS4 permits include requirements to effectively prohibit non-stormwater discharges into the MS4 and to control the discharge of pollutants from the MS4 to the maximum extent practicable.	The Regional Board feels the use of runoff is not inaccurrate, as the tentative Order defines runoff as: "All flows in a storm water conveyance system and consists of the following components: (1) storm water (wet weather flows) and (2) non-storm water illicit discharges (dry weather flows)." The Tentative Order does track the Clean Water Act, as Section B requires the effective prohibition of "non-storm water discharges." Please see response to Comment No. 39 regarding storm water and non-storm water discharges from the MS4.
54	4	Finding	Finding	This finding implies that discharges from the MS4 must strictly comply with water quality standards. That is not correct. The Clean Water Act requires that discharges meet the MEP standard. See, e.g., Defenders of Wildlife v. Browner, supra, 191 F.3d at pp. 1166-67.	On the issue of water quality standards, USEPA, the State Board, and the Regional Board have consistently maintained that MS4s must indeed comply with water quality standards. Those water quality standards may be met with numeric effluent limits or by narrative effluent limits. USEPA guidance on the matter, in fact requires that MS4 discharges comply with water quality standards. In a letter to State Board dated January 21, 1998, the USEPA clarified that "EPA's NPDES permitting regulations include 40 CFR 122.44(d), which implements CWA Section 301(b)(1)(C). Section 122.44(d)(1)(i) provides that "[L]imitations must control all pollutants or pollutant parameters…which the Director determines are or may be discharged at a level which will cause, have the reasonable potential to cause or contribute to an excursion above any State Water Quality standard…" This requirement clearly applies to all excursions above WQS." Please see response to Comment No. 39 regarding non-storm water discharges. While implementation of the iterative BMP process is a means to achieve compliance with water quality objectives for storm water discharges, it does not shield the discharger from enforcement actions for continued non-compliance with water quality standards. The commenter is correct in reading that the Clean Water Act does not explicitly require discharges to meet the MEP standard. The decision in Defenders of Wildlife v. Browner, however, find that the Clean Water Act gives the administrator "the discretion to determine what pollution controls are appropriate. Under that discretionary provision, the EPA has the authority to determine that ensuring strict compliance with state water-quality standards is necessary to control pollutants." The state's water quality protection requirements within the Tentative Order are authorized by Federal Law, are necessary to meet the federal MEP standard, and are not unfunded mandates. Please see comments #155 and 165.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
55	4	Finding	Findings	The inaccurate language of this finding, imposing different standards on wet weather and dry weather discharges, continues throughout the permit. The Clean Water Act does not require Permittees to reduce the discharge of pollutants from stormwater to the MEP. Rather, the requirement is to reduce the discharge of pollutants from the MS4 to the MEP (regardless of whether the discharge is of wet weather or dry weather flows). Similarly, the federal requirement is to eliminate illicit discharges into the MS4 (which if accomplished would largely eliminate dry weather flows from the MS4), not to eliminate pollutants in dry weather flows.	Please see response to Comment 39.
56	4	Finding	Finding	Under the Clean Water Act, discharges from the MS4 are required to meet the MEP standard. To the extent the permit, when read with the Basin Plan, requires discharges to meet receiving water limitations, it must be a state law requirement. This finding should be clarified accordingly.	Please see response to Comment 39 for clarification regarding applicability of MEP to non-storm water discharges. Finding E.13 from the March 2009 Tentative Order has been removed, as it is redundant with Finding C.2, which states: "Municipal storm water and non-storm water discharges are likely to contain pollutants that cause or threaten to cause a violation of the water quality standards, as outlined in the Regional Board's Water Quality Control Plan for the San Diego Basin (Basin Plan). Storm water and non-storm water discharges are subject to the conditions and requirements established in the San Diego Basin Plan for point source discharges. These water quality standards must be complied with at all times, irrespective of the source and manner of discharge."
57	4	prohibition	A.	Finding A.3 says the permit is consistent with the State Board's precedential Order 99-05. However, the language in section A.3.b of the Order (which requires Permittees to continue the iterative process unless directed otherwise by the Executive Officer) is not consistent with Order 99-05 (which says Permittees do not have to repeat the process unless directed otherwise by the E.O.). Accordingly, Section A.3.b should be revised consistent with State Board Order 99- 05.	The Tentative Order has been modified to clarify that through adoption of this Tentative Order, the Executive Officer issues a standing order that the Copermittees must repeat the process until directed otherwise. The language has been modified to conform with the rest of the permit.
58	4	ASBS	A	The Ocean Plan prohibition of discharges to ASBS is controversial. Moreover, it is a state law, not federal requirement. Unless the Board can justify it in a MS4 permit, it should be deleted.	The Regional Board has removed ASBS/SWQPA language from the tentative Order. Please note ASBS/SWQPAs, like all water bodies, remain subject to receiving water limitations and discharge prohibitions under the Tentative Order.

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59	4	TMDL	I	The Clean Water Act does not require that an MS4 permit include numeric limits derived from waste load allocations (WLAs) in adopted TMDLs. To the extent the Tentative Order will implement such WLAs, compliance should be through the accepted iterative process for complying with water quality standards.	This Order addresses TMDLs through Water Quality Based Effluent Limits (WQBELs) that must be consistent with the assumptions and requirements of the WLA [40 CFR 122.44(d)(1)(vii)(B)] . Federal guidance states that when adequate information exists storm water permits are to incorporate numeric water quality based effluent limitations (USEPA, Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits, 61 FR 43761, August 26, 1996). In most cases, the numeric target(s) of a TMDL are a component of the WQBELs. When the numeric target is based on one or more numeric WQOs, the numeric WQOs and underlying assumptions and requirements will be used in the WQBELs as numeric effluent limitations by the end of the TMDL compliance schedule, unless additional information is required. When the numeric target interprets one or more narrative WQOs, the numeric target may assess the efficacy and progress of the BMPs in meeting the WLAs and restoring the Beneficial Uses by the end of the TMDL compliance schedule. In either case, the dischargers will have to monitor and implement BMPs using an iterative process to meet the MS4 WLA, restore impaired beneficial uses, and comply with Water Quality Standards.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
60	4	General	General	The Response to Comments issued by the Regional Board dated July 6, 2007, contends that the Drainage Area Management Plan (DAMP) is an unnecessary document and "serves as a collection of model program components from which the Permittees have chosen to base their own program components." The County takes exception to this view of the DAMP. The DAMP and Local Implementation Plans (LIPs) are fundamental and necessary elements of the MS4 program since they serve as the primary policy and guidance documents for the program and describe the methods and procedures that will be implemented to reduce the discharge of pollutants to the maximum extent practicable and achieve compliance with the MS4 permit performance standards. Indeed, the CWA regulations speak directly to the necessity and importance of the stormwater management plan in the permitting process. The management program "shall include a comprehensive planning process…..to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate……Proposed management program shall describe priorities for implementing controls." 40 CFR 122.16(d)(2)(iv). The necessary detail and prioritization of management efforts must remain at the local level and be described within the DAMP and not in the permit. The significance of the DAMP should therefore be recognized rather than dismissed.	The Regional Board stands by the previous response to comments document and continues to hold the view that the DAMP is a document not required by the Permit. Although it may have some role in guiding the Copermittees in their development of their Local Implementation Plan, the DAMP itself is not an enforceable component of the permit. The Regional Board's legal authority is with issuing requirements to the discharger; for this permit, it is the Copermittee. If the DAMP erroneously leads a Copermittee into a violation of the Tentative Order's requirements, the Regional Board would issue enforcement measures to that individual Copermittee and not to the County. While the individual Copermittees may elect to incorporate certain elements of the DAMP into their local programs, certain requirements in the Tentative Order must be specific enough to ensure that the local programs will reduce discharges of storm water pollutants to the maximum extent practicable (MEP) and effectively prohibit non-storm water discharges (unless exempted or covered by a separate permit). We agree that Local Implementation Plans are fundamental and necessary elements of the MS4 program since they serve as the primary policy and guidance documents for the program and describe the methods and procedures that will be implemented to reduce pollutants in storm water discharges to the maximum extent practicable and to prohibit non-storm water discharges. The commenter misinterprets the Clean Water Act regulations. Where the CWA regulations speak to the necessity and importance of the storm water management plan, the regulations do so in regards to the Jurisdictional Runoff Management Plan and not to the DAMP. We disagree with the commenter's importance placed on the DAMP rather than the JRMPs. Each Copermittee's JRMP allows the individual Copermittee to form and implement their own storm water program as they need to for their unique City. The JRMP allows the Copermittee the freedom to improve water quality without needing to adhere to an overarching mandated document that is not required by the Permit and may not reflect the individual Copermitttee's unique interests and priorities.

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61	4	General	General	It is noted that the current draft of the Tentative Order comprises 91 pages compared to the 54 pages of the 2008 Tentative Order. The expanding document connotes an increasingly top down approach that potentially reduces the ability of the Permittees to adaptively manage their programs to meet the MEP standard. This approach seems contrary to the discussion of MEP in the Fact Sheet, which stresses the dynamic aspect of the MEP standard and concludes with the statement that The Order provides a minimum framework to guide the Permittees in meeting the MEP standard. The increasingly prescriptive and detailed permits provisions erode the flexibility and local responsibility of Permittees for continued development and improvement of the MS4 program based upon their extensive and collective experience in managing the program. This shift runs counter to the purpose and intent of the federal stormwater management program as set forth in the federal CWA regulations and USEPA guidance. Notwithstanding these statements, the County supports the need to establish performance standards or metrics within the DAMP that will be used to support our program and direct limited resources effectively.	The commenter provides misleading and inaccurate information mis-characterizes the Tentative Order. The 2008 Tentative Order had 81 pages of text not the 54 pages as claimed by the commenter. Also, the draft Tentative Order is in underline strikeout format which inherently lengthens the document. To base the number of pages as defining the MEP standard is a gross over simplification. Regardless of the number of pages, the draft Tentative Order does provide the minimum framework in meeting the MEP standard. As the body of knowledge in storm water permitting and science progresses, MS4 permits naturally become longer and more complex. The preamble of the Federal NPDES storm water regulations places discretion for permit requirements with the permit writer when it states: "The purpose of the two-part application process is to develop information in a reasonable time frame that would build successful decisions with regard to developing permit conditions" (55 FR 48044) and “Proposed management programs will […] be evaluated in the development of permit conditions” (55 FR 48052). This discretion is further reinforced in the Federal Register by USEPA in its “Interim Permitting Approach for Water quality-Based Effluent Limitations in Storm Water Permit” (61 FR 43761), which states: “In cases where adequate information exists to develop more specific conditions or limitations to meet water quality standards, these conditions or limitations are to be incorporated into storm water permits, as necessary and appropriate.” More recent guidance from the USEPA Environmental Appeals Board also supports permit writer discretion, stating: “Congress therefore created the ‘maximum extent practicable’ (‘MEP’) standard […] in an effort to allow permit writers the flexibility necessary to tailor permits to the site specific nature of the MS4 discharges […] Included in that flexibility was the capacity to direct permit requirements at the sources of pollution in the MS4 rather than solely at the end of pipe.” (NPDES Appeal No. 00-18). The Regional Board finds it disconcerting that the commenter characterizes the evolution of the regulatory process as being an "increasingly top down approach.” The very nature of the NPDES permitting process (e.g. 5 year reissuance, BAT requirements, TBELS, etc.) requires that NPDES permits be updated over time to reflect updated standards, including those relating to the MEP process for storm water discharges. This draft Tentative Order is the first MS4 permit in Southern Orange County to include numeric effluent limitations for dry weather non-storm water discharges and municipal action levels for wet weather discharges. Following an effectiveness evaluation after the next permit cycle, the use of water-quality based

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					performance criteria could possibly reduce the level of prescriptiveness needed in other permit areas. In addition, as Total Maximum Daily Loads are developed and implemented in the MS4 permits, the level of prescriptiveness will increase. More prescriptive requirements provide more clarity to the discharger on actions and standards needed to meet compliance.

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62	4	General	General	The Tentative Order persists in the inappropriate reference to data that exceed Water Quality Objectives (WQOs) as violations. In several instances the language in the Tentative Order has been changed from the prior Order (R9-2002-0001) to replace the term "exceedance" with the term "violation". For example, "exceedances of water quality objectives" has been replaced with "violations of water quality objectives" (emphasis added). In some cases, the change is inappropriate. The Tentative Order should use the term "exceedance" where it refers to a comparison of data with criteria such as water quality objectives that are relevant to evaluation of the data. The Tentative Order should use the term "violation" when it is referring to a failure to comply with a prohibition or other requirement of the Tentative Order. Careful use of these terms is important, because an "exceedance" does not equate with a "violation." For example, while it may be useful to compare water quality monitoring data to receiving water quality objectives and use identified "exceedances" to target potential problems areas and pollutants, it is inappropriate to make this same comparison and determine that there is a "violation". Indeed, the use of the term "violation" to refer to any exceedance detected would, in effect, be using the water quality objectives or other relevant reference criteria as de-facto numeric effluent limitations. The County again requests modification of the Tentative Order language to use the word "exceedance" instead of "violation" when referring to the comparison of water quality monitoring data to reference criteria. The locations in the permit where these changes should be made are: • Page 5, Finding C.9. • Page 6, Finding D.1.b. • Page 10, Finding D.3.d. • Page 12, Finding E.1. • Page 17, A.3. The term "violation" in this section is inconsistent with SWRCB Order WQ 99-05 and needs to be modified to "exceedance". The iterative language in the receiving water limitations speaks to exceedances of water quality standards, not violations. Urban runoff data cannot in itself indicate a violation of water quality standard. A water quality standard consists of two elements: the beneficial use that we're trying to protect and the water quality objective established to protect that use. The exceedance of a water quality objective does not necessarily result in a violation of a water quality standard. Runoff data can be described as exceeding water quality objectives, but the assessment of whether or not water quality standards are violated is based upon samples and data from the receiving water and impacts or lack of impacts on beneficial uses. The County further notes that similar MS4 permits draw distinctions between assessing urban runoff monitoring results and describing the receiving water. These permits include the	This comment is one that is continuous with previous objections to the use of the term "violation" in Revised Tentative Orders R9-2008-001 and R9-2007-002, when referring to instances when water quality objectives are exceeded. The commenter prefers the term "exceedance," as has been used in previous Regional Board documents. This comment was addressed via written response for the 2007 and 2008 tentative Orders. The word "violation" is appropriately used in the referenced Findings as a violation is an exceedance of applicable Basin Plan water quality objectives (and other applicable criteria), and such violations have persistently been documented with sufficient, reliable data for a number of storm water and non-storm water related pollutants in water bodies in Orange County. The comment incorrectly implies that the Findings, which reference violations of water quality objectives, are tantamount to enacting numeric effluent limits (see response to Comment 33 and 39 regarding numeric effluent limits).

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				areawide permits issued by: the San Diego Regional Board to the MS4s draining the watersheds of San Diego County (Order No. R9-2007-0001, NPDES No. CAS0108758, January 24, 2007); and Riverside County (Order No. R9-2004-0001, NPDES No. CAS0108766, July 14, 2004); and those issued by the Santa Ana Regional Board to the MS4s draining the watersheds of San Bernardino County (Order No. R8-2002-0012, NPDES No. CAS618036, April 26, 2002); Riverside (Order No. R8-2002-0011 NPDES NO. CAS 618033, October 25, 2002); and Orange County (Order No. R8-2002-0010 NPDES No. CAS618030, January 18, 2002), and the May 1, 2009 Draft Tentative Order R8-2009-0030 NPDES No. CAS618030). In these permits the monitoring data is described as, or actions are predicated upon, exceedances of water quality standards while prohibitions regarding receiving water tend to use the terminology 'shall not cause or contribute to a violation of water quality standards'. Although the latter is not universal and many permits use the language 'shall not cause or contribute to an exceedance of water quality standards'.	
63	4	Finding	Finding	Finding C.2 seems to be establishing the fact that MS4s are responsible for all sources of pollutant and manner of discharges (see last sentence). The County would submit that municipalities are limited in their ability to control all sources of pollutants (e.g. air pollutants being transported to the receiving waters from the MS4). We recommend that the last sentence be deleted.	Finding C.2 has been modified to clarify that discharges from the MS4 must comply with water quality standards, no matter the source or manner of that discharge. Please see response to Comment 39 regarding non-storm water discharges and response to Comment 54 regarding storm water discharges.
64	4	Monitoring	Findings	Finding C.9. states, in part, that the water quality monitoring data collected to date indicates that there are violationss of Basin Plan objectives for a number of pollutants and that the data indicates that runoff discharges are the leading cause of impairment. While the receiving water quality may exceed Basin Plan objectives for constituents identified by the municipalities as pollutants of concern, there is inadequate data to make such a definitive statement that the runoff discharges are the leading cause of impairment in Orange County. This statement does not take into account the other sources within the watershed or the uncertainty within many of the studies that have been conducted. Accordingly, the last sentence of that paragraph should be modified to read, "In sum, the above findings indicate that urban runoff discharges may be causing or contributing to water quality impairments, and warrant special attention."	Finding C.9 (below) does state that runoff discharges are the leading cause of impairment. This is based upon monitoring data submitted to date, as well as sources of impairment identified in 303(d) listings. The commenter does not provide adequate evidence of other discharges, permitted or otherwise, to support the assertion. Furthermore, water quality data does show that discharges of effluent from the MS4 exceed applicable water quality criteria. Finding C.9: The Copermittees' water quality monitoring data submitted to date documents persistent violations of Basin Plan water quality objectives for various runoff related pollutants (fecal coliform bacteria, total suspended solids, turbidity, metals, etc.) at various watershed monitoring stations. Persistent toxicity has also been observed at some watershed monitoring stations. In addition, bioassessment data indicates that the majority of urbanized receiving waters have Poor to Very Poor Index of Biotic Integrity ratings. In sum, the above findings indicate that runoff discharges are causing or contributing to water quality impairments, and are a leading cause of such impairments in Orange County.

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65	4	General	Finding	Finding D.1.c. states that the Tentative Order "contains new or modified requirements that are necessary to improve the Permittees' efforts to reduce the discharge of pollutants to the MEP and achieve water quality standards". The Finding further states some of these new or modified requirements "address program deficiencies that have been noted in audits, report reviews, and other Regional Board compliance assessment activities." In fact, in many cases the new or modified requirements do not have adequate findings of fact and technical justification. In many instances the Fact Sheet not only provides little or no justification of the need for the new requirement, it also does not identify the "program deficiency" that warrants the modification. In many cases the Fact Sheet also does not consider the thorough program analysis that the Permittees conducted as a part of their preparation of the ROWD and the deficiencies and program modifications that Permittees themselves identified as necessary for the program. The Permit Provisions comments in the next section of these comments identify many of the areas where new or modified provisions of the Tentative Order lack factual or technical support in the Fact Sheet.	The Tentative Order's fact sheet and supplemental fact sheet provides all the necessary information regarding program deficiencies and technical justification. The comment is vague and without the necessary detail describing the specific Tentative Order's sections that the commenter believes needs more justification. Where the commenter has sought more information through other sections of their comment letter, the Regional Board has responded accordingly.
66	4	SUSMP	Finding	Finding D.2.b. seems to be making the case that treatment control BMPs are ineffective and should not be used. This Finding overstates or incorrectly states the constraints of treatment control BMPs. It is fair to say that without a performance standard for treatment control BMPs then treatment control BMPs suffer from the constraints noted. However, treatment control BMPs can be effective in removing pollutants for a wide range of storms and, when combined with source control BMPs, provide a comprehensive pollutant reduction strategy. This finding should be significantly modified to support the statement that "using a combination of onsite source control and site design BMPs augmented with treatment control BMPS… is important."	The Finding simply points out the difference between on-site source control / site design BMPs and end-of-pipe BMPs. The finding describes the importance of on-site source control and site design BMPs by pointing out potential detriments to end-of-pipe BMPs. While end-of-pipe BMPs are effective at reducing pollutants, they nevertheless have some drawbacks and are not preferable to on-site source control and site design BMPs.
67	4	Existing Development	Finding	Finding D.2.e. states that the one-acre threshold for heavy industrial sites is appropriate "since it is consistent with the requirements in the Phase II NPDES stormwater regulations that apply to small municipalities". The Phase II stormwater regulations do not apply to the Phase I communities. 40 CFR 122.32. The reference to Phase II NPDES regulations and, as discussed below, the corresponding change in the permit provisions should be deleted.	The language in Finding D.2.e does not imply that Phase II storm water regulations apply to Phase I municipalities. The language simply states that smaller municipalities are required to apply the one-acre threshold, thus requiring the same of a larger (Phase I) municipality is reasonable and appropriate. Furthermore, the threshold has been lowered to 10,000 square feet in consistency with other phase 1 MS4 permits throughout California.

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68	4	Hydromod	Finding	Finding D.2.g. identifies that increased volume, frequency, and discharge duration of storm runoff from developed areas has the potential to greatly accelerate downstream erosion, impair stream habitat in natural drainages, and negatively impact beneficial uses. However, it does not acknowledge that hardened or stabilized channels will likely not be susceptible to hydromodification impacts. It is recommended that the Finding be modified as follows: The increased volume, velocity, frequency and discharge duration of storm water runoff from developed areas has the potential to accelerate downstream erosion in natural drainages and unimproved channels, impair stream habitat in natural drainages, and negatively impact beneficial uses. Development and urbanization increase pollutant loads in stormwater and volume of stormwater runoff. Impervious surfaces can neither absorb water nor remove pollutants and thus lose the purification and infiltration provided by naturally vegetated soil. Some channels that are either engineered and maintained, or hardened may not be susceptible to the impacts of hydromodification.	The Regional Board will include the final language suggested by the commenter. In addition, the following sentence will also be added as the last sentence of the paragraph: "Nevertheless, it is important to include hydromodification measures upstream of hardened channels in the event that the hardened channels are restored to their natural state, thereby restoring the chemical, physical, and biological integrity and Beneficial Uses of local creeks." The Regional Board disagrees with the commenter's suggestion to modify the text to address natural drainages as "unimproved channels." This implies that hardened channels are "improved" over natural drainages. In terms of water quality and Beneficial Uses of surface waters, such an interpretation is highly inaccurate. According to the Copermittees' 2006-2007 monitoring data, urban streams have low Index of Biotic Integrity (IBI) scores. In the absence of water chemistry and toxicity impacts, these low scores were attributed to poor physical habitat conditions, i.e. concrete lining and channelization. Therefore, it is contradictory to refer to such concrete-lined channels as "improved" over natural drainages. The goal of hydromodification requirements are to prevent or further prevent hydromodification impacts on downstream watercourses and eventually restore natural flow regimes. The restoration of natural flow regimes is a major component necessary to protect and restore the physical, chemical and biological integrity of receiving waters, which is a major objective of the Clean Water Act.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
69	4	SUSMP	Finding	Finding E.7. states that,"[u]rban runoff treatment and/or mitigation must occur prior to the discharge of urban runoff into a receiving water." We believe that Finding E.7. is based on a misinterpretation of CWA regulations and misconstrues USEPA guidance on stormwater treatment BMPs. This concern is discussed in detail in Attachment A (Pages 1-7). We wish to comment here on the implications it has for watershed restoration activities. Prohibiting treatment and mitigation in receiving waters severely limits the potential locations for installation of treatment control BMPs and will adversely affect many watershed restoration projects. For example, this Finding may have unintended adverse effects for the Aliso Creek Water Quality SUPER Project. The Aliso Creek Water Quality SUPER Project proposes a multi-objective approach to Aliso Creek watershed development and enhancement, accommodating channel stabilization, flood hazard reduction, economic uses, aesthetic and recreational opportunities, water quality improvements, and habitat concerns. The project is aimed at water supply efficiency and system reliability through reclamation, along with benefits for flood control and overall watershed management and protection. The ecosystem restoration and stabilization component of the project will include: • Construction of a series of low grade control structures and reestablishment of aquatic habitat connectivity; • Shaving of slide slopes to reduce vertical banks; and • Invasive species removal and riparian revegetation and restoration of floodplain moisture. The Permittees are concerned that some of these activities may be deemed "urban runoff treatment and/or mitigation" in a receiving water and, thus, may not be allowed, compromising the project objectives. In addition, this Finding seems to conflict with Existing Development Component Section 3.a.(4) Page 51 of the Tentative Order, which requires the Permittees to evaluate their flood control devices and identify the feasibility of retrofitting the devices to provide for more water quality benefits. Given the lack of any proper legal or factual basis for these limitations as well as the adverse impacts on watershed restoration efforts, the Finding should be deleted from the Tentative Order.	This comment was addressed in the 2007 response to comments on a previous version of this draft permit and stated: "The intent of the Finding, and related requirements, is to prevent the conversion of waters of the U.S. and State into waste treatment facilities consistent with Federal guidance. It in no way prevents restoration of natural hydrological, biochemical, and habitat functions. Similarly, providing treatment of urban runoff after it has been discharged from the MS4 to waters of the U.S. does not relieve the Copermittees of their responsibility to implement source control, pollution prevention, and treatment BMPs before the water is discharged from the MS4. If diverted water is treated, then discharged back to waters of the U.S., it is likely to need an individual NPDES Permit. Diversion to the sanitary sewer for treatment is allowable, provided the effluent from the sewage treatment facility can meet its NPDES requirements. This Finding is supported by federal regulation 40 CFR 131.10(a) and USEPA guidance. 40 CFR 131.10(a) is very clear "In no case shall a State adopt waste transport or waste assimilation as a designated use for any waters of the United States."" Where a CWA section 404 permit has been issued by the U.S. Army Corps of Engineers for the conversion of a water body into a non-jurisdictional water, then the placement of a treatment BMP in that area would be consistent with the Tentative Order. However, the placement of fill and other material into the water body may be subject to waste discharge requirements from the Regional Board. Generally, the Copermittees cannot assume that such conversion would be allowed. The Tentative Order requirements for priority projects (Section D.1.d.4) acknowledge that some conversion is likely to be permitted. However, the Copermittees must recognize that limiting such conversions can be a practical site design BMP.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
70	4	FETD	Finding	This finding identifies that the Order does not regulate the discharge of Facilities that Extract, Treat and Discharge (FETDs) to waters of the U.S. It also indicates the intention of the Regional Board to require individual NPDES Permits for each of these types of facilities. Such an approach to the regulation of these facilities is deemed highly problematic to the Permittees for the same reasons that were presented in early 2008, principally that separate permits would likely preclude the use of facilities currently necessary for protecting public health at Orange County's beaches. The Permittees were working on potential FETD language with previous Permit staff during the first draft Permit adoption process prior to postponement by the Board. That language is significantly similar to the draft language found in the Region 8 draft. It is provided below and commended to you for incorporation into the Order. "Discharges from facilities that extract, treat and discharge water diverted from waters of the U.S: These discharges shall meet the following conditions: (1) The discharges to waters of the US must not contain pollutants added by the treatment process or pollutants in greater concentration or load than the influent; (2) the discharge must not cause or contribute to a condition of erosion; (3) The extraction and treatment must be in compliance with Section 404 of the Clean Water Act; and (4) Conduct Monitoring in accordance with Monitoring and Reporting Program attached to this Order."	The intent of Finding E.9 is to clarify that the Order is specifically for discharges from the MS4 system. FETDs are facilities that would be extracting from waters of the U.S. It is imporatant to note that non-storm water discharges from the MS4 should not need any treatment to protect public health, as non-storm water discharges into, through and from the MS4 that are a source of pollutants are considered illicit discharges, are not authroized under the Clean Water Act and are to be prohibited (see response to Comment 39). Also, please see response to Comment 51.
71	4	TMDL	Finding	This new finding identifies that MS4 WLAs from adopted TMDLs are incorporated into the Tentative Order, and additionally early TMDL requirements may be included in the Tentative Order. The County has significant concerns about the use of either Clean Up and Abatement Orders (CAOs) (as indicated in the Tentative Order) or Cease and Desist Orders (CDOs) (as indicated in the supplemental Tentative Fact Sheet) as the means by which to incorporate forthcoming TMDL WLAs into the MS4 permit. CAOs and CDOs are types of enforcement actions used to compel compliance, typically of an uncooperative discharger. These tools were neither envisioned by the State Water Board in its TMDL and impaired water policy documents or by USEPA in its recent draft handbook TMDLs to Stormwater Permits4.	All references to CDOs and CAOs, in regards to TMDL implementation, have been removed from the Tentative Order. This does not, however, preclude the Regional Board from future consideration of the use of these authorities to address TMDLs.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
72	4	TMDL	Finding	Further, this finding indicates that it is the intention of the Regional Board to incorporate MS4 WLAs as end-of-the-pipe numeric Water Quality Based Effluent Limitations for adopted TMDLs. US EPA's 2002 guidance memorandum5 on establishing stormwater permit requirements to implement WLAs stated that EPA expected that most WQBELs for NPDES-regulated municipal … will be in the form of BMPs and that numeric limits will be used only in rare instances [emphasis added]. This reference was specifically cited in the Beaches and Creeks TMDL Technical Report and reflects the intent of the Regional Board staff and the understanding of the Stakeholder Advisory Group as to how the TMDL would be incorporated into the NPDES permit. This approach to incorporating WLAs into stormwater permits is maintained in the draft handbook TMDLs to Stormwater Permit, in which Chapter 6 identifies method of coordinating TMDLs and stormwater permits. Six options are put forward as methods for permit writers to incorporate TMDLs in a stormwater permit, the last of which is to consider numeric effluent limitations. Furthermore the County would also note that as required by 40 C.F.R. § 122.44(d)(1)(vii)(B), the Permit must be "consistent with the assumptions and requirements of available WLAs". The Regional Board should seriously consider and not foreclose the palette of options available to implement water quality controls for impaired waters in stormwater permits. The Regional Board should follow the guidance in the 2002 Memorandum and the Draft Handbook and the intent of the Regional Board TMDL staff and express the WLAs in the Tentative Order as being implemented through the BMPs. This is especially true in California where an implementation plan is required for TMDLs and which in turn may be incorporated into the Permit consistent with EPA guidance.	The 2002 USEPA guidance does not preclude the establishment of WLAs as end-of-pipe numeric Water Quality Based Effluent Limts (WQBELs). The 02 guidance also directs the reader to the "Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits, 61 FR 43761, Aug 26, 1996," which states that when adequate information exists storm water permits are to incorporate numeric water quality based effluent limitations. The Implementation Plan in the December 17, 2007 Technical Report for the "Bacteria Impaired Waters TMDL Project I for Beaches and Creeks," specifically states that WQBEL WLAs may be expressed as numeric effluent limitations using a different metric [e.g., derived from the Numeric Targets or from the Basin Plan Water Quality Objectives] or as BMP development, implementation, and revision requirements. It is expected that an iterative BMP Program will be a component of the WQBELs, but at the end of the TMDL compliance schedule the numeric targets and/or numeric WQOs may serve as numeric effluent limitations, unless additional information is required. This Order does not "...foreclose the palette of options…" available because it requires a BMP Program (up to the Copermittees to develop and implement) that will meet the Numeric Targets within the time period allowed to meet the required WLA reductions. This approach is consistent with the Draft USEPA Technical Document "TMDLS to Stormwater Permits Handbook." Furthermore, it is consistent with USEPA comments received on this Order (no. 305) that "We [USEPA] are also pleased by the apparent intent of the Regional Board as indicated in Finding E.12 and Section I of the draft permit to express permit effluent limits, when necessary to ensure consistency with applicable WLAs, as numeric effluent limits. Numeric limits provide greater assurance of consistency with WLAs than the alternative of BMPs which are sometimes used, given the uncertainty in the performance of many ofthe BMPs commonly used for stormwater pollution control."

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
73	4	General	Finding	The intention of this new Finding is not clear and appears to be redundant with the receiving water limitations language in Section A, Prohibitions and Receiving Water Limitations. Finding E.13 states that the Permittees discharge from the MS4 is required to meet receiving water limitations [emphasis added]. This requirement is already stated more effectively and within the context of the Receiving Water Limitations language - the Permittees evaluate the discharges and the receiving waters to determine if the discharges cause or contribute to an exceedance of water quality standards and follow the outlined process in cases where the discharge is determined to be causing or contributing to a WQS exceedance in the receiving water. It is recommended that this Finding be deleted.	Finding E.13 from the March 2009 Tentative Order has been removed as it is redundant with Finding C.2.
74	4	General	A	In section A.3.b., the Regional Board has modified the standard state-wide receiving water limitations language to require the Permittees to repeat the assessment process for exceedances of the same water quality standard. This modification is inconsistent with State Water Board WQ Order 99-05. In the previous permit, and in permits throughout the state, including the permit recently issued by the Regional Board to MS4 dischargers to the watersheds draining San Diego County, this provision of the RWL language is set up such that the process is only repeated once unless otherwise directed. The original language recognizes the length of time it can take for new BMP programs to be developed, deployed, and fully implemented before a change in water quality may be observed and avoids pointless reassessments of the same pollutant. Even in cases where there has been a significant reduction of the source of a pollutant, it typically takes several years for monitoring programs to see the change in the receiving water. In cases where the pollutant is persistent in the environment, it can take decades to detect changes in water quality or indicator monitoring. It is recommended that the Regional Board reinstate the original language from WQ Order 99-05 (see below) regarding iterations of the assessment process for exceedances of the same water quality standard. So long as the Copermittee has complied with the procedures set forth above and is implementing the revised Jurisdictional Urban Runoff Management Program, the Copermittee does not have to repeat the same procedure or continuing or recurring exceedances of the same receiving water limitations unless directed by the Regional Board to do so.	The Permit language in section A.3.b has been amended. Please see comment #57.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
75	4	Overirrigation	B	The Regional Board has modified the list of conditionally exempt non-stormwater discharges so that it no longer includes landscape irrigation, irrigation water, and lawn watering. The Findings explain that these discharges have been identified by the Permittees as a source of pollutants (Finding C.14, Page 6). We would contend that a prohibition on these discharges is potentially problematic from the perspective of fostering and sustaining public support for the Program and that the approach should be focused more on public education and water conservation. The Orange County DAMP contains a variety of BMPs and efforts to reduce pollutants in discharges associated landscape irrigation. These practices include public outreach on the use of landscape chemicals (fertilizers and pesticides) and overwatering, implementation of integrated pest management (IPM) practices within municipal programs, and water conservation measures that mandate the use of efficient irrigation systems, as well as other programs that general control pollutant sources which reduce the pollutants that might be conveyed into the MS4s by excess irrigation flows. The use of BMPs to reduce pollutants associated with runoff is a preferable and more practical approach. Additionally, as noted in the Supplemental Fact Sheet, Permittees have sought grant funding to assist with the implementation of programs to reduce irrigation-related urban runoff. Grant programs frequently prohibit the award of grants to meet requirements of NPDES permits requirements. The inclusion of the prohibition could limit the types of grants the Permittees might otherwise be eligible for to help address this discharge.	Please see comment # 28. The Copermittees are expected to use appropriate discretion in implementing their education and enforcement programs to address public concerns and to effectively prohbit this non-storm water discharge. This action in no way should deter the County from continuing their outreach and retrofit efforts. The Copermittees are encouraged to continue seeking grant funding for projects and are encouraged to help define and craft any future bills heard by the legislature that could restrict the ues of grant funds from State propositions.
76	4	Overirrigation	B	Finally, a prohibition of irrigation-related runoff may be in conflict with other permits that allow such discharges including the industrial general permit and the construction general permit. In particular, the construction permit authorizes such discharges if they are necessary for the completion of construction (and are identified in the SWPPP with appropriate BMPs). The final phase of construction includes the installation and establishment of landscaping (also known as vegetative stabilization). The establishment of new plantings to ensure long-term survival typically requires higher than normal levels of irrigation to ensure good root growth and vegetative cover prior to the onset of the rainy season to reduce erosion and sediment transport from the project site. The complete prohibition of irrigation related runoff may impede the ability of the Permittees to establish erosion resistant vegetative covering.	The prohibition is against irrigation runoff and not against irrigation application. Construction sites can adjust their irrigation schedules appropriately to eliminate runoff while maintaining plant growth. Further, the locations and types of landscaping can be adjusted to require much less water. Prior to erosion-preventative vegetative covering being established, a construction site is expected to implement temporary erosion controls. The draft Tentative Order is consistent with the Statewide General Construction Permit in this regard. The Construction permit states "discharges of non-storm water are authorized only where they do not cause or contribute to a violation of any water quality standard." The Copermittees in South Orange County have identified over irrigation as causing or contributing to a violation of a water quality standard; therefore overirrigation discharges from construction sites must no longer be authorized.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
77	4	NEL	C	The Tentative Order makes the case (see Finding C.14) that non-stormwater discharges are not subject to the maximum extent practicable standard and therefore subject to water quality based effluent limits (see Table 3). The County disagrees with this assessment for a number of technical and legal reasons which are discussed in the following paragraphs and in Attachment A respectively. The Regional Board in Finding C.14 incorrectly interpreted CWA section 402(p)(3)(B)(ii). In Finding C.14 the Board staff concludes that non-stormwater discharges are to be effectively prohibited unless specifically exempted. Furthermore the finding goes on to include a contradictory statement that “exempted discharges as a source of pollutants are required to be addressed through prohibition”. On the one hand non-stormwater discharges are prohibited unless exempted but exempted discharges with pollutants are prohibited. The question that begs to be asked is why exempt a non-stormwater discharge that is a source of pollutants from the prohibition is[in] the first place. CWA section 402(p) (3) (B) (ii) reads as follows: (B) Municipal Discharge – Permits for discharges from municipal storm sewers – (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewer; The provision does not provide any reference to exemptions. Rather the section may be read that a permit shall “effectively prohibit non-stormwater discharges” but may exempt certain discharges that are not significant sources of pollutants from the prohibition. The section does not require a full prohibition but rather an effective prohibition. The operative word is “effective”. The more precise and correct finding should note that non-stormwater discharges are effectively prohibited (per 402 (p) (3) (B) (ii)). However discharges that are not significant sources of pollutants are exempted from the prohibition.	The section referenced in Finding C.14 reads as follows: "Non-storm water (dry weather) discharge is not considered a storm water (wet weather) discharge and therefore is not subject to regulation to the Maximum Extent Practicable (MEP) from CWA 402(p)(3)(B)(iii), which is explicitly for “Municipal and Industrial Stormwater Discharges (emphasis added)”. Non-storm water discharges, per CWA 402(p)(3)(B)(ii) are to be effectively prohibited unless specifically exempted. Exempted discharges identified as a source of pollutants are required to be addressed through prohibition." Section 402(p)(3)(B)(ii) of the Clean Water Act clearly requires the "effective prohibition" of non-storm water discharges into the MS4. This is further clarified by the Federal Register which states that “Congress did not intend that the term storm water be used to describe any discharge that has a de minimis amount of pollutants, nor did it intend for section 402(p) to be used to provide a moratorium from permitting other non-storm water discharges” (55 Fed. Reg. 47995-96). Instead, non-storm water discharges into, through and from the MS4 are Illicit Discharges not authroized under the Clean Water Act, except for specific discharges identified under 40 CFR 122.26(d)(iv)(B) that are not thought to be a source of pollution and are therefore exempted from prohibition. These specific discharges into the MS4 are exempted unless identified as a source of pollutants, in which case they are subsequently required to be addressed by the Copermittee as illicit discharges, per language and requirements in 40 CFR 122.26(d). Nonetheless, Finding C.14 has been updated to prevent any confusion of language. The Federal Register does clarify that certain non-storm water discharges were expected to not pose environmental problems in every case, and goes further to provide that "the Director may include permit conditions that either require municipalities to prohibit or otherwise control any of these types of discharges where appropriate" (55 Federal Register 48037). Thus Finding C.14 is not contradictory, and the Director is further authorized to take action regarding exempted non-storm water discharges, even if said discharges are not identified as a source of pollutants by the municipality. The updated Supplemental Fact Sheet provides further clarification regarding NELs.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
78	4	NEL	C	The County would submit that the technology based standard for non-stormwater discharges is “effectively prohibit” just as “maximum extent practicable” is the technology based standard for stormwater discharges. Furthermore, the County would submit that this technology based limit is in fact protective of water quality and compliance with water quality standards. The County has an extensive dry weather monitoring program to identify problematic discharges, including illegal discharges, which support the protection of water quality standards. It is unclear to the County how the Board has determined that these efforts are in fact inadequate to necessitate the development of water quality based effluent limits. Furthermore the TMDL program as noted in Finding E.11 and E.12 provide the appropriate regulatory vehicle to address stormwater and non-stormwater discharges that are causing and contributing to an exceedance of a water quality standard.	The Regional Board does not agree with the County of Orange's submission that the narrative prohibition of non-storm water discharges under Section 402 of the CWA is a technology based standard, as technology based limitations are to be promulgated by USEPA in accordance with Section 301 of the CWA. The Regional Board contends that the Clean Water Act's "effectively prohibit" narrative requirment for non-storm water discharges into the MS4 should result in a net numeric discharge from the MS4 of zero. Under a scenario of zero discharge, the discharge would be protective of water quality criteria as there would simply be no discharge into and thus from the MS4 system. However, as 40 CFR 122.26(d) and 55 Federal Register 222 explain, certain categories of non-storm water discharges are conditionally exempt from the discharge prohibition unless found to be a source of pollutants, which would then require their discharge into the MS4 to be effectively prohibited. Additionally, other non-storm water NPDES permits (utility vaults, dewatering, etc) may allow discharge into the MS4 if done in compliance with the limitations present within those permits and after garnering authorization from the owner and operator of the MS4. The updated erratta and supplemental fact sheet clarify why water-quality based effluent limitations are required for non-storm water discharges from the MS4.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
79	4	NEL	C	Should the Regional Board choose a numeric metric to define the technology based narrative limit of “effectively prohibit” then the development of technology based numeric effluent limits must be consistent with Federal and State regulations and policy. The County would submit that the proposed NELs in Table 3 are not. USEPA has provided significant guidance6 for the development of technology based effluent limits (TBELs) for industrial dischargers in order to comply with best practicable control technology currently available (BPT) and best available technology economically achievable (BAT) standards. Consistent with this guidance TBELs are based on demonstrated performance of a reasonable level of treatment that is within the economic means of the discharger. (Page 49-50, NPDES Permit Writers’ Manual). This guidance provides insight into how one may develop TBELs for municipal dischargers. For industrial dischargers, the development of TBELs should consider the following parameters: • Data collection – Sufficient technical and economic data must be available and should be obtained from various sources with respect to trends, environmental impacts, BMPs, and economics. • Discharger and site profile – Discharger specific information should be obtained through surveys, site visits, etc. to develop a profile. The profile should include: o General description/definition and NAICS and/or SIC codes o Industry practices and trends o Manufacturing processes used o General facility information (age of equipment and facilities involved) o Discharge characteristics o Based on the data gaps identified as a part of the existing data collection efforts, additional field sampling and statistical analyses may be necessary o Local climatological data. • Technology Assessment – The technology assessment should determine the depth and breadth of effectiveness data for various industry related source and treatment BMPs and identify the quantity and quality of data available to describe the performance of all currently used and innovative practices, the ability of each to effectively control impacts due to runoff and the design criteria or standards currently used to size each practice to ensure effective control of runoff. For each source and treatment BMP, the assessment should include: o General Description of the BMP o Applicability o Design and installation criteria o Design and/or site considerations and/or variations o Effectiveness o Limitations o Maintenance o Cost • Regulatory Options – Once the Data Collection, Industry Profile and Technology Assessment has been completed, the State	Please see response to Comment No. 78. The Supplemental Fact Sheet clarifies why water-quality based effluent limitations are required for non-storm water discharges from the MS4. To date, USEPA has not promulgated national effluent limitations guidelines for non-storm water discharges from the MS4. Furthermore, the Regional Board will not be developing TBELs for non-storm water discharges from the MS4 based upon Best Professional Judgement (BPJ). Furthermore, the commenter incorrectly interprets the NPDES permit writers manual (page 49-50) as stating, "TBELs are based on demonstrated performance of a reasonable level of treatment that is within the economic means of the discharger." The full correct passage is as follows: "For industrial sources, the national ELGs are developed based on the demonstrated performance of a reasonable level of treatment that is within the economic means of specific categories of industrial facilities. Where national ELGs have not been developed, the same performance-based approach is applied to a specific industrial facility based on the permit writers BPJ". The updated Supplemental Fact Sheet provides discussion regarding the evaluation of TBELs when establishing numeric limitations for non-storm water discharges.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
				should identify the regulatory options that are available. This effort should identify industry impacts, which pollutants to address as well as other non-water quality related impacts (such as energy requirements). • Economic analysis7 - Once the regulatory options are identified (see above), the State should evaluate the costs and environmental benefits and determine the appropriate option based on factors such as: o Total Costs o Monetized and non-monetized environmental benefits o Ease of implementation o Industry financial impacts o Industry acceptance	
80	4		NEL	C	As demonstrated above, the development of TBELs for industrial dischargers must be comprehensive and consider many factors. A similar approach for municipal dischargers is appropriate. The County was unable to confirm whether the State completed such an analysis as it appears the State defaulted to Basin Plan water quality objectives to establish a technology based standard. In essence the Tentative Order has stipulated water quality based limits as equivalent to the technology based limits.	Please see response to comment 79. The Regional Board has not stipulated water quality-based limitations as equivalent to TBELs. Please see the updated Supplemental Fact Sheet for further discussion (discussion of Section C of the Order).
81	4		NEL	C	Notwithstanding the argument that water quality based effluent limits are inappropriate and not justified, the Board, if it determines that technology based limits are insufficient to meet water quality standards, is obligated to stipulate additional requirements consistent with 40 CFR 122.44. In this context the Regional Board must determine whether the discharge has a "reasonable potential" to cause of contribute to an excursion of the applicable water quality standard. (40 CFR 122.44 (d)(1)(i-iii). If determined to cause or contribute then effluent limits (either narrative or numeric) must be developed for the discharge. The County was unable to determine whether such an analysis was completed and the subsequent basis for Table 3 of the Revised Tentative Order. Furthermore, if numeric effluent limits are developed then they must be consistent with 40 CFR 122.45. Again we were unable to verify this consistency as Table 3 is not consistent with 40 CFR 122.45 (c). In fact there is conflicting information in Table 3 and Finding E. 11. In Table 3 the Board has established numeric effluent limits for a list of some 28 constituent/hydrologic area combinations. This table would imply that the Board has determined reasonable potential for each of these constituents. However, in Finding E.11 the Board acknowledges that only four pollutants have been shown to have reasonable potential.	The Supplemental Fact Sheet contains the reasonable potential analysis for non-storm water discharges from the MS4 (discussion of Section C in the Supplemental Fact Sheet), including metals as referenced by the commenter in regards to 40 CFR 122.45(c).

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
82	4	NEL	C	Of primary importance to the County is that the Regional Water Board adopt a permit that is reasonable, feasible and protects water quality. At this time, the Permittees are exposed to significant risk to comply with the numeric effluent limits for dry weather discharges. We have completed a comparison of existing dry weather discharges with the selected NELs noted in Table 3. The results of that comparison are shown below: Constituent Hydrologic Unit Percentage of time NELs Total Dissolved Solids* Group 1 74.5 Total Dissolved Solids* Group 2 97.1 Total Phosphorus@ Group 1 and 2 93.0 Nitrate + Nitrite Group 1 and 2 93.8 Fecal coliform Group 1 and 2 90.0 Nickel (dissolved) Group 1 and 2 0.3 Copper (dissolved) Group 1 and 2 9.5 Cadmium (dissolved) Group 1 and 2 18.1 *A factor of 0.6 was multiplied by the specific conductance measurements to estimate TDS @Proposed NEL was compared to measurements of reactive orthophosphate as P As a result, the County/Permittees will face enforcement action for not complying with all the NELs. Where there is exceedance, the Permittees will be faced with liability under several different enforcement regimes. First, the NELs, as proposed in the Revised Tentative Order, would clearly constitute numeric effluent limitations. Violation of effluent limitations in an NPDES permit subjects the Permittees to mandatory minimum penalties (MMPs). (See Water Code §§ 13385 and 13385.1). In addition, non-compliance with the NELs may subject the Permittees to additional enforcement actions imposed by the Regional Water Board and through third party actions under the citizen suit provisions of the CWA. Although the Tentative Order (see 4/29/09 Tentative Updates) attempts to clarify that compliance with Non-Stormwater Dry Weather Numeric Effluent Limits Section C is met by one of three follow-up actions, the structure of the Tentative Order negates such a compliance option and stipulates a hard and fast numeric effluent limit and the resulting exposure to MMPs.	The Regional Board acknowledges that excursions above non-storm water numeric effluent limits may subject the Copermittees to multiple enforcement mechanisms, including mandatory minimum penalties (MMPs). MMPs are subject to the requirments under CWC 13385.1 including, but not limited to, the definitions for a serious violation, the number of violations within a given sampling time frame, and the provisions under subdivision (j). Furthermore, the requirements of Section C.1 of the Tentative Order recognize that other, permitted sources could be discharging into the MS4. That is why the section is written to provide for an investigation of the source of the discharge to occur after an exceedances of an NEL is found.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
83	4	NEL	C	As a final point the County would submit that the use of numeric limits for non-stormwater discharges is premature at best. The TMDL program provides the safety net for ensuring that our water bodies are protected in the most reasonable and effective manner. The direct translation of water quality objectives into numeric effluent limits bypasses the TMDL process. It is likely that some of our non-stormwater discharges will exceed the NEL but have no effect on the receiving water quality or beneficial uses. But under the proposed Order the Permittees would be obligated to expend considerable resources without a reciprocal water quality benefit. This is poor public policy and use of public funds.	Irregardless of the TMDL process, discharges of waste from point sources to waters of the United States are required to apply for and obtain permit coverage under a NPDES permit. A 303(d) listing and subsequent TMDL development does not provide an exemption from NPDES permitting requirements, and the TMDL process may, in fact, result in discharge requirements which are more stringent than the non-storm water numeric effluent limits proposed under the Tentative Order because TMDLs often incoroporate a Margin of Safety. In addittion, the argument that non-storm water numeric limits should not be included due to the liklihood that some discharges may not have an effect on receiving water quality or Beneficial Uses is inconsistent with NPDES permitting requirements, specifically in regards to Section 301 of the CWA and 40 CFR 122.44. Finally, the Regional Board maintains that ensuring compliance with water quality criteria to protect the receiving waters and Beneficial Uses in accordance with the Clean Water Act is niether poor public policy nor poor use of public funds.
84	4	NEL	C	In summary, the establishment of NELs for non-stormwater discharges is fundamentally flawed from a technical and legal perspective. If the NELs are proposed are [as] technology based effluent limits then they must be developed pursuant to USEPA guidance (USEPA NPDES Permit Writers' Manual). If, on the other hand, they are proposed as water quality based numeric limits then their derivation must also follow Federal and state regulations (40 CFR 122.44). The County was unable to determine whether either of these efforts took place. Furthermore, the technical feasibility of complying with these numeric limits is questionable especially since our drinking water supply would not be able to comply with the limits.	Please see response to comment 81. Furthermore, aquatic life criteria may, in some cases, be more restrictive than drinking water criteria due to the sensitivity of aquatic life in the receiving waters (e.g. 40 CFR 131).
85	4	MAL	D	The County has considerable concerns regarding the development and application of MALs. Overall, we contend that the MALs are not technically sound, and more importantly, are not legal in the manner proposed in the Draft Tentative Order. Our legal discussion is provided in Attachment A, County of Orange Legal Comments. The Tentative Order (with updates) attempts to walk a fine line of using MALs to identify the adequacy/inadequacy of the program (see Finding D.h.1, page 8) without calling them numeric effluent limits. However, we would submit that the current configuration of MALs in the Tentative Order may be considered effluent limitations under state law (See Water Code §13385.1 where effluent limitation means "a numerically expressed narrative restriction.") and exceedances of the MALs after Year 3 may subject the Permittees to mandatory minimum penalties. Our comments here highlight and summarize the relevant points to MALs.	Please see response to Comment 33.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
86	4	MAL	D	A) Establishment of TBELs must reflect EPA Guidance The Tentative Order (see 4/29/09 Tentative Updates at page 4) contains a combination of purported technology based MALs and water quality based MALs. To the extent that municipal action levels are used to define the technology based standard of maximum extent practicable (MEP) they should be consistent with EPA guidance8, and federal law and regulations. As noted previously in the discussion regarding non-stormwater, USEPA has provided significant guidance for the development of technology based effluent limits (TBELs) for industrial dischargers in order to comply with best practicable control technology currently available (BPT) and best available technology economically achievable (BAT) standards. Consistent with this guidance, TBELs are based on demonstrated performance of a reasonable level of treatment that is within the economic means of the discharger (Page 49-50, NPDES Permit Writers' Manual). This guidance provides insight into how one may develop TBELs for municipal dischargers. For industrial dischargers, the development of TBELs should consider the following parameters: • Data collection – Sufficient technical and economic data must be available and should be obtained from various sources with respect to trends, environmental impacts, BMPs, and economics. • Discharger and site profile – Discharger specific information should be obtained through surveys, site visits, etc. to develop a profile. The profile should include: o General description/definition and NAICS and/or SIC codes o Industry practices and trends o Manufacturing processes used o General facility information (age of equipment and facilities involved) o Discharge characteristics o Based on the data gaps identified as a part of the existing data collection efforts, additional field sampling and statistical analyses may be necessary o Local climatological data. • Technology Assessment - The technology assessment should determine the depth and breadth of effectiveness data for various industry related source and treatment BMPs and identify the quantity and quality of data available to describe the performance of all currently used and innovative practices, the ability of each to effectively control impacts due to runoff and the design criteria or standards currently used to size each practice to ensure effective control of runoff. For each source and treatment BMP, the assessment should include: o General Description of the BMP o Applicability o Design and installation criteria o Design and/or site considerations and/or variations	Please see response to Comment 33.

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				o Effectiveness o Limitations o Maintenance o Cost • Regulatory Options - Once the Data Collection, Industry Profile and Technology Assessment has been completed, the State should identify the regulatory options that are available. This effort should identify industry impacts, which pollutants to address as well as other non-water quality related impacts (such as energy requirements). • Economic analysis9 - Once the regulatory options are identified (see above), the State should evaluate the costs and environmental benefits and determine the appropriate option based on factors such as: o Total Costs o Monetized and non-monetized environmental benefits o Ease of implementation o Industry financial impacts o Industry acceptance As demonstrated above, the development of TBELs for industrial dischargers must be comprehensive and consider many factors. A similar approach for municipal stormwater dischargers is appropriate. The County was unable to confirm whether the State completed such an analysis as it appears the State defaulted to a regional dataset to arbitrarily establish a technology based standard.	
87	4	MAL	D	Furthermore, to the extent that the Tentative Order establishes water quality based numeric effluent limits (WQBELs), the WQBELs must be established consistent with Federal and State regulations and policy. The Board, if it determines that technology based limits are insufficient to meet water quality standards, is obligated to stipulate additional requirements consistent with 40 CFR 122.44. In this context the Regional Board must determine whether the discharge has a "reasonable potential" to cause of contribute to an excursion of the applicable water quality standard. (40 CFR 122.44 (d)(1)(i-iii)). If determined to cause or contribute, then effluent limits (either narrative or numeric) must be developed for the discharge. The County was unable to determine whether such an analysis was completed and the subsequent basis for Table 4 of the Revised Tentative Order. Furthermore, if numeric effluent limits are developed then they must be consistent with 40 CFR 122.45. The Board basically stipulated that end of pipe discharges must comply with water quality objectives for pH, TDS and mercury regardless of whether the MS4 discharges were causing or contributing to a water quality standard exceedance.	Please see response to Comment 33. Furthermore, the values for pH, TDS and Mercury expressed as action levels. The levels are based upon Phase I arid west regional data, of which the calculated action levels would be set below applicable water quality criteria for those constituents (pH, TDS and Mercury). Since it is expected that the iterative process will result in a storm water effluent discharge which meets all applicable water qualtity criteria and thus protects the Beneficial Uses of the receiving waters, these action levels were raised to their respective water quality criteria. As they are action levels, they are not restrictions on the storm water discharge.

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88	4	MAL	D	B) The MALs Contained in the Tentative Order Are Not Supported by SWRCB Blue Ribbon Panel Findings and Recommendations. The County submits that the specific MALs contained in the Tentative Order are not technically supportable or valid. The technical validity of establishing numeric limits for outfalls was posed to a State Water Resources Board Control Board (State Water Board) convened group of experts referred to as the Blue Ribbon Panel (BRP). The results and conclusions of the BRP are highlighted in a June 2006 Blue Ribbon Panel Report10. The BRP Report unequivocally states the position that numeric limits for municipal stormwater discharges are not possible at this time. However, the Panel did agree that "action levels" may be used to identify "bad actor" catchments. Specifically, the BRP Report states: It is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs and in particular urban discharges … For catchments not treated by a structural or treatment BMP, setting a numeric effluent limit is basically not possible. However, the approach of setting an 'upset' value, which is clearly above the normal observed variability, may be an interim approach which would allow "bad actor" catchments to receive additional attention. For the purposes of this document, we are calling this "upset" value an Action Level because the water quality discharge from such locations are enough of a concern that most all could agree that some action should be taken ... (BRP Report at p. 8, emphasis added.) The Tentative Order attempts to disguise these numeric effluent limits by defining them as Action Levels. However, the intent and application of these numeric limits are consistent with numeric effluent limits (See Water Code §13385.1 where effluent limitation means "a numerically expressed narrative restriction.") and not action levels.	Please see response to Comment 33.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
89	4	MAL	D	Action levels come into play when the stormwater is clearly above the normal observed variability. To develop an appropriate action level, the State's Blue Ribbon Panel suggested various options, which included: (1) consensus based approach; (2) ranked percentile distribution; and, (3) statistically based population parameters. The Tentative Order claims to use a statistical approach that used the central tendency of the dataset and accounting for data variability (Tentative Order, at p. 8). In its actual calculation, it appears that the Tentative Order took the median value of a regional data set and multiplied it by the coefficient of variation. There is no basis for this approach in establishing action levels. This calculation actually reflects the variability of the data (measured as the standard deviation) and does not account for central tendency of the dataset.11 The Tentative Order's approach is not consistent with the State's Blue Ribbon Panel suggestion for a statistically relevant calculation.	The Regional Board contends that the statistical approach taken to develop MALs is one recommended by the Blue Ribbon report, which allows for flexibility when taking a statistically based population approach. The report states: "The statistically based population approach would once again rely on the average distribution of measured water quality values developed from many water quality samples taken for many events at many locations. In this case, however, the Action Level would be defined by the central tendency and variance estimates from the population data. For example, the Action Level could be set as two standard deviations above the mean, i.e. if measured concentrations are consistently higher than two standard deviations above the mean, an Action Level would be triggered. Other population based measures of central tendency could be used (i.e. geomean, median, etc.) or estimates of variance (i.e. prediction intervals, etc.). Regardless of which population based estimators are used (or percentile from above), the idea would be to identify the [statistically derived] point at which managers feel concentrations are significantly beyond the norm." The Regional Board used a measure of central tendency (the median) and of variation (the coefficient of variation) to develop MALs on a pollutant by pollutant basis. The commenter states that there is no basis for this approach, and that the calculation does not account for the central tendancy of the dataset. The Regional Board does not agree with the commenter. In addition, in meeting with the Copermittees regarding the tentative Order, the Regional Board has made it clear that selection of the median and coefficient of variation was done to be consistent with the statistical approach taken by the Los Angeles Regional Board. Furthermore, Regional Board staff had made it clear to the Copermittees that this approach was one of many recommended by the Blue Ribbon panel, and that Regional Board staff were/are open to discussing alternative statistical approaches when developing MALs. The commenter disputes the approach, but do offer an alternative of using a 90th percentile approach for a localized dataset (see Comment 96). While it is unclear if the Copermittees would accept a 90th percentile approach utilizing the USEPA Rain Zone 6 data, the Regional Board remains open to further discussion regarding alternative statistical approaches.

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90	4	MAL	D	In addition, the Tentative Order's use of USEPA Rainfall zone 6 database (4/29/09 Fact Sheet Changes at p. 11) is not appropriate to generate the MALs if a sufficient local data base is available. The State's Blue Ribbon Panel noted that there is greater opportunity to use various data sets for establishing the MALs. Three options proposed in the Report, in order or preference, are: • Local urban stormwater monitoring data (the Panel even notes the existence of such data sets from Los Angeles County, Orange County and other California MS4 programs) • Combine municipal permit monitoring datasets if there is a lack of data for specific constituents in any one location • National database In this case, the Tentative Order selects the second preferred option to generate the MALs even though there are local stormwater data sets available. In fact, in California and specifically in Orange County, the MS4s have comprehensive data sets. While the Climate zone 6 database is much preferred over the use of the national dataset, the County would submit that our monitoring dataset is sufficiently robust to generate MALs.	The Regional Board acknowledges that local data sets are the preferred option for developing MALs. For this reason, the data set for MALs was changed to reflect USEPA Rainfall Zone 6, which includes MS4 effluent data from Orange, San Diego, Los Angeles and Ventura County. While the County of Orange has a large monitoring data set, Regional Board staff have concluded that there is a lack of effluent monitoring from major outfalls that are representative of conditions throughtout the Region. Furthermore, staff do not feel it is appropriate to utilize storm water receiving water data to develop MALs, as the resultant MALs may not be representative of storm water effluent and result in MALs that may be higher or lower than storm water effluent for the region. Since the Regional Board acknowledges the importance of localized data, the Tentative Order updates includes the following language: "Section D.5 (new section) The MALs will be reviewed and updated at the end of every permit cycle. The data collected pursuant to D.2 above can be used to create MALs based upon local data. It is the goal of the MALs, through the iterative and MEP process, to have outfall storm water discharges meet all applicable water quality objectives."
91	4	MAL	D	Furthermore, the derivation and use of action levels as envisioned by the State's Blue Ribbon Panel reflects an approach to identify the "bad actors." (Report at page 8) The use of MALs in the Tentative Order establishes a numeric end point for assessing MEP. The Tentative Order does introduce the iterative process to address exceedances of MALs and subject to the action or lack of action by the MS4s to address these exceedances, the discharger may be viewed to be out of compliance with the MEP standard. Such a permit strategy is unique but it does not diminish the fact that a numeric value is being used to define MEP. Notwithstanding this statement, the Tentative Order notes the absence of MAL exceedances does not give rise to a presumption that the discharger in compliance with the MEP criteria. Thus it's fair to say regardless of the outcome of the MAL comparison the Board will ultimately decide whether the dischargers are complying with MEP. This somewhat convoluted logic poses difficulties for all parties and makes the interpretation of the Tentative Order even more difficult. With that in mind, the County submits that consistent with the Blue Ribbon Panel recommendations, MALs should be used as assessment tools to identify "bad actors" and not as compliance metrics.	Please see previous response to comment no. 33 regarding MALs and the MEP standard. Also, language in the updated erratta has been modified to clarify that meeting a MAL does not exempt the Copermittees from the implementation of other required storm water programs. The Regional Board will look at mulitple lines of evidence, including reaction to MAL exceedances, in assessing the Copermittees compliance with the MEP standard to reduce pollutants in storm water discharges from the MS4.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
92	4	MAL	D	C) MALs Are More Restrictive than the Basin Plan and Establish New Water Quality Objectives for a Water Body Instead of identifying "bad actors," the MALs as calculated in the Tentative Order may actually establish new water quality objectives for a waterbody or, at the very least, may establish action levels that are more restrictive than applicable water quality objectives for the waterbodies in question. For example, the Tentative Order proposes a MAL for total nickel of 26.34 ug/L that must be compiled with 80% of the time based on a running average. A comparison of the nickel MAL with the Basin Plan water quality objective is shown below in Table 3. Table 3 - Comparison of MALs v. Basin Plan Water Quality Objective for Nickel1 Constituent Units Municipal Action Levels2 Basin Plan3 Nickel ug/L 26.34 469 1. Measured as total 2. Table 4, as modified in 4/29/09 Tentative Updates. 3. From California Toxic Rule and assuming acute criterion and 100 mg/L as CaCO3 hardness and default conversion factors. A review of the table demonstrates that the MAL is considerably more restrictive than the water quality objectives (in the case of nickel, the MAL is nearly 18 times more restrictive than the water quality objective). Thus it is very possible that the County would be held responsible for significantly reducing its lead and nickel concentrations even though the water body receiving the discharge is in compliance with the water quality standard. To demonstrate this point, water quality data were compiled for mass emission stations located on various creeks in Orange County. This compilation is shown in Table 4. A review of the table shows that the creeks are out of compliance with the MAL even though they are in general in compliance with the Basin Plan objective for these same waters. Table 4. Comparison of Orange County Waterbodies with Nickel MAL and Water Quality Objectives Waterbody Percentage of time1 > MAL of 26.34 ug/L Percentage of samples1 > CTR water quality objective of 469 ug/L Aliso Creek 58.5 0 Prima Deshecha 100.0 2.1 Segunda Deshecha 93.4 0	Regional Board staff, prior to submission of this comment by the County of Orange, updated MAL language to include a clause that provides a sliding scale for those prioirty pollutant MALs which have California Toxic Rule values dependent on the hardness of the receiving water. This was presented to the Copermittees in proposed updated erratta documents submitted to the Copermittees on April 29th and May 5th, 2009.

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93	4	MAL	D	Table 5. Characteristics of Ventura County Land Use -Specific Outfalls for Nickel Industrial Outfall Residential Outfall Number of samples 26 26 Mean, ug/L 28.9 17.6 Range <5 - 120 <1 - 53 % of time above MAL 42 22 Assuming runoff in Orange County is similar to runoff in Ventura County we would submit that the application of MALs to Orange County will create a situation where our receiving waters will be in compliance with the Basin Plan but that discharges from our outfalls will not be in compliance with the MALs. Furthermore, because the water body (see Table 4) is significantly in compliance with the applicable water quality objective, discharges from residential storm drain outfalls are clearly not causing or contributing to an exceedance of a water quality standard. Thus, the MS4 discharges and the waterbody do not exceed or impact the Basin Plan water quality standards, but due to the application of the MAL, the Permittees without corrective action to lower the discharge level, would be out of compliance with the Tentative Order and would potentially be subject to mandatory minimum penalties for failing to comply with an effluent limits. Unnecessary and significant costs will therefore accrue to the Permittees from the obligation to address discharges that present regulatory rather than environmental concerns.	Please see previous response to comment no. 33 regarding MALs and the MEP standard. MALs are not effluent limitations and will not result in MMPs. Furtheromre, MALs are not set below aplicable water quality objectives. Please see responses to comment nos. 87 and 92.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
94	4	MAL	D	D. Compliance with MALs will prove to be problematic The Tentative Order (as modified in the 4/29/09 Tentative Updates) provides clarification regarding the follow-up action required should the outfalls exceed the MALs. The Tentative Order requires each Permittee to affirmatively augment and implement all necessary stormwater controls and measures to reduce the discharge of the associated class of pollutants(s) in the affected watershed to the MEP. The definition of MEP (at Attachment C, page C-7) provides a broad definition that primarily focusing on source control BMPs and treatment control BMPs only if source control BMPs prove ineffective12. Given the current lack of knowledge regarding the effectiveness of source control BMPs and the liability of non compliance with numeric effluent limits (and resulting mandatory minimum fines) the Permittees would be well served to implement treatment control BMPs. As a result, the Tentative Order is structured to effectively require Permittees to retrofit all outfalls with treatment control BMPs. However, the language in the Tentative Order creates an illusion that the Permittees can comply with the MALs through a traditional stormwater management program. If it is the Regional Water Board's intent to structure compliance through the implementation of treatment control BMPs (see Provision 3.d Retrofitting Existing Development at pg. 65), then the Tentative Order must clearly state that all outfalls are to be retrofitted with treatment control BMPs. Obviously, the costs and ramifications on Permittees for such a requirement are huge and in some cases may not be possible without displacing existing development.	As modified, the Tentative Order updates language does not, as the comment states, effectively require Permittees to retrofit all outfalls with treatment control BMPs. The language requires: "each Copermittee to affirmatively augment and implement all necessary storm water controls and measures to reduce the discharge of the associated class of pollutants(s) in the affected watershed to the MEP. The Copermittee shall utilize the exceedance information as a high priority consideration when adjusting and executing annual work plans, as required by this Permit. Failure to appropriately consider and react to MAL exceedances in an iterative manner creates a presumption that the Copermittee(s) have not complied to the MEP." Thus, Copermittees are required to evaluate exceedances and react in an iterative manner. It is expected that the Copermittees will take the presence of exceedances as a prioirity when making decisions on what actions should be taken in the short and long term as part of the iterative process. The Regional Board contends that MALs are not restrictions, but an additional identification and evaluation tool for Copermittees to utilize as part of the iterative process to reduce pollutants in storm water discharges to the MEP.
95	4	MAL	D	Furthermore, it is unclear to the County that even after retrofitting all of our outfalls that we would comply with the MAL numeric effluent limits. As a case in point, the County reviewed options for lowering the nickel concentrations to the MAL level and were unable to verify that the BMPs purported to be practicable in the national ASCE database could in fact reduce nickel to levels required for compliance. Basically, the ASCE BMP database has no supporting documentation demonstrating the effectiveness of treatment control BMPs to reduce nickel. Similarly, the database did not contain performance data for mercury removal; thus, it's unclear what options are available to the MS4 should the discharge exceed the MAL for mercury.	Please see response to Comment No. 94. An exceedance does not neccesarily mean an outfall requires immediate retrofitting. The exceedance of the MAL is expected to be used to evaluate all programs, including implementation of addition BMPs. It is expected that the Copermitttee, during evaluation of MAL data, may set priorities based upon the avaliable BMP options at the time. The Regional Board does not expect that MALs will require Copermittees to go above and beyond the MEP standard for storm water.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
96	4	MAL	D	E. County's Alternative Approach for Use of MALs The Tentative Order's use of MALs to define MEP is ill conceived as it is inconsistent with state and federal policies, is technically flawed, results in requirements more stringent then federal law, and creates limits that are more restrictive then adopted water quality objectives contained in the Basin Plan. While the County disagrees with the use of MALs to define MEP as a numeric value to determine compliance, we understand the Regional Water Board is looking for a new mechanism to ensure Orange County's stormwater program is effective and protective of water quality. Thus, instead of using MALs as proposed in the Tentative Order, we propose an alternative method consistent with the approach proposed by the State Water Resources Control Board's "Blue Ribbon Panel of Experts," as expressed in the June 2006 Blue Ribbon Panel Report ("BRP Report"). This approach would meet the Regional Water Board's desire to include performance measures in a municipal stormwater program for Orange County. To achieve these goals, we support an approach that "would set "an 'upset' value, which is clearly above the normal observed variability, which would allow bad actor catchments to receive additional attention" through creation of an upset value (see BRP Report at p. 8.). The BRP Report termed upset value as "…an Action Level because the water quality discharge from such locations are enough of a concern that most all could agree that some action should be taken…" (Id.) The strikeout/underline language in Attachment B presents the Permittee's proposal for how MALs should be developed and used to achieve the purpose set forth in the BRP Report. The Permittees' proposal is to use locally relevant data to create MALs as a tool which, together with additional investigation and attention, will ensure that water quality is improved in the subject subwatershed. Such a proposal would also include the deletion of any references of MALs to support the determination of MEP. To develop MALs for this purpose, the Permittees propose to use the 90th percentile of local, countywide data to develop MALs. Any sub-watershed that exceeds the 90th percentile would be above the normal observed variability and in need of additional attention. In addition, we propose to develop MALs only for those pollutants where there is water quality impairment (based on the section 303(d) list), or have been identified as pollutants of concern and that are present in significant quantities in MS4 discharges. The Permittees' approach would avoid using public resources unwisely and inefficiently and focus on pollutants that are causing water quality concerns.	Please see response to Comment Nos. 33 and 90. In addition, while the Regional Board appreciates the alternative suggestion regarding MALs, Regional Board staff contend that MALs as presented in the Tentative Order updates are sufficient given the avaliable storm water effluent data. As previously discussed, the Phase I effluent monitoring data, including localized data, is for pollutants that are expected to be present in storm water runoff from the MS4. Furthermore, the Regional Board encourages the Copermittees to incorporate sampling for constituents above and beyond what is proposed in the Tentative Order, particularly for additional pollutants of concern to the Copermittees and/or any 303(d) listed constituents. Additional sampling for such constituents can be used in developing localized MALs, as described in Comment 90, and by Copermittees to determine if additional priorities for other pollutants, including 303(d) listed impairments, are needed.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
97	4	MAL	D	Where a sub-watershed exceeds a MAL due to the MS4 discharge, the Permittees propose that the responsible Permittee be required to submit an "MAL Action Plan" to the Regional Water Board's Executive Officer. The plan would need to include an assessment of the sources responsible for the abnormal pollutant levels, the existing BMPs that address those sources, an assessment of additional BMPs and actions that could be implemented, and, based on such analyses, the additional BMPs and/or actions the responsible Permittee proposes to implement to achieve the MAL to the MEP. The Executive Officer, in approving the plan, would have the opportunity to identify additional BMPs or actions the Regional Water Board believes necessary to address the constituent of concern. In summary, Permittees propose that MALs be used to identify poor performing catchments or sub-watersheds for pollutants of concern to implement further practical controls. Where MALs are exceeded, the Permittees, in conjunction and with approval by the Regional Water Board's Executive Officer would be required to implement additional actions deemed necessary to address the high concentration. Thus, MALs are used to elevate municipal responsibility in a manner that is reasonable and practical while improving water quality.	Please see response to Comments 33, 90 and 96. The Tentative Order has been changed to include language very similar to what is proposed by the comment. The Regional Board, however, feels that every MAL exceedance would not warrant submission of an individual "MAL Action Plan." It is expected that Copermittees will evaluate MAL exceedances in a comprehensive scenario on a watershed and pollutant basis when setting BMP priorities. This is already a requirement of all monitoring programs conducted under the Order. Thus, the Regional Board contends that "MAL Action Plans" should be incorporated into the overall work plans (Sections G.3 and J.4) for Copermittees and used as a tool for setting priorities and implementing BMPs within the MEP process.
98	4	Legal	E	LEGAL AUTHORITY • Effectiveness of BMPs (Section E.1.j, Page 24) The Tentative Order includes a new provision that requires the Permittees to demonstrate that they have the legal authority to require documentation on the effectiveness of BMPs. This provision is redundant with other requirements in the permit in that it ignores the fact that the New Development/Significant Redevelopment section of the DAMP (Section 7.0) establishes a process for the selection, design, and long-term maintenance of permanent BMPs for new development and significant redevelopment projects and requires developers to select BMPs that have been demonstrated as effective for their project category. In addition, it ignores the fact that the Permittees have already established legal authority for their development standards so that project proponents have to incorporate and implement the required BMPs. This provision should be deleted from the Order.	This section has been added to the Order to ensure that BMPs implemented by third parties are effective. Since the Copermittees cannot passively receive and discharge pollutants from third parties, the Copermittees must ensure discharges of storm water pollutants to the MS4 are reduced to the MEP. In order to achieve this, the Copermittees must be able to ensure that effective BMPs are being implemented by requiring the third parties to document BMP effectiveness. Regarding the Copermittees' ability to require documentation and reporting from third parties, USEPA states "municipalities should provide documentation of their authority to enter, sample, inspect, review, and copy records, etc., as well as demonstrate their authority to require regular reports."

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99	4	LID	F.1	LID BMPs (Section F.1.c.(2), Page 26) Provision F.1.c.2 identifies that the LID BMPs listed in the provision shall be implemented at all Development Projects where applicable and feasible, however no definition of "applicable and feasible" is identified in the provision or within the fact sheet. The determination of feasibility of implementing the LID BMPs identified in the provision should be the responsibility of the Permittees. It is recommended that the Provision be modified as follows: The following LID BMPs listed below shall be implemented at all Development Projects where applicable and feasible as determined by the permittee.	The LID requirements have been extensively modified following meetings with the Copermittees and the interested stakeholders. The Tentative Order addresses the conditions of technical infeasibility. More robust criteria is expected in the Copermittee's updated SUSMP document.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
100	4	SUSMP	F.1.	• Infiltration and Groundwater Protection (Section F.1.c.(6), Page 26) The Regional Board Response to Comments dated July 6, 2007 regarding this section makes reference to the Order No. R9-2002-0001 Fact Sheet and recommendations provided by the U.S. EPA Risk Reduction Engineering Laboratory related to restrictions on infiltration of stormwater. The Order No. R9-2002-0001 Fact Sheet references the document U.S. Environmental Protection Agency. 1994. Potential Groundwater Contamination from Intentional and Nonintentional Stormwater Infiltration. EPA 600 SR- 94 051. This document that is referenced as guidance for infiltration of stormwater is more than 15 years old and does not provide an adequate technical basis for many of the requirements related to infiltration of stormwater. A closer review of this document will show that the study evaluated the impact of industrial stormwater discharges into local groundwater. However, the site soil conditions had a poorly defined soil structure and included gravel. Thus stormwater from the industrial site was discharged in an almost direct conduit to the groundwater. The County would submit that the Tentative Order should require the Permittees to develop criteria for the use of infiltration BMPs that consider land use, runoff quality, groundwater depth, site soil conditions and other information relevant to groundwater protection. The Regional Board Response to Comments dated July 6, 2007 also identifies that language contained in the Tentative Order also allows the Permittees to develop alternative criteria to replace the suggested restrictions. As currently drafted the restrictions are more than “suggestions” and are actually more restrictive than requirements for onsite septic systems currently being considered by the State Water Board. If the restrictions are “suggested” then they should not be required as provision but should be identified as suggested or removed from the permit. If the intent is to allow the Permittees to develop criteria for infiltration of stormwater than the provision should be that the Permittees should develop the criteria and the “suggested” criteria should be deleted form the permit. Since the Fact Sheet, and the Regional Board Response to Comments dated July 6, 2007 does not provide adequate technical basis for the requirements and the Regional Board Response to Comments dated July 6, 2007 identifies the requirements as “suggested”, Section F.1.c.(6) should be deleted from the Tentative Order. Jurisdictional Runoff Management Program (JRMP) Section F.1.c.(6)(g) restricts the use of infiltration treatment control BMPs in areas of industrial or light industrial activity and areas subject to high vehicular traffic. High vehicular traffic is defined as 25,000 or greater average daily traffic on main roadway or 15,000 or more average daily traffic on any intersecting roadway. There is no specific technical basis for this restriction or the definition of “high vehicular traffic” included within the Fact	The Tentative Order continues to give the Copermittees the needed flexibility to develop criteria for infiltration treatment devices. The criteria set forth in the Permit are the minimum requirements for infiltration if the Copermittees choose not to develop separate criteria. The language will remain in the Permit as we have no knowledge of an individual Copermittee implementing separate infiltration criteria. Any separate infiltration criteria developed by the Copermittees, must be submitted as part of their updated SSMP for public review and comment. The restriction on areas with high vehicular traffic is included on the recommendation of the USEPA guidance that the commenter cited. The requirement in Section F.1.c.6.(g) restricting infiltration in certain areas has been modified to be allow infiltration, provided the runoff is treated or filtered to remove pollutants prior to entering the infiltration device. This change is in light of the findings of the Los Angeles and San Gabriel Rivers Watershed Council's Water Augmentation Study Phase II Final Report. The study found that "Filtration methods employed at industrial sites seemed to be effective at removing certain pollutants prior to entering the infiltration system, which may make infiltration more feasible at these more polluted sites." This provision is in keeping with the goal of maximizing infiltration opportunities to benefit surface water quality and maximize local sources of water supply.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
				Sheet and the reference to the EPA Guidance in the Regional Board Response to Comments dated July 6, 2007 does not provide an adequate technical basis. As such, prescriptive requirements should not be included in the Tentative Order unless there is a strong technical basis. Although SWRCB Order WQ 2000-11 provides guidance on some of the restrictions on the use of infiltration treatment control BMPs contained in the Tentative Order, there is no mention of restrictions related to areas subject to high vehicular traffic. Moreover, we are not aware of any demonstrated relationship between traffic counts and frequency of materials deposited on the street.	
101	4	SUSMP	F.1	• Native/Low Water Landscaping (Section F.1.c.(7), Page 27) This new provision identifies that landscaping with native or low water species where feasible shall be preferred in areas that drain to the MS4 or waters of the U.S. It is unclear to the County as to the nexus between the use of native plants and runoff water quality. For what purpose does this provision have to protect water quality and beneficial uses? This provision would appear to be outside the jurisdiction of the Regional Board.	This provision is not an Order requirement, and is simply a suggestion to use native species where feasible. Invasive plant species can degrade the Beneficial Uses of the waters of the State, and the Regional Board is encouraged by the actions taken to date by Copermittees to prevent many non-native species from being introduced to waters of the U.S. and State, especially via the MS4 system. Furthermore, native/low water landscaping is likely to require fewer fertilizers that could be mobilized to jurisdictional waters and cause nutrient-related water quality impacts.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
102	4	SUSMP	F.1	• Standard Stormwater Mitigation Plans (SSMPs) (Section F.1.d, Page 27-28) Section F.1.d. requires each Permittee to implement an updated local SSMP within twelve months of adoption of the Order. The schedule for the update of the SSMP is overly aggressive and does not allow the time necessary for the Permittees to incorporate changes and implement an updated SSMP. This provision adds language that requires the inclusion of the hydromodification requirements in provision F.1.h in an updated local SSMP within one year of the adoption of the Order. The requirements in provision F.1.h include the development of watershed specific HMPs within two years of adoption of the Order. The timeframe to update the local SSMPs in Provision F.1.d should be consistent with the time frame identified to develop the watershed specific HMPs in provision F.1.h. It is recommended that the Provision be modified as follows: Each Copermittee must implement an updated local SSMP, upon completion of the watershed specific HMP(s) in their jurisdiction, which meets the requirements of section F. 1. d. of this Order and (1) reduces Priority Development Project discharges of storm water pollutants from MS4 to the MEP, (2) prevents Priority Development Project runoff discharges from the MS4 from causing or contributing to a violation of water quality standards, (3) manages increases in runoff discharge rates and durations from Priority Development Projects that are likely to cause increased erosion of stream beds and banks, silt pollution generation, or other impacts to beneficial uses and stream habitat due to increased erosive force and (4) implements the hydromodification requirements in section F.1.h.	The Tentative Order has been revised to allow up to two years to develop the updated SSMP in conjunction with the hydromodification management plan.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
103	4	SUSMP	F.1	• Priority Development Project Categories (Section F.1.d.(2), Page 29) The Regional Board Response to Comments dated July 6, 2007 regarding this section does not provide any technical basis for requiring that a new Development project feature requires the entire project footprint being subject to SSMP requirements. The Response to Comments only mentions that the provision is "a particularly important requirement since municipalities have greater latitude during development to require pollution prevention than they have with existing development", however pollution prevention is not required from land uses that are not Priority Development Project Categories and so the Response to Comments fails to address this potential situation and does not provide any technical basis for the provision. Furthermore, this requirement, Provision F.1.d.(2), appears in direct conflict with Provision F.1.d.(1)(b) which defines the area subject to SUSMP requirements. Given that provision F.1.d.(1)(b) is consistent with Board Order WQ 2000-11, provision F.1.d.(2) should be deleted. Since the previous comments on this issue were not addressed in the Regional Board's Response to Comments, the comments are being resubmitted.	Although a priority development project is defined throughout the permit, the entire project footprint is subject to SSMP requirements. This is reasonable and protective of water quality because specific priority development projects have amenities that may generate pollutants. This common sense approach that the SSMP requirements apply to the entire project footprint is recognized in the County of Orange's Local Implementation Plan that is contrary to their comment. Table A-7.VI-2, Anticipated and Potential Pollutants Generated by Land Use Type, in the County's LIP describes parking lots as potentially generating nutrients, pesticides, sediments and oxygen demanding substances if landscaping exists onsite. If the SSMP applied to only the criteria triggering a priority development project, the County's table would not list those substances as being generated from a parking lot. For example, although a housing subdivision of 10 or more dwelling units defines one type of priority development project, the entire project would be subject to SSMP requirements. The SSMP would need to treat runoff from the yards, streets, and driveways as well as runoff from the houses. The commenter misreads provision F.1.d.(1)(b). The requirement is not in conflict but is demonstrating the difference associated with redevelopment and new development categories. It is appropriate to have a different requirement for redevelopment due to expected site constraints encountered with redevelopment.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
104	4	SUSMP	F.1	Section F.1.d.(2) defines Priority Development Project Categories. In an introduction to the listed categories, this section states that, where a new development project feature, such as a parking lot, falls into a Priority Development Project Category, the entire project footprint is subject to SUSMP requirements. As currently written this provision would require a new development that has a 5,000 square foot parking lot feature and 100,000 square feet of other land uses that are not Priority Development Project Categories, to provide treatment for the entire project (105,000 square feet). This requirement would unduly burden the landowner in this case with the cost of treating runoff from 105,000 square feet when only 5,000 square feet should be subject to SUSMP requirements and treatment controls. The need to treat runoff from a greatly increased land area will require an increase in the size of treatment controls, which will increase the volume of water treated without a likely commensurate increase in pollutant removal. This requirement will unnecessarily increase the cost of treatment control BMPs without commensurate pollutant removal benefits and likely discourage re-development. The Fact Sheet fails to provide any information showing that development land uses that are not in the Priority Development Project Category contribute pollutants to the MS4 and are a threat to water quality. The Fact Sheet (page 78) states that this provision "is included in the Order because existing development inspections by Orange County municipalities show that facilities included in the Priority Development Project Categories routinely pose threats to water quality. This permit requirement will improve water quality and program efficiency by preventing future problems associated with partially treated runoff from redevelopment sites. This explanation does not demonstrate any connection between development land uses that are not in the Priority Development Project Category and the observed "threats to water quality." In addition, although the explanation focuses on the water quality benefits for redevelopment projects, the Section is for "new development" projects". Since the Fact Sheet does not provide any technical information showing that land uses that are not Priority Development Project Categories are a significant source of pollutants and a threat to water quality, the introductory paragraph of Section F.1.d.(2) subjecting the entire project footprint to SUSMP requirements should be removed from the permit.	See response to Comment No.103. In addition, the commenter appears to be confusing the difference between the project footprint and the lot size. Project footprint is that area that is being developed. Within a property owner's lot, there may be natural undisturbed areas in addition to the project footprint. Clearly, runoff from the natural, left undisturbed areas need not be treated.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
105	4	SUSMP	F.1.	• Commercial Developments (Section F.1.d.(2)(b), Page 29) Section F.1.d.(2)(b) lowers the threshold criterion for commercial developments required to comply with SUSMP requirements from 100,000 square feet (2.3 acres) to one acre. The Fact Sheet states that this provision has been modified to be consistent with US EPA Phase II Guidance. However, EPA Phase II guidance is not relevant to a Phase I permit. The Fact Sheet also states that this Provision is based on Permittee findings that smaller commercial facilities pose high threats to water quality. This is not the case. The Permittees indicated that commercial facilities of 100,000 square feet or less receive a score of 3 out 5 (a medium threat) in Table 9-8 in the 2007 DAMP. Since the Fact Sheet does not provide any technical basis for lowering the threshold criterion for commercial developments required to comply with SUSMP requirements from 100,000 (2.3 acres) square feet to one acre, the category should be described as, "Commercial developments greater than 100,000 square feet."	The Tentative Order has been changed to make the definition of a priority development project consistent with the recently adopted Region 8 MS4 permit for North Orange County. The modified requirement defines any commercial development greater than 10,000 square feet to be a priority development project requiring a SSMP. This criteria was redefined to adequately address potential pollutant sources, which may exist at properties that undergo development for commercial uses.
106	4	SUSMP	F.1	• Industrial Developments (Section F.1.d.(2)(c), Page 29) Section D.1.d.(2)(c) requires industrial developments of greater than one acre to comply with SUSMP requirements. The Fact Sheet states that this provision has been modified to be consistent with US EPA Phase II Guidance. Again, EPA Phase II guidance is not relevant to a Phase I permit. In addition, the Fact Sheet does not provide a technical basis for adding industrial sites to the Priority Development Project Categories and consequently Section D.1.d.(2)(c) should be deleted from the permit.	The Tentative Order has been changed to make the definition of a priority development project consistent with the recently adopted Region 8 MS4 permit for North Orange County. The modified requirement defines any industrial development greater than 10,000 square feet to be a priority development project requiring a SSMP. This criteria was redefined to adequately address potential pollutant sources, which may exist at properties that undergo development for industrial uses.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
107	4	SUSMP	F.1	• Retail Gasoline Outlets (Section F.1.d.(2)(j), Page 30) Section F.1.d.(2)(j) includes as a Priority Development Project Category Retail Gasoline Outlets (RGOs) that meet the criteria of 5,000 square feet or more or have a projected Average Daily Traffic (ADT) of 100 or more vehicles per day. SWRCB Order WQ 2000- 11 provides guidance on whether RGOs are subject to SSMP requirements. The State Board states in this Order that "In considering this issue, we conclude that construction of RGOs is already heavily regulated and that owners may be limited in their ability to construct infiltration facilities. Moreover, in light of the small size of many RGOs and the proximity to underground tanks, treatment may not always be feasible, or safe." Although the State Board does not prohibit subjecting RGOs to SSMP requirements, the State Board provides a number of reasons for not doing so, including that fact that RGOs are already heavily regulated. It should also be noted that the DAMP already prescribe a suite of BMPs specific to RGOs. Subjecting RGOs to SSMP requirements imposes duplicity where it is not needed. Section F.1.d.(2)(j) should be removed from the permit.	The inclusion of Retail Gasoline Outlets was discussed at length in the Fact Sheet. Please see the discussion in the fact sheet for Finding D.2.d. on page 52, and Section D.1.d.(2)(j) on page 86. This section has not been changed or modified.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
108	4	LID	F.1.	• LID Site Design BMP Requirements (Section F.1.d.(4), Page 30-33) This provision identifies that each Permittee must require LID stormwater practices or make a finding of infeasibility for each Priority Development Project (PDP) for inclusion of LID. This provision effectively requires each PDP to perform an analysis of the applicability of LID BMPs for a given project and either incorporate LID BMPs into the project or provide documentation that supports a finding that LID BMPs cannot be incorporated, which presents a significant change in the way development projects are planned and designed and presents an additional burden on developers and municipal plan checkers. The Tentative Updates and Errata document released on May 5th changes this language by specifying that each Permittee must require a project to include LID stormwater practices or, alternatively, participate in the LID substitution program described in Section F.1.d.(8). The analysis of the feasibility of LID BMPs is most appropriate to be included under this provision as the LID Site Design Substitution Program, as discussed later, is confusing and an unnecessary provision. It is recommended that Section F.1.d.(4)(a)(i) not be changed per the Tentative Updates and Errata document release on May 5th and remain as worded in the March 13th Tentative Order as follows: Each Copermittee must require LID storm water practices or make a finding of infeasibility for each Priority Development Project.	The Tentative Order has been modified to address the commenter's concern. The finding of infeasibility is subject to the criteria outlined in the LID substitution program.
109	4	LID	F.1	Section F.1.d.(4)(a)(iii) requires each PDP to perform an assessment of the potential for collection of stormwater for beneficial use on-site or off-site prior to discharging from the MS4. The language “discharging from the MS4” is confusing and the meaning should be defined or the language should be changed to “discharging to the MS4”. There is no language in the Tentative Order that identifies how extensive the analysis should be and there is no supporting language in the Fact Sheet as to why this analysis should be done. The requirement to perform this assessment for off-site use, which is not defined, puts an undue burden on developers to identify potential uses beyond the area and control of the PDP. This provision likely goes beyond the authority of the Regional Boards per Water Code § 13360, which prohibits the Regional Board from specifying the manner of compliance with its regulations. It is recommended that Section (a)(iii) of this provision be modified as follows: The review of each Priority Development Project shall consider potential collection of storm water for beneficial use on-site prior to discharging to the MS4.	The Tentative Order has been changed in response to this comment. The phrase, "on site or off site prior to discharging from the MS4" has been removed.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
110	4	LID	F.1	Section F.1.d.(4)(a)(vi) requires that within 365 days of adoption of the Order that each Permittee review its local codes and ordinances and identify barriers therein to implementation of LID stormwater practices. One year, however is not adequate time for each Permittee to identify barriers to LID in its local codes and ordinances as similar projects to identify barriers to LID have taken multiple years. A minimum of two (2) years should be provided for the Permittees to identify these barriers which would allow a thorough understanding of the types of barriers present in local codes and ordinances, and the time to create ordinances that are compatible and support the other stormwater program elements. It is recommended that Section F.1.d.(4)(a)(vi) be modified as follows: Within 365 days two (2) years after adoption of this Order, each Copermittee must review its local codes and ordinances and identify barriers therein to implementation of LID storm water practices. Following the identification of these barriers to LID implementation, where feasible the Copermittee must take appropriate actions to remove barriers directly under Copermittee control by the end of the permit cycle.	The Tentative Order has been changed to allow the Copermittee's up to two years to review their local ordinances as part of the updated SSMP. Although the Copermittee has two years to identifiy the local ordinances, the Copermittee has up to five years, the next permit cycle, to create and amend their ordinances to be compatible and support LID, i.e. remove barriers.
111	4	LID	F.1.	Section F.1.d.(4)(b)(i) requires PDPs to maintain or restore natural storage reservoirs and drainage corridors in drainage networks in preference to pipes, culverts, and engineered ditches. The intent of the provision appears to be to assist in maintaining the pre-development hydrology, however this provision specifies how a PDP is to maintain the pre-development hydrology which may go beyond the limitations in Water Code § 13360. It is recommended that Section F.1.d.(4)(b)(i) be modified as follows: Consider maintaining or restoring natural storage reservoirs and drainage corridors (including depressions, areas of permeable soils, swales, and ephemeral and intermittent streams) in drainage networks in preference to pipes, culverts, and engineered ditches.	After meeting with the Copermittees, the Tentative Order has been modified to remove the term "in drainage networks in preference to pipes, culverts, and engineered ditches."

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
112	4	LID	F.1.	Section F.1.d.(4)(b)(ii) of this provision requires draining a portion of the impervious area to pervious areas before discharge to the MS4, specifying that the amount of runoff shall correspond to the total capacity of the pervious areas. Section (b)(iii) of this provision identifies that pervious or landscaped areas should be properly designed and constructed to effectively receive and infiltrate or treat runoff. The effect of these provisions requires that all landscaped and pervious areas are sized and designed as stormwater treatment devices, such as bioretention or vegetated swales. Using landscaped and pervious areas as stormwater treatment devices is not always feasible and is dependant on site specific constraints. It is recommended that Section F.1.d.(4)(b)(ii) and Section F.1.d.(4)(b)(iii) of this provision be modified as follows: Section F.1.d.(4)(b)(ii) - Projects with landscaped or other pervious areas shall, where feasible, drain a portion of impervious areas (rooftops, parking lots, sidewalks, walkways, patios, etc) into pervious areas prior to discharge to the MS4. The amount of runoff from impervious areas that is to drain to pervious areas shall correspond with the total capacity of the project's pervious areas to infiltrate or treat runoff, taking into consideration the pervious areas' soil conditions, slope, and other pertinent factors. Section F.1.d.(4)(b)(iii) - Projects with landscaped or other pervious areas shall, where feasible, properly design and construct the pervious areas to effectively receive and infiltrate or treat runoff from impervious areas, prior to discharge to the MS4. Soil compaction for these areas shall be minimized. The amount of the impervious areas that are to drain to pervious areas must be based upon the total size, soil conditions, slope, and other pertinent factors.	The Tenative Order has been updated to incorporate the commenter's suggestion.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
113	4	LID	F.1.	• LID Site Design BMPs Sizing and Design (Section F.1.d.(4)(c), Page 33) The Tentative Updates and Errata document released on May 5th (page 7) contains a new section which requires that LID structural site design BMPs to be sized and designed to ensure capture of the 85th percentile storm event for all flows from the development in accordance with Section F.1.d.(6)(a)(i) and Section F.1.h. The objective of Low Impact Development is for a development site to maintain pre-development site hydrology by implementing site-design techniques that function similar to natural processes. LID BMPs should therefore not be designed to capture the 85th percentile storm event but rather to capture the difference in volume between the 85th percentile storm event for the pre-development condition and the 85th percentile storm event for the post-development condition (delta volume). By sizing and designing LID BMPs to the delta volume this will help to ensure that the pre-development hydrology is maintained which is the objective of the Low Impact Development stormwater approach. This new section also requires that any volume over and above the design capture volume, that is not captured by the LID BMPs shall be treated using conventional treatment control BMPs in accordance with Section F.1.d.(6). This language appears to require treatment beyond the 85th percentile storm event which unnecessary as most pollutants are removed through treatment or capture of the 85th percentile storm event, it is likely infeasible in many locations, and it would but an unnecessary burden on PDPs without much added pollutant removal benefit. It is recommended that the Provision be modified as follows: LID structural site design BMPs shall be sized and designed to ensure capture of the difference between 85th percentile storm event (“design capture volume”)for the predevelopment condition and the 85th percentile storm event (“design capture volume”)for the post-development condition for all flows from the development or redevelopment project in accordance with Section F.1.d.(6)(a)i. and Section F.1.h below.	The Tentative Order's language regarding Low Impact Development requirements has been modified to be consistent with the Region 8's recently adopted MS4 permit for North Orange County. The language still requires onsite retention through infiltration, evapotranspiration or rainwater harvesting. In addition, the Permit allows properly designed biofiltration BMPs to be used as allowed by the Region 8 permit. Retention on site and/or biofiltration is required of all flows resulting from storm up to and including the 24-hour 85th-percentile storm event.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
114	4	LID	F.1.	Alternatively the term “capture” as used in the Tentative Updates and Errata document released on May 5th should be defined as capturing water for treatment using LID BMPs and should not be defined as retention of the 85th percentile storm event. Retention of the 85th percentile storm event is an artificial metric that does not meet the objective of Low Impact Development which is to maintain pre-development site hydrology. If retention is used as the definition of capture there will be many development site locations where this will be infeasible due to site constraints. Capture should be defined as treatment of the 85th percentile storm event which is likely feasible at almost all development site locations. The benefits of LID are realized with the definition of capture as treatment, as retention will still occur on sites where it is feasible through infiltration and evapotranspiration, and on sites where retention is not feasible, vegetated LID BMPs will still provide treatment and volume reduction will occur through some infiltration and evapotranspiration. Alternatively it is recommended that the Provision be modified as follows: LID structural site design BMPs shall be sized and designed to ensure capture treatment of the 85th percentile storm event (“design capture volume”) for all flows from the development or redevelopment project in accordance with Section F.1.d.(6)(a)i. and Section F.1.h below.	The Tentative Order's language regarding Low Impact Development requirements has been modified to be consistent with the Region 8's recently adopted MS4 permit for North Orange County. The language still requires onsite retention through infiltration, evapotranspiration or rainwater harvesting. In addition, the Permit allows properly designed biofiltration BMPs to be used as allowed by the Region 8 permit.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
115	4	SUSMP	F.1.	• Treatment Control BMP Requirements (Section F.1.d.(6)(f) and (g), Page 34) The Regional Board Response to Comments dated July 6, 2007 regarding this section does not provide any technical basis for these provisions and it does not adequately address the comments provided stating that "the concerns are addressed within the Tentative Order". Since the previous comments on this issue were not adequately addressed in the Regional Board's Response to Comments, the comments are being resubmitted. Section F.1.d.(6)(f) require treatment control BMPs be implemented prior to discharging into waters of the U.S. and provision F.1.d.(6)(g) requires that treatment controls not be constructed within waters of the U.S. or waters of the State. These provisions of the Tentative Order greatly limit the use of regional BMP and watershed-based approaches. The provisions demand a lot-by-lot approach in implementing BMPs that is analogous to the site-by-site septic tank approach that has been discredited as an effective strategy for sewage treatment in urban areas. Similarly, the Permittees submit that such an approach is also ineffective for stormwater and will lead to a diversion of limited resources to managing thousands of site-by-site treatment controls, which are managed by parties that have limited or no experience, instead of hundreds of regional controls, that are managed by parties and governmental agencies that have expertise in BMP management. The Tentative Order encourages a renewed focus on the 'watershed approach' but the proposed restriction on regional BMPs is antithetical to a watershed approach. The USEPA in its National Management Measures Guidance to Control Nonpoint Source Pollution from Urban Areas, Management Measure 5: New Development Runoff Treatment dated November 2005 (page 5-38) states that "regional ponds are an important component of a runoff management program." and that the costs and benefits of regional, or off-site, practices compared to on-site practices should be considered as part of a comprehensive management program. The EPA guidance acknowledges that a regional approach can effectively be used for BMPs. In addition, the Fact Sheet does not provide any technical justification for these provisions. Since neither the Findings nor the Fact Sheet provide any technical basis for precluding regional BMPs and EPA guidance recommends the use of regional BMPS, these provisions should be deleted from the permit.	This issue was addressed in the 2007 fact sheet and response to comments. Please see the response to Comment No. 69.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
116	4	LID	F.1.	• LID Site Design BMP Substitution Program (Section F.1.d.(8)(d), Page 36) In the March 13th Tentative Order the provision has been modified to require that for PDPs participating in the Substitution Program that all LID site design BMPs meet the requirements in Section F.1.d.(4). As LID BMPs are now required in every PDP the Substitution Program essentially becomes a moot provision since if it is feasible to incorporate LID BMPs a PDP would most likely not need to include treatment control BMPs. The May 5th Tentative Updates and Errata document modifies this provision to include a feasibility analysis for PDPs where LID BMPs are not feasible. This new language effectively changes the meaning of Provision F.1.d.(8) from a LID Site Design BMP Substitution Program to a Treatment Control BMP Substitution Program as the Tentative Order requires LID site design BMPs unless they are demonstrated to be infeasible, which then Treatment BMPs appear to be able to be substituted. It is recommended that the Provision be deleted and that the LID feasibility provisions under Section F.1.d.(8)(d) from the May 5th Tentative Updates and Errata document be moved under Section F.1.d.4.(a)(i).	The commenter is correct that it is the intent of this section that LID BMPs are required unless demonstrated to be infeasible, which then Treatment BMPs are able to be substituted and mitigation implemented. The language in the Tentative Order has been modified to clarify that intent.
117	4	SUSMP	F.1.	• Treatment Control BMP Maintenance Tracking (Section F.1.f, Page 38) The Regional Board Response to Comments dated July 6, 2007 regarding this section identifies that the provision has been modified to "allow the Permittees more latitude with verifying treatment control BMP operations through self-certification, third party inspection and/or verification by the Copermittee," however the self-certification program is required to comply with the same very prescriptive provisions. The Provision should be amended to properly allow the Permittees to develop a self-certification inspection program that will meet the intent of the provision without having pre-determined requirements which undermine the benefits of a self-certification inspection program. It is recommended that the Provision be modified as follows: (c) Verify implementation, operation, and maintenance of treatment BMPs by inspection, through the development of a self-certification BMP inspection program within 12 months of the adoption of this Order.	Please see the response to Comment #27. Copermittee inspections are preferable to self certification programs for high priority projects. The requirements in the Tentative Order are on the verification program as a whole including inspections and self certifications. The requirements define when it is appropriate to use the self certification program.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
118	4	Hydromod	F.1.	• Requirements for Hydromodification and Downstream Erosion (Section F.1.h, Page 39) Section F.1.h. discusses the hydromodification requirements for Priority Development Projects. The hydromodification provisions are of concern to the Permittees for several reasons. As a general matter, the hydromodification provisions may actually discourage smart growth and sustainable development and encourage urban sprawl. High density urban development generally does not have the space to allocate to onsite hydromodification controls. However, urban development has other water quality benefits such as incorporating subterranean parking garages, retail and office workspace, and residential space into a single impervious footprint. As a result, these types of developments have a much smaller impervious footprint than suburban developments that accommodate the same features. This Provision should be amended to include an exception for urban development based on impervious footprint.	The Regional Board agrees that urban development is preferable to urban sprawl for the reasons stated by the commenter. Nevertheless, the Regional Board disagrees that the hydromodification requirements should include an exception for urban development. New urban development must provide opportunities to incorporate LID design features and green spaces that can infiltrate runoff from smaller, frequent storms. In order to incorporate the necessary design features to capture runoff from larger storms per the hydromodification requirements, land developers have the option to use regional treatment controls where space is limited. Section F.1.h of the Tentative Order has been modified to include the use of regional treatment controls as an option to meet the hydromodification requirements.
119	4	Hydromod	F.1.	Section F.1.h.(3) (Page 40) requires each Permittee to implement, or require implementation of, a suite of management measures within each Priority Development Project to protect downstream beneficial uses and prevent adverse physical changes to downstream stream channels. This section should not apply to watersheds or watershed plans that already include sufficient hydromodification measures. For example, the County of Orange and major landowners, such as Rancho Mission Viejo have put in place a comprehensive watershed land use/open space strategy for the San Juan Creek Watershed/Western San Mateo Watershed which includes water quality/quantity management as an integral component. The Tentative Order should be amended to provide an exception to this section for those watersheds where a watershed plan that contains sufficient hydromodification measures has been developed.	The Regional Board disagrees that the hydromodification measures stated in section F.1.h should not apply to certain watersheds. Although certain watersheds may have an existing watershed land use/open space strategy, there is no assurance that this strategy would maintain the same level of protection from hydromodification that the measures in section F.1.h provide. Additionally, the hydromodification measures call for a collective strategy to be developed by all the Copermittees to ensure a consistent, effective, region-wide approach. Allowing exceptions because of alternative management plans does not accomplish a consistent approach.
120	4	Hydromod	F.1.	This section should also recognize that the common hydromodification management measures for complying with the hydromodification requirements don't necessarily apply directly to flood control projects.	Part of the tasks in developing an HMP by the copermittees is defining a range of flows for which hydromodification management measures must be applied. Flows outside of that range (including flows that may cause flooding) need not be controlled.
121	4	Hydromod	F.1.	Section F.1.h.3.(b) (Page 40) requires that management measures must be based on a sequenced consideration of site design measures, on-site management controls, and then in-stream controls. The provision does not include an option to address hydromodification on a regional or watershed basis. This provision should be amended to include an option to address hydromodification on a regional or watershed basis.	Section F.1.h of the tentative order has been modified to include a provision for regional controls. Regional controls shall be an option after site design measures and on-site controls have been considered.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
122	4	Hydromod	F.1.	Section F.1.h.(3)(b)(i) (Page 40) requires that site design measures for hydromodification must be implemented on all Priority Development Projects. It is neither necessary nor prudent to require hydromodification controls on all priority projects. Some priority projects may be too small to have hydromodification effects and some may discharge into engineered channels, which makes these measures unnecessary. The receiving channel must always be part of the assessment of whether hydromodification controls will be required. This Provision should be amended to include language that the controls are required unless a waiver per paragraph (c) of this section is granted.	The Regional Board recognizes that some priority development projects may be too small to have hydromodification effects; for that reason, the Copermittees must define a range of flow rates for which hydromodification management measures must be implemented. If a project is estimated to generate flows outside of this range, then the flows need not be controlled. Additionally, for smaller projects, it is likely that the hydromodification management measures will be met through the use of LID features, which are required per section F.1.d (4). Although some projects may discharge into engineered channels, the hydromodification management measures must still be implemented to ensure bank stability if the engineered channel is ever returned to its natural, pre-armored state. Therefore the assessment of the receiving channel will be included in the HMP, and in cases where the receiving channel has been hardened, the assessment shall be done for a comparable soft-bottomed channel, as described in section F.h.(1)(b). Alternatively, if the Copermittees determine that it is infeasible to perform the assessment on a hardened channel as though it were a soft-bottomed, then the Copermittees may use the hardened channel as the channel standard. However, the Copermittees must also conduct a feasibility study to explore the removal of concrete in the channel as a means towards stream restoration. The study must include an analysis of the maximum flows that could be tolerated by a stable soft-bottomed creek bed and bank, and an analysis of the flow reductions required per sub-watershed to achieve a stable soft-bottomed creek bed and bank. Because the hydromodification controls will be required upstream of hardened channels, or a feasibility study for restoring the creek will be required, the Regional Board will not modify the language regarding waivers per the commenter's suggestion.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
123	4	Hydromod	F.1.	• Hydromodification & Engineered Channels (Section F.1.h.3.(c)(ii), Page 41) Provision F.1.h.3.(c)(ii) has been deleted, which removes the waiver of hydromodification requirements for those PDPs that discharges to concrete-lined or significantly hardened channels downstream to their outfall in bays or the ocean. The waiver for PDPs that discharge to concrete-lined or significantly hardened channels should be included as hydromodification requirements are not appropriate for channels that are designed to accept increased flows from upstream development as the potential for erosion is minimal or not present. The fact sheet does not provide any discussion under this provision of why the waiver was removed and the discussion under Finding D.2.g does not adequately address hydromodification requirements related to concrete lined or significantly hardened channels. It is recommended that the Provision providing conditional waivers for hydromodification requirements for concrete-lined or significantly hardened channels be added back into the Tentative Order.	The fact sheet has been modified to include a discussion regarding the removal of the waiver of hydromodification requirements for Priority Development Projects which discharge to concrete-lined channels.
124	4	Hydromod	F.1.	• Hydromodification Management Plans (Section F.1.h.(4) & (5), Page 41-43) Provisions F.1.h.(4) & (5) have been modified to require the development of watershed specific Hydromodification Management Plans that include specific criteria for minimizing and mitigating hydrologic modification at all development and redevelopment projects within two years of adoption of the Order. The timeframe for development of HMPs for each watershed is too short to ensure an optimized program. Interim criteria assures that there will not be unregulated construction in the interim. A minimum of three years, which was the length of time to develop criteria identified in the previous Tentative Order, should be allowed for their development. It is recommended that the Provisions be modified as follows: Section F.1.h.(4) - Each Copermittee must revise its SSMP/WQMP to implement a watershed specific Hydromodification Management Plan (HMP) to include specific criteria for minimizing and mitigating hydrologic modification at all development and redevelopment projects, unless hydromodification requirements have already been developed for a watershed which can be integrated into the SSMP/WQMP. Section F.1.h.(5) (a) - Within 3 years of adoption of the Order, the Permittees shall submit to the Regional Board a draft HMP that has been reviewed by the public, including the analysis that identifies the appropriate limiting range of flow rates.	The Regional Board will not modify the language in the Tentative Order to allow for the use of an alternate hydromodification management plan that may not have as rigorous of requirements for the reasons discussed in the response to comment No. 119. Given that a Hydromodification Management Plan (HMP) is nearing completion in the San Diego area, it is not appropriate to delay the development of an HMP in the Orange County area by adding another year. The Regional Board fully expects the Orange County copermittees to utilize the findings from the San Diego copermittees in developing a local HMP.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
125	4	Hydromod	F.1.	• Interim Hydromodification & Effective Impervious Area (Section F.1.h.(6)(i), Page 43) Section F.1.h.(6)(i) has been modified to require, as an interim measure that each PDP, not just projects disturbing 20 acres or more, disconnect impervious areas by reducing the percentage of Effective Impervious Area to less than five percent of total project area. EIA is not an adequate metric for hydromodification as there is a lack of a technical consensus on a performance standard relating the disconnection of impervious area and either water quality or hydromodification. This performance standard will ultimately be a very land intensive requirement which may promote sprawl and not conserve natural areas. The 5% EIA number was originally identified in the context of watershed imperviousness and not for a specific development site. The fact sheet identifies that the 5% EIA number was added in direct response to comments from the USEPA on Tentative Order R9-2008-001, however USEPA, in several statements made by Dr. Cindy Lin at the November 14, 2008 CASQA General Meeting, suggested that the 5% EIA metric should only be considered as an example and that USEPA is open to consideration of other metrics for LID. It is unclear whether the language in the Tentative Updates and Errata document released on May 5th replaces and removes the 5% EIA metric from the Tentative Order or if the language is in addition to the 5% EIA metric. In addition the new language from the Tentative Updates and Errata document released on May 5th should be based on the 85th percentile storm event runoff volume. It is recommended that the current language of the Draft North Orange County permit be substituted.	The language regarding the interim hydromodification and EIA has been removed from section F.1.h.(6)(i). The requirements involving EIA are discussed under the LID requirements (section F.1.d.(4)). Please response to Comment No. 4 for discussion on the revised LID metric.
126	4	Construction	F.2	Construction Component • Permit Fees Since the previous comments on this issue were not addressed in the Regional Board's two Response to Comments documents, the comments are being resubmitted. Although not directly addressed within the Tentative Order, the Permittees take issue with the requirement that they must pay a significant fee for the municipal stormwater permit, which covers their construction responsibilities and are also required to pay an additional fee when they submit an NOI to obtain coverage under the Statewide Construction General Permit. Since there is some discretion in how the Regional Water Board addresses these fees, the Permittees request that their municipal stormwater fees cover all municipal activities including construction and that they not be held liable for additional fees when submitting NOIs.	Each person for whom waste discharge requirements have been prescribed pursuant to section 13263 of the Water Code shall submit, to the State Board, an annual fee in accordance with the schedules prescribed in California Code of Regulations Title 23. Division 3. Chapter 9. Waste Discharge Reports and Requirements Article 1. Fees Section 2200. Annual Fee Schedules. The fee shall be submitted for EACH waste discharge requirement order issued to that person. The Regional Board does not have the discretion to combine, reduce, or waive fees for waste discharge requirements. The Regional Board is required by the California Code of Regulations to collect fees for each order issued to an entity wanting to discharge waste to waters of the State of California.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
127	4	Construction	F.2.	• BMP Implementation (Section F.2.d, Page 46-47) The previous comments on this issue made by the Permittees were not addressed in the Regional Board's two Response to Comments documents, and are therefore resubmitted. Section F.2.d.(1)(a)(ii) requires the development and implementation of a site-specific stormwater management plan. To make the language consistent with the changes made to Section F.2.c.2 (Page 46), the County suggests the following change: (ii) Development and implementation of a site-specific stormwater management plan erosion and sediment control plan (or equivalent BMP plan);	Comment noted. In order to be consistent the permit language on Page 46 will strike the requirement of an erosion and sediment control plan and replace it with a runoff management plan. The new language will read as follows: Provision F.2.c.2 - "Prior to permit issuance, the project proponent's runoff management plan (or equivalent construction BMP plan) must be required to comply, and reviewed to verify compliance, with the local grading ordinance, other applicable local ordinances, and this Order. Provision F.2.d.(1)(a) – Management Measures Provision F.2.d.(1)(a)(ii) - "Development and implementation of a runoff management plan;" To provide further clarity, runoff is defined in Appendix B of the Order.
128	4	Construction	F.2.	• Construction Reporting of Non-compliant Sites (Section F.2.g.(2), Page 50) This new provision requires that each Permittee must annually notify the Regional Board of all construction sites with potential violations prior to the commencement of the wet season. This reporting requirement should be limited to the sites meeting the criteria specified in F.2.e.1 that are required to be inspected in August and September of each year. The County recommends the following modifications. Each Copermittee shall annual notify the Regional Board, prior to the commencement of the wet season, of all construction sites inspected in accordance with F.2.e.4 that meet the criteria specified in F.2.e.1, with potential violations. …"	The Tentative Order has been updated and "potential" replaced with the word "suspected." The intent of the requirement is to allow the Regional Board to evaluate and prioritize inspections of construction sites, and is not intended to be used to determine Copermittee compliance with the Order. While suspect sites can include those under F.2.e.1, and the Regional Board does not discount their importance, the Regional Board expects suspect sites will include the following: 1) Sites where the Copermittees have issued enforcement, but a follow-up inspection has not occurred. 2) Sites that have not been inspected. 3) Sites that have received 3rd party complaints. 4) Sites that Copermittees have otherwise identified as warranting further inspection. The required information can be included with the JRMP Annual Report.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
129	4	Existing Development	F.3.	Municipal • Flood Control Structures (Section F.3.a.(4)(c), Page 53) Section F.3.a.(4)(c) requires the Permittees to evaluate existing flood control devices to identify those that are causing or contributing to a condition of pollution, identify measures to reduce or eliminate the structure's effect on pollution, and evaluate the feasibility of retrofitting the structure. This provision is problematic for several reasons as described below. The federal regulations [40 CFR, Part 122.26(d)(2)(vi)(A)(4)] focus on evaluating flood control devices and determining if retrofitting the device is feasible. The regulations state: (4) A description of procedures to assure that flood management projects assess the impacts on the water quality of receiving water bodies and that existing structural flood control devices have been evaluated to determine if retrofitting the device to provide additional pollutant removal from stormwater is feasible. The language should be modified so that it is aligned with the current stormwater permit, recognizes the work that has been completed, is consistent with the intent of the federal regulations, and is consistent with the justification within the Fact Sheet. The proposed language modification is as follows: (4). BMP Implementation for Flood Control Structures (c) Each Permittee who owns or operates flood control devices/facilities must continue to evaluate its existing flood control devices/facilities, identify devices causing or contributing to a condition of pollution, identify measures to reduce or eliminate the structure's effect on pollution, as needed and identify opportunities and the feasibility of configuring and/or reconfiguring channel segments/structural devices to function as pollution control devices to protect beneficial uses. The inventory and updated evaluation must be completed by July 1, 2008/10 and submitted to the Regional Board with the Fall 2008/10 annual report.	The Regional Board appreciates the fact that many structural flood control devices are owned and operated by the Orange County Flood Control District, which is also a Copermittee. Each Copermittee, however, must meet the requirements of the Tentative Order for its structural flood control devices. The Regional Board expects that the Flood Control District and other Copermittees will communicate with each other regarding structures owned by the District that serve other municipalities. This comment was addressed at length in the Response to Comments Documents Nos. 1 and 2, and the Fact Sheet. No changes have been made to the Order in response to this comment.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
130	4	Existing Development	F.3.	• Infiltration from Sanitary Sewer to MS4 (Section F.3.a.(7), Page 54) Although the first portion of the Tentative Order provision (7)(a) is consistent with the current permit (Order No. R9-2002-0001), the Permittees submit that the provisions regarding sanitary sewer maintenance are more applicable to sanitary sewer agencies,not stormwater agencies. It is inappropriate to include sanitary sewer maintenance requirements in a stormwater permit even where the two systems may be operated by the Permittee. Where similar maintenance requirements are included in the wastewater treatment plant or collection system permit13, these provisions are an unnecessary duplication of other regulatory programs. On a similar issue, the State Board stayed a provision in the existing permit finding that "the regulation of sanitary sewer overflows by municipal storm water entities, while other public entities are already charged with that responsibility in separate NPDES permits, may result in significant confusion and unnecessary control activities." [emphasis added] (WQ 2002-0014 at p.8). Therefore we submit that part (a) of the provision (7) should be deleted from the Tentative Order. While the Permittees agree that stormwater agencies must also address aspects of sanitary sewer incursions into the MS4s, the provisions in (7)(b) are aspects of other portions of the stormwater program and should be moved to those sections of the Tentative Order. The proposed changes include: i. Adequate plan checking for construction and new development – incorporate in the Construction and New Development programs ii. Incident response training for municipal employees that identify sanitary sewer spills – incorporate in the Illegal Discharges/Illicit Connections (ID/IC) program. iii. Code enforcement inspections – delete, this is covered by other programs iv. MS4 maintenance and inspections – incorporate in the Municipal program, provision D.3.a(6). v. Interagency coordination with sewer agencies – incorporate in the ID/IC program vi. Proper education of municipal staff and contractors conducting field operations on the MS4 or municipal sanitary sewer (if applicable) – incorporate in the Municipal program	Section F.3.a.7 identifies requirements regarding infiltration of sewage into the MS4 and preventive maintenance of the MS4. The requirements in the Tentative Order are specific to maintenance of the storm drain system and other tasks typically performed by the Copermittee and not the sanitary sewer agency, except in circumstances where the Copermittee operates its own sanitary sewer system. The requirements that apply to agencies which also operate sanitary sewers are clearly identified. Other requirements are reasonable functions of MS4 operators. This section has not been revised. See Also July 6, 2007 Response to Comments Document. No.44

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
131	4	Existing Development	F.3.	Commercial/Industrial • Commercial Sites/Sources (Section F.3.b.(1)(a)(i), Page 57) The Tentative Order added four new categories of commercial sites/sources: food markets, building material retailers and storage, animal facilities, and power washing services. The Fact Sheet notes that these facilities were added because these activities were identified as potentially significant sources of pollutants in annual reports. While we agree that sites/sources that are identified by the Permittees as contributing a significant pollutant load to the MS4 should be incorporated into the inventory, we disagree with adding them to the list in the Tentative Order unless universally identified, by all the Permittees as a significant source. The determinations of significance need to be made at a local level and incorporated into the local JURMP. As noted in the Regional Board's first response to comments document in discussing the balance of flexibility and enforceable criteria: "… the Tentative Order sets numeric criteria regarding commercial inspections, but relies on each Copermittee to select inspection targets based on its local knowledge." It is important that these determinations be made at a local level and if identified as a common problem, then apply the requirement applied countywide, otherwise the Board staff may inadvertently be diverting resources from high priority issues to lower priority issues in some areas. The new categories should be deleted from the Tentative Order and, instead, recognize that those sites/sources have been locally determined to contribute a significant pollutant load to the MS4 be should be incorporated into the local JURMP(s).	The new categories of pollutant generating activities and areas were identified in the annual MS4 program reports and quarterly Aliso Creek watershed reports. It is appropriate to include these new categories within the Tentative Order. Watersheds generally do not follow jurisdictional boundaries. Pollutant generating businesses and activities identified by some Copermittees were not jurisdictionally specific. The requirement in the Tentative Order applying to all Copermittees would prevent a "Tragedy of the Commons" whereby a less stringent requirement in a neighboring jurisdiction encourages the business to move operations to the jurisdiction with the less stringent requirement. The business is more than likely not to change practices or BMPs to reduce pollutant loads in the new jurisdiction with the less stringent requirement. Although, the Copermittee must identify the additional pollutant generating businesses, the Tentative Order provides great flexibility in determining what businesses the Copermittee must inspect. The addition of the categories is consistent with the requirements in the MS4 permit for San Diego County and the MS4 permit for North Orange County recently adopted by Region 8.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
132	4	Existing Development	F.3	• Mobile Businesses (Section F.3.b(3)(a), Page 59) The Tentative Order adds a new requirement to develop and implement a program to address discharges from mobile businesses. The program must include the identification of BMPs for the mobile business, development of an enforcement strategy, a notification effort, the development of an outreach and education program, and inspection as needed. In our previous comment letter we noted the difficulties associated with initiating this program, concerns which were mirrored in the Fact Sheet. For the reasons previously noted and acknowledged by the Regional Board, we request that the requirement for this program be changed to the development of a pilot program for the mobile business category. The pilot program would allow the Permittees to work together on a regional basis to develop an appropriate framework for addressing mobile business and determine whether the program is effective prior to expending a significant amount of resources on multiple categories of mobile businesses.	This comment was addressed in the July 2007 response to comments. The requirement for the inclusion of mobile business is not a significant change from the existing Order because several categories of mobile businesses are required to implement BMPs. The separate requirement only specifies the unique circumstances of mobile businesses; therefore the section has been segregated from the fixed location businesses. Conducting a pilot program would be unnecessary, because nothing in the Tentative Order prohibits the Copermittees from working together on a watershed basis to address mobile businesses. In addition, since the existing Order already requires BMP implementation at some of the identified mobile businesses; any lessening of that requirement would be considered backsliding and not compliant with anti-backsliding regulations within CFR 122.44(l).
133	4	Existing Development	F.3.	• Inspection of Industrial and Commercial Sites/Sources (Section F.3.b(4)(b), Page 60) This new provision requires that each Permittee must annually notify the Regional Board of all commercial and industrial sites/sources with potential violations prior to the commencement of the wet season. Similar to the new requirement for inspecting and reporting non-compliant construction sites, this requirement is ambiguous and subject to potential misinterpretation because Permittees do not inspect all commercial and industrial sites/sources each year. This reporting requirement should be revised so that it does not imply an expansion of the inspection frequency or change in inspection timing than that identified in the subsequent findings and JURMPs. "Each Permittee shall annual notify the Regional Board, prior to the commencement of the wet season, of all the Industrial Sites and Industrial Facilities subject to the General Industrial Permit or other individual NPDES permit with potential violations that were inspected within the preceding 6 months."	The Tentative Order has been modified to clarify the provision. Please see response to Comment 178 and 257.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
134	4	Existing Development	F.3.	• Food Facility Inspections (Section F.3.b.(4)(d), Page 61) The Permittees appreciate the elimination of the proposed expanded requirement to address maintenance of greasy roof vents. As noted in our April 2007 comments, the existing Food Facility Inspection program, which focuses on the major water-quality related issues associated with restaurants including disposal methods for food wastes, fats, oils and greases, wash water, dumpster management and floor mat cleaning has be shown to be effective. The Permittees submit that the additional expanded requirement, (c)(iv) identification of outdoor sewer and MS4 connections, either be deleted from the Tentative Order or the subject of further technical justification of its need for this successful program element.	Provision F.3.b.(4)(d) requires a Copermittee to conduct inspections at food facilities for compliance with its water quality ordinances. Sub-provisions (i) through (v) identify 5 areas an inspector should review during their inspection. Sub-provision (iv) specifically calls to attention a review of any outdoor sewer and MS4 connections. Review of surrounding outdoor sewer and MS4 connections is reasonable to evaluate how the facility's drainage is connected and if any illegal connections are present. No changes were made to this section.
135	4	Existing Development	F.3.	• Third Party Inspections (Section F.3.b(4)(e), Page 61) The previous comment on this issue was not addressed in the Regional Board's two Response to Comments documents, and is therefore resubmitted. The Tentative Order includes new, prescriptive requirements for third party inspections that provide a significant amount of detail as to how the inspection program must be managed. However, the Findings and the Fact Sheet do not address the need for these expanded requirements or provide any rationale as to how these new requirements would make the third-party inspection program more effective. In fact, this level of detail should be determined locally and should be included as a part of the program within the model DAMP and local JURMPs. After the inclusion of the industrial and commercial inspection programs in the third term permit, the Permittees determined that they could leverage their resources by utilizing and expanding upon existing inspection programs to assist them in complying with the permit instead of creating duplicative inspection programs. The ability to utilize third-party inspections as an effective part of the program, has allowed the Permittees to maximize their resources. An example of a third party inspection program that has been developed and implemented is the use of the Orange County Health Care Agency (OCHCA) inspectors to assist the Permittees in inspecting 10,000 restaurants countywide on an annual basis. The Permittees have developed this program in conjunction with OCHCA so that it is only an incremental burden on their limited resources, effective, and allows for clear communication between the inspectors and the Permittees. Since the Permittees have already developed an effective framework for a third-party inspection program, provisions (i)(a) through (i)(d) are unnecessary and should be deleted from the Tentative Order.	The Regional Board recognizes the utilization of third party inspectors for verifying compliance may aid the Copermittees in their program effectiveness. Thus, the Tentative Order allows for the use of third party inspections while re-iterating that Copermittees are responsible for quality assurance and quality control for those inspections. The requirements are intended to retain flexibility while incorporating necessary inspection elements to ensure compliance with other permit requirements and conditions (e.g. illicit and illegal discharges). Furthermore, requirements are meant to encourage cooperative enforcement between the Copermittees and the Regional Board.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
136	4	Retrofitting	F.3.	• Retrofit Existing Development (Section F.3.d, Pages 65-66) This new provision requires that each Permittee must implement a retrofitting program for existing developments (i.e. municipal, industrial, commercial, residential). These new requirements present a significant change and present a substantial burden to the municipal stormwater program. Currently, new development requirements are imposed as conditions of approval for new projects and projects that are voluntarily undergoing redevelopment. A thorough legal review is required to determine whether municipalities have the authority to compel land development requirements absent a voluntary land development application and if such authorities can be developed given other legal constraints. The Permittees do not concur with the statement of the Regional Board in the supplemental fact sheet that "Retrofitting existing development is practicable for a municipality…" The Permittees request that the Regional Board provide a technical justification for this statement. A systematic evaluation of the technical and legal opportunities and constraints of a requirement to require retrofitting, especially of private landowners, is necessary to determine whether or not such a requirement is practicable. The evaluation must precede the permit provision to mandate MS4s require retrofitting of existing development. These provisions of the permit represents an entire new approach to existing development that places an unknown significant burden on the Permittees and ultimately to property owners in the south Orange County area. The Permittees therefore request that this unprecedented requirement be eliminated from the permit.	The updated supplemental fact sheet provides several examples of municipalities across the nation that have found retrofitting existing development to be practicable. The requirements in the Tentative Order have been written in a manner to address the municipalities constraints in requiring retrofitting projects on privately held land. In addition, this permit section only requires the Copermittees to look for and identify potential retrofitting opportunities and to implement those that are a high priority based upon their evaluations and rankings. The state's water quality protection requirements within the Tentative Order are authorized by Federal Law, are necessary to meet the federal MEP standard, and are not unfunded mandates. Please see comments #155 and 165. Also, please see response to comment no. 46.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
137	4	Monitoring	F.4.	ID/IC Program • Investigation/Inspection and Follow Up (Section D.4.e(2)(b) and (c), Page 68-69) The County appreciates the acknowledgement of the concern in the Regional Board's first Response to Comments document regarding the intent of the permit language. However the language of the Tentative Order was not altered to match the Regional Board's stated intent that the investigation must be initiated within the specified timeframe. The requirements in the Tentative Order are that the Permittees must conduct the investigation within the specified time frame. The following language changes are requested within the Tentative Order to better meet the intent of this requirement as stated by the Regional Board. (b) Field screen data: Within two business days of receiving dry weather field screening results that exceed action levels, the Permittees must either initiate an investigation to identify the source of the discharge or document the rationale for why the discharge does not pose a threat to water quality and does not need further investigation. (c) Analytical data: Within two business days of receiving analytical laboratory results the exceed action levels, the Permittees must either initiate an investigation to identify the source of the discharge or document the rationale for why the discharge does not pose a threat to water quality and does not need further investigation.	The Regional Board agrees that the requested change is reasonable. The Tentative Order updates have been changed to include the modified language.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
138	4	WURMP	G	Watershed Urban Runoff Management Program (Section G, Page 70) The Tentative Order includes increasingly prescriptive requirements for the Watershed Urban Runoff Management Program (WURMP). The Fact Sheet states that the increased prescriptiveness for the WURMP provision was necessary because enforceability of the permit has been a critical aspect. The Fact Sheet further states that: “For example, the watershed requirements of Order No. R9-2002-01 were some of the Order’s most flexible requirements. This lack of specificity in the watershed requirements resulted in inefficient watershed compliance efforts. This situation reflects a common outcome of flexible permit language. Such language can be unclear and unenforceable, and it can lead to implementation of inadequate programs14.” Not only do the Permittees take strong exception to this statement, but the Fact Sheet is inconsistent with the Findings, which simply state that the WURMPs need to focus on the high priority water quality issues. In addition, the Fact Sheet does not acknowledge any of the notable Permittee successes including 1) the development of a South Orange County Integrated Regional Watershed Management Plan (IRWMP), which resulted in a $25 million IRWMP competitive grant award, (2) the 303(d) de-listing efforts that are ongoing and have been submitted for consideration; and 3) the efforts of the County of Orange and major landowners, such as Rancho Mission Viejo to put in place a comprehensive watershed land use/open space strategy for the San Juan Creek Watershed/Western San Mateo Watershed through the approved Southern Subregion Habitat Conservation Plan (HCP) and Special Area Management Plan (SAMP) both of which include water quality/quantity management as an integral component. The Permittees submit that the increased prescriptiveness of the Tentative Order is unwarranted and antithetical to a watershed management approach, which should be founded on a stakeholder driven process. Successful watershed-based programs follow a stakeholder driven process and are developed from the “bottom-up” not from the “top-down”. The Permittees must be given latitude in how the watershed-based programs are developed and implemented, especially since many of the pollutants of concern (Cu, Zn, pesticides, pathogen indicators, etc.) and issues are the same within and among watersheds. The language must be modified to provide the flexibility that is necessary within a watershed management program (similar to the language in Order No. R9-2002-0001) and, instead, focus on the major objectives for the program. Some language changes that would assist the Board in making these changes are provided below.	The full excerpt from the Fact Sheet is as follows: "The challenge in drafting the Order is to provide the flexibility described above while ensuring that the Order is still enforceable. To achieve this, the Tentative Order frequently prescribes minimum measurable outcomes, while providing the Copermittees with flexibility in the approaches they use to meet those outcomes. Enforceability has been found to be a critical aspect of the Order. For example, the watershed requirements of Order No. R9-2002-01 were some of the Order’s most flexible requirements. This lack of specificity in the watershed requirements resulted in inefficient watershed compliance efforts. This situation reflects a common outcome of flexible permit language. Such language can be unclear and unenforceable, and it can lead to implementation of inadequate programs. To avoid these types of situations, a balance between flexibility and enforceability has been crafted into the Order. Minimum measurable outcomes are utilized to ensure the Order is enforceable, while the Copermittees are provided flexibility in deciding how they will implement their programs to meet the minimum measurable outcomes." The Regional Board does not state, as the commenter suggests, that all programs are deficient. Instead, the flexibility in the previous Order did not require minimum outcomes from WRMP activities that the Regional Board felt were needed. The Finding in the Tentative Order states: "This Order contains new or modified requirements that are necessary to improve Copermittees’ efforts to reduce the discharge of pollutants in storm water runoff to the MEP and achieve water quality standards. Some of the new or modified requirements, such as the expanded Watershed Runoff Management Program section, are designed to specifically address high priority water quality problems. Other new or modified requirements address program deficiencies that have been noted during audits, report reviews, and other Regional Board compliance assessment activities." It is unclear to the Regional Board why the Copermittees should not address high priority water quality problems, which the Copermittees are required to do as part of the iterative process. The Regional Board is not dictating what each Copermittee's high priority water quality problem is, and as such there is flexibility within the WRMP requirements. Furthermore, the language provides the Copermittees with flexibility in the development and implementation of BMPs. The WRMP section of the Order has been restructured to retain this flexibility but provide guidance and enforceable outcomes. Provision G has been streamlined requiring only one Watershed Work Plan that covers the 5 year permit cycle and annual watershed review meetings. Annual watershed review meetings

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					are required to be appropriately noticed and open to the public. It is expected that the Copermittees will consider these meetings to be an important stakeholder process for evaluating what the public considers high priority water quality problem(s), as well as provide for an evaluation and update of the overall BMP strategy and implementation to address the high priority water quality problems. The Regional Board expects that this will contribute to what the commenter wants in a "bottom-up" stakeholder process.
139	4	WURMP	G	• Lead Watershed Permittee (Section G.1.a, Page 71) The Tentative Order has designated which entity within the watershed should be the default lead Permittee and what those responsibilities entail. The Permittees contend that this level of detail is inappropriate for a permit provision and should, instead, be a collaborative decision that is made among the various watershed stakeholders based on locally determined criteria and needs. The Permittees propose that the language be modified as follows: a. Lead Watershed Permittee Identification Watershed Permittees may must identify the Lead Watershed Permittee for their WMA. In the event that a Lead Watershed Permittee is not selected and identified by the Watershed Permittees, by default the Permittee identified in Table 3 as the Lead Watershed Permittee for that WMA must be responsible for implementing the requirements of the Lead Watershed Permittee in that WMA. The Lead Watershed Permittees must will serve as liaisons between the Permittees and Regional Board, where appropriate.	The requested modification to the Tentative Order has been made.
140	4	WURMP	G	• BMP Implementation and Assessment (Section G.1.e, Page 74) The Tentative Order requires an arbitrary minimum number of watershed activities to occur in each year. The Fact Sheet states that the Permittees have completed the assessments, prioritization, and collaboration and now need to implement the activities identified. While the Permittees agree that there are activities that will be undertaken in conformance with the WURMP, the Tentative Order should not presuppose that the Permittees will not follow through with implementation of the WUMRPs now they have been developed. Since this requirement is unfounded, onerous, arbitrary, and dictates a top-down approach for managing the watersheds, the language should be modified to incorporate the flexibility necessary for the stakeholders to identify the BMPs to be implemented and the details of that implementation. The Tentative Order language should be modified to remove the prescriptive detail and incorporate more flexible language that will ensure that the WURMPs contain performance standards, timeframes for implementation, responsible parties and methods for measuring the effectiveness of their programs.	Provision G has been modified to provide the Copermittees sufficient flexibility to identify their watershed's highest priority water quality problem(s), develop a watershed BMP implementation strategy to abate the identified highest priority water quality problem(s), model and monitor improvements in receiving water quality, determine their schedule for development and implementation of the Watershed Work plan, and report on WRMP updates annually during a meeting (as opposed to lengthy yearly written reporting submittals). This modification provides the flexibility requested and promotes efficient use resources.

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141	4	Economic	H	Fiscal Analysis (Section H, Page 78) Section F of the Tentative Order requires the Permittees to secure the resources necessary to implement the permit, conduct a fiscal analysis of the stormwater program, and develop a long term funding strategy and business plan. While the Permittees agree with Board staff that there is an identified need to prepare a fiscal reporting strategy to better define the expenditure and budget line items and to reduce the variability in the reported program costs and have committed to do such in the ROWD, the Permittees take exception to the requirement to develop a long-term funding strategy and business plan. The concerns for these new requirements are discussed in further detail below.	This comment was addressed in the 2007 response to comments. This section has been expanded in order to develop more useful and meaningful fiscal reporting. However, the Business Plan requirement has been removed from the Tentative Order.
142	4	Economic	H	• Long Term Funding Strategy and Business Plan (Section H.3, Page 78) The Tentative Order requires that each Permittee submit a funding business plan that identifies the long-term strategy for program funding decisions. The Fact Sheet states that this requirement is based on the need to improve the long-term viability of the program and is based on the 2006 Guidance for Municipal Stormwater Funding from the National Association of Flood and Stormwater Management Agencies (NAFSMA). The Fact Sheet further indicates that, without a clear plan, that the Board has uncertainty regarding the implementation of the program. The Permittees have a demonstrated history of compliance and leadership in developing, implementing and adequately funding the stormwater program. Regardless of the source of funds, a historical review of the expenditures to date provide undisputable evidence that the Permittees are dedicated to the program, plan their budgets accordingly, and have adequately funded the program for the past 16 years. In our previous comments we provided a historical review of the shared and individual costs of program implementation that demonstrates the commitment of the Permittees to funding the program. It is an unnecessary diversion of the Permittees resources to invest in the development of a new tool for a program component that has been successfully met for 16 years. The Regional Board staff relies on the 2006 NAFSMA Guidance for Municipal Stormwater Funding to justify this new requirement. We note that this national guidance document was developed to provide a resource to local governments as they address stormwater program financing challenges and primarily focuses on the considerations and requirements for developing a service/user/utility fee. While the guidance document states that the most "successful" programs have developed a business plan, such guidance is not a one size fits all approach, and in light of the history of the Orange County Program it is not warranted and should be removed from the permit.	Please see response to Comment 141. In addition, this comment is a repeat of comments received and responded to in 2007; please see http://www.waterboards.ca.gov/sandiego/water_issues/programs/stormwater/oc_stormwater.shtml for previous responses to comments.

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143	4	TMDL	I	• TMDLs (Section I, Page 79) This new provision supports Finding E.12 and identifies that adopted TMDL WLAs will be incorporated as numeric effluent limits for specific pollutants and watersheds. As noted previously in these comments (see comments on Finding E12), the County has significant reservations about the use of either Clean Up and Abatement Orders (as indicated in the TO) or Cease and Desist Orders (as indicated in the supplemental Tentative Fact Sheet) as the means by which to incorporate forthcoming TMDL WLAs into the MS4 permit. The Permittees request an explanation as to why the Regional Water Board plans to use these two types of enforcement tools to specify TMDL requirements.	All references to CDOs and CAOs, in regards to TMDL implementation, have been removed from the Tentative Order. This does not, however, preclude the Regional Board from future consideration of the use of these authorities to address TMDLs.
144	4	TMDL	I	Also as noted previously, the Permittees are concerned that it appears the Regional Board plans to incorporate WLAs as numeric effluent limits in the stormwater permit without consideration of other options or as to how the TMDL may be written, which might include: • Requiring implementation of specific BMPs in the permit; • Providing a recommended menu of potential BMPs in the TMDL, implementation plan, or the permit for sources to evaluate and select; • Referencing BMP performance standards in the TMDL, implementation plan, or the permit; • Recommending the selection of BMPs and developing benchmark values or performance measures; and • Requiring the review of existing BMPs and selecting additional BMPs to achieve progress. The USEPA draft handbook TMDLs to Stormwater Permit lists the above options and notes that: “There are no guidelines for determining which approach is most appropriate to use. It is likely that a variety of factors, including type of source, type of permit, and availability of resources, will influence which approach makes the most sense.” It does not appear that the Regional Board has consider the variety of factors in determining that numeric effluent limitations are most appropriate method of incorporating the WLAs for all pollutants in all watersheds into the MS4 stormwater permit.	Please see response to comment no. 72. Further, the "TMDL Implementation Plan" contained in Attachment A to Resolution R9-2008-0027 specifically states that meeting Waste Load Allocations of the TMDL will result in full attainment of Water Quality Standards. And, by the end of the compliance period, applicable Water Qulaity Objectives will be met in the receiving waters.

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145	4	General	J	Program Effectiveness Assessment (Section J, Page 79) The previous comments on this issue made by the Permittees were not addressed in the Regional Board's two Response to Comments documents, and are therefore resubmitted. Section J. of the Tentative Order requires the Permittees to assess the effectiveness of their JURMP, identify necessary program modifications, and report that information to the Regional Water Board on annual basis. Section J.1.a. identifies specific water quality-based objectives for 303(d) listed water bodies, environmentally sensitive areas (ESAs), and the major program components. Although the concept and intent of the provision is understood and supported by the Permittees, the specificity and inclusion of the required water quality-based objectives and focus on the 303(d) listed water bodies and ESAs is misplaced and has not been developed within the context of the California Stormwater Quality Association (CASQA) Guidance, the existing Orange County program effectiveness assessment framework and metrics, or the recommendations within the ROWD (Section 1.2.2). In addition, the Tentative Order also requires that each Permittee conduct their own assessments including integrated assessments, which are more effective on a regional scale and over a longer timeframe. As written, this section of the Tentative Order does not provide flexibility for the Permittees to develop objectives and an overall strategy for the effectiveness assessment and will result in resources being expended without achieving the intended goal. Since the Permittees have already developed and implemented a program effectiveness assessment framework and programmatic and environmental performance metrics and have committed to developing metric definitions and guidance to improve the efficacy of the assessments in the ROWD, the provision should be modified to allow the Permittees to functionally update their long-term effectiveness assessment approach. The updated approach would build on the existing framework that has been utilized within the County for the past four years as well as the CASQA Municipal Stormwater Program Effectiveness Assessment Guidance Document, May 2007, and would assess the jurisdictional, countywide, and watershed-based elements of the stormwater program. The long-term strategy would include the purpose, objectives, and methods for the assessments and achieve the Regional Water Board staff objectives. The proposed language, which is provided below, would replace J.1. and J.2. of the Tentative Order and is based on the current permit requirements. The proposed language is: a. As part of its individual JURMP, each	This comment was raised in 2007 and responded to at that time (comment #56, page 70 of Response to Comments on Tentative Order No. R9-2007-0002, July 6, 2007). The comment does not raise any new arguments on the subject. The Regional Board disagrees with the commenter who suggested that the Tentative Order not require each Copermittee to conduct annual effectiveness assessments. The commenter based its recommendation on the grounds that assessments are more appropriately conducted on a regional basis, rather than jurisdictional basis. The Regional Board considers annual assessments of individual programs crucial to the implementation of effective programs. For instance, without such assessments, the Copermittees would be challenged to properly implement the iterative process of the Receiving Waters Limitation language. Annual assessments should be based on an evaluation of the findings of the individual program's components and water quality data. A regional assessment can help provide some context for the total effort or proportional effort of various components, but it cannot substitute for an assessment of the actual effectiveness of the jurisdictional program. In regards to the CASQA guidance and the recommendations within the ROWD, the Regional Board is not obligated to write the Tentative Order to be identical with such documents. The CASQA document is more suited as guidance for the Copermittees in complying with MS4 permits rather than guidance for the Regional Board in writing MS4 permits. The Regional Board considers that information as part of the body of knowledge in crafting the requirement. We disagree that effectiveness assessments are better suited on a regional level rather than on a jurisdictional level. Assessments conducted on a regional level are inflexible to the needs and concerns of the individual Copermittee, but rather reflect the priorities and mandates of the regional authority who conducts the assessment. The individual Copermittee is responsible for the discharge from their MS4 and for compliance with the MS4 permit, not the regional authority. The permit requires watershed based assessment through the WRMP program (Section G), which is more appropriate than a regional assessment.

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				Permittee shall update their long-term strategy for assessing the effectiveness of its individual Jurisdictional URMP based on lessons learned from the existing program framework and available guidance. The long-term assessment strategy shall identify the purpose, objectives, methods and specific direct and indirect measurements that each Permittee will use to track the long-term progress of its individual Jurisdictional URMP towards achieving improvements in receiving water quality. Methods used for assessing effectiveness shall include the following or their equivalent: surveys, pollutant loading estimations, and receiving water quality monitoring. The long-term strategy shall also discuss the role of monitoring data in substantiating or refining the assessment. b. As part of its individual Jurisdictional URMP Annual Report, each Permittee shall include an assessment of the effectiveness of its Jurisdictional URMP using the direct and indirect assessment measurements and methods developed in its long-term assessment strategy. The updated long-term strategy shall be submitted within 365 days after adoption of the permit. c. Long-term strategy for assessing the effectiveness of the Watershed URMP. As part of the WURMPs, the watershed Permittees shall update their long-term strategy for assessing the effectiveness of the WURMPs based on lessons learned from the existing program framework and available guidance. The long-term assessment strategy shall identify the purpose, objectives, methods and specific direct and indirect performance measurements that will track the long-term progress of Watershed URMP towards achieving improvements in receiving water quality impacted by urban runoff discharges. Methods used for assessing effectiveness shall include the following or their equivalent: surveys, pollutant loading estimations, and receiving water quality monitoring. The longterm strategy shall also discuss the role of monitoring data in substantiating or refining the assessment. The updated long-term strategy shall be submitted within 365 days after adoption of the permit.	

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146	4	General	K	Reporting (Section K, Pages 83-85, and Section G, Page76) The previous comments on this issue made by the Permittees were not addressed in the Regional Board's two Response to Comments documents, and are therefore resubmitted. Section H of the Tentative Order requires the Permittees to submit the following reports: • Individual and Unified JURMP annual reports - September 30 of each year (July 1 – June 30) • Individual and Unified WURMP annual reports - January 31 of each year (July 1 – June 30) Although the Permittees understand that the Tentative Order included these changes to allow for a longer time period between the two sets of submittals, the Permittees would receive more benefit from keeping the two timelines for the submittals aligned. As such, the language should be revised so that the JURMPs and WURMPs are submitted January 31 of each year. This will allow the Permittees to assess their stormwater program and water quality monitoring program and conduct an integrated assessment to identify water quality improvements. Section G.4. requires that the Permittees submit the Aliso Creek WURMP annual report by March 1 of each year for the period January – December of the previous year. Since the Watershed Action Plan Annual Report for the Aliso Creek Watershed has historically been submitted in November of each year and has been based on the fiscal year like the other WURMP reports, it is unclear why Board staff are requiring this change. As such, the Aliso Creek WURMP submittal is now inconsistent with the other WURMP submittals both in the date for submittal and the time period for which the report covers. The submittal date for the Aliso Creek WURMP annual report should be modified to be aligned with the other WURMP submittals. The proposed language modification is as follows: 4. Aliso Creek Watershed RMP Provisions b. Each Copermittee must provide annual reports by March 1 January 31 of each year beginning in 20089 for the preceding annual period of January July 1 through December June 30…	In addition to allowing the Coermittees more time to prepare each set of the submittals, the staggered submittal schedule allows the Regional Board more time to review the annual reports. Also, separating the WRMP and JRMP annual reports provides separate attention to the watershed program so that the watershed priorities do not become confused, lost and diminished in light of the jurisdictional reports. Section K. Reporting of the Tentative Order has been revised to allow the Copermittees to propose an alternate reporting criteria and schedule as part of their updated JRMP.

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147	5	NEL	C	The Draft Permit's misapplication, or in some cases lack of application, of the Maximum Extent Practicable ("MEP") standard remains a primary overarching defect with the Permit. The Draft Permit contains numerous provisions that simply ignore the MEP standard that governs municipal storm water discharges under the Clean Water Act ("CWA"). In effect, the Draft Permit attempts to treat municipal dischargers in the same manner as industrial dischargers by applying strict numeric effluent limits to all dry weather discharges (through the use of specific numeric effluent limits) and wet weather discharges (through the use of what are referred to as Municipal Action Levels or "MALs"). … In sum, these terms: (i) replace the MEP standard with numeric effluent limits for all dry weather discharges (Section C.2, Section C.14), (ii) apply MALs as numeric limits for wet weather discharges (Section D), … . These provisions are contrary to the CWA and California law.	Please see response to Comments 33, 39 and 79.
148	5	TMDL	I	The Draft Permit's misapplication, or in some cases lack of application, of the Maximum Extent Practicable ("MEP") standard remains a primary overarching defect with the Permit. The Draft Permit contains numerous provisions that simply ignore the MEP standard that governs municipal storm water discharges under the Clean Water Act ("CWA"). … The Draft Permit likewise seeks to require strict compliance with all waste load allocations from adopted Total Maximum Daily Loads ("TMDLs"). … (iii) directly incorporate waste load allocations from adopted TMDLs as strict discharge prohibitions (Section I, p. 79), and (iv) enforces TMDLs through the use of Cease and Desist orders. These provisions are contrary to the CWA and California law.	All references to CDOs and CAOs, in regards to TMDL implementation, have been removed from the Tentative Order. This does not, however, preclude the Regional Board from future consideration of the use of these authorities to address TMDLs. Please see response to comment no. 59. The Regional Board (San Diego) does not agree that these provisions, which have been removed for the most part, are contratry to the CWA or Califonia Law. It is not clear what aspects of the CWA and of CA Law the City is invoking and/or calling into question.
149	5	Urban Runoff	General	Notably, the Draft Permit's universal deletion of "urban" from the phrase "urban runoff" also appears to reflect a policy shift to completely remove the MEP standard from the Permit. But this attempt to effectively revise the CWA is directly contrary to U.S. EPA's regulations under the CWA, which define storm water as including urban runoff: "Storm water means storm water runoff, snow melt runoff, and surface runoff and drainage." (40 CFR 122.26(b)(13).) Because "storm water," by definition, specifically includes not only "storm water runoff" and "snow melt runoff" but also "surface runoff and drainage," the plain language of the regulation demonstrates that EPA expressly intended for "urban" runoff to be included in the definition of storm water.	The commenter misinterprets the definition of storm water in the Code of Federal Regulations. In no way does "surface runoff and drainage" connote "urban runoff" nor restrict that surface runoff only comes from urbanized areas. The plain language of the definition in the Code of Federal Regulations does not include the term "urban runoff," a term that was well known to the USEPA. The Final Rule to the Code of Federal Regulations expressly declares that MS4 permits apply to all MS4 discharges in the designated areas and is not limited to those MS4 discharges in urban areas, but also includes MS4 discharges in suburban and semi-rural areas where the Copermittees own and operate a MS4. Please see the response to Comment No. 47 for more information.

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150	5	NEL	C	Likewise, the Draft Permit's effort to remove "dry-weather" discharges from regulation as "storm water" is directly contrary to law and should be deleted. The CWA simply does not treat dry weather discharges as a separate category of non-storm water discharge. In short, the Draft Permit's attempt to distinguish between wet weather runoff, versus other urban runoff, and the desired enhanced regulation of municipal dischargers which follows in the Draft Permit from this ill-conceived distinction, is contrary to law.	Please see response to Comments 39 and 79.
151	5	Legal	General	When viewed collectively, the Draft Permit's terms operate to eliminate the application of the MEP standard to municipal discharges and to replace the MEP standard with strict numeric limits. Time and again, however, courts, U.S. EPA, and the State Board have recognized that storm water discharges are different than traditional point source discharges, and storm water must be analyzed and treated as such under the CWA. For example, in Building Industry Association of San Diego County v. State Water Resources Control Board (2004) 124 Cal. App. 4th 866, 874 the court found that "Congress amended the Clean Water Act to add provisions that specifically concerned NPDES permit requirements for Storm Sewer discharges. [Citations] In these amendments, enacted as part of the Water Quality Act of 1987, Congress distinguished between industrial and municipal storm water discharges. . . . With respect to municipal storm water discharges, Congress clarified that the EPA has the authority to fashion NPDES permit requirements to meet water quality standards without specific numeric effluent limits and instead to impose controls to reduce the discharge of pollutants to the maximum extent practicable." (Id. citing 33 USC § 1342 (p)(3)(B)(iii) & Defenders of Wildlife v. Brown (9th Cir. 1999) 191 F.3d 1159, 1163.)	Please see response to Comments 33 and 39. The Regional Board agrees regarding the differring treatment of municipal and industrial storm water dishcharges under 402(p) of the CWA, hence the amendments to section 402 in 1987. However, the Regional Board maintains that the regulations under 402(p) and USEPA are clear regarding the applicability and use of numeric limits for municipal stormwater discharges, though none are proposed under this Tentative Order. The Federal Register states that NPDES permits for municipal storm water discharges must require controls to reduce the discharge of pollutants to the MEP and where necessary water quality based controls (55 Fed Reg 47994, 47995). This is further supported by USEPA in their Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits, dated August 26, 1996. The document states: "The interim permitting approach uses best management practices in first-round storm water permits, and expanded or better-tailored BMPs in subsequent permits, where neccesary, to provide for the attainment of water quality standards. In cases where adequete information exists to develop more specific conditions of limitations to meet water quality standards, these conditions or limitations are to be incorporated into storm water permits, as neccesary and appropriate. This interim permitting approach is not intended to affect those storm water permits that already include appropriately derived numeric water quality-based effleunt limitations. Since the policy only applies to water qualit-based effluent limitations, it is not intended to affect technology-based limitations, such as those based on effluent guidelines or the permit writer's best professional judgement, that are incorporated into storm water permits". In addition, as noted in Building Industry Association of San Diego County et al. v. State Water Resources Control Board, et al. ((2004) 124 Cal.App.4th 866, 142-143), the Ninth Circuit in Defenders of Wildlife v. Browner [(9th Cir. 1999) 191 F.3d 1159)] rejected arguments "that 'the EPA may not, under the [Clean Water Act], require strict compliance with state water-quality standards, through numerical limits or otherwise.' (Defenders of Wildlife v. Browner, supra, 191 F.3d at p. 1166).

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152	5	NEL	General	EPA also has expressly acknowledged that storm water discharges must be treated differently than industrial discharges, and that urban runoff need not meet numeric limits or implement costly end-of-pipe controls. For example, when adopting the California Toxics Rule ("CTR"), EPA made the following comments in its Preamble and/or in its Responses to Comments on CTR: Thus, under the CWA, EPA's promulgation of water quality criteria or standards establishes standards that the State, in turn, implements through the NPDES permit process. The State has considerable discretion in deciding how to meet the water quality standards and in developing discharge limits as needed to meet the standards. In circumstances where there is more than one discharger to a water body that is subject to water quality standards or a criteria, a State also [has] discretion in deciding on the appropriate limits for the different dischargers. While the State's implementation of federally-promulgated water quality criteria or standards may result indirectly in new or revised discharge limits for small entities, the criteria or standards themselves do not apply to any discharger, including small entities. (65 Fed. Reg. 31682, 31708-09 [Ex. 3].) In EPA's Responses to certain Ventura County Comments on CTR, EPA stated that: If you look across the country, across the U.S., there are many, many states that have standards on the books, water quality standards that are far more stringent than the numbers we're promulgating or proposing to promulgate in Southern California. If you look at their standards, you won't see any black boxes on the end of those storm water discharges. Nobody builds treatment for storm water treatment in this country. They've been implementing standards for 15 years, California is no different. (See Ex. 3 hereto, EPA Response to CTR H-002-017.) In EPA's Response to Comments from Los Angeles County, EPA stated: EPA did not ascribe benefits or costs of controlling storm water discharges in the proposed or final Economic Analysis. EPA believes that many storm water dischargers can avoid violation of water quality standards through the application of best management practices that are already required by the current storm water permits. The commenter claims that even with the application of current BMPs, its storm water dischargers would still violate water quality standards due to the CTR criteria. The commenter appears to assume that storm water discharge would be subject to numeric water quality based effluent limits, which would be equivalent to the criteria values and applied as effluent limits never to be exceeded or calculated in the same manner that effluent limits are calculated for other point sources, such as POTWs. The comment then appears to assume that such WQBELs would then require the construction of very costly end-of-pipe controls. EPA contends that neither scenario is valid with regard to developing WQBELs for storm water discharges or	Please see response to Comments 33, 39 and 79. The Regional Board disagrees with the commenters statement that EPA "has expressly acknowledged that storm water discharges must be treated differently than industrial discharges, and that urban runoff need not meet numeric limits or implement costly end-of-pipe controls". Please see response to comment 151. In comments received on this Tentative Order, USEPA states: "We believe that the use of numeric effluent limits for non-stormwater discharges would be a significant step in the right direction and we support the proposed limits. // As noted in the fact sheet, additional information has become available to the Board about the discharges over the years, and we agree that the numeric effluent limits are now appropriate." Please see comment no. 307.

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				establishing compliance with WQBELs…. EPA will continue to advocate the use of BMPs, as discussed in the CTR preamble. EPA will continue to work with the State to implement storm water permits that comply with water quality standards with an emphasis on pollution, prevention, and best management practices rather than costly end-of-pipe controls. (Ex. 3, EPA Response to CTR-001-007.) In EPA's Response to Comments of Sacramento County, it admitted that: EPA believes the applicability of water quality standards to storm water discharges is outside the scope of the rule. (Ex. 3, EPA Response to CTR-040- 014b.) In EPA's Response to the Fresno County Metropolitan Flood Control District's Comments, it acknowledged as follows: EPA believes that implementation of the criteria [CTR] as applied to wet weather will not require the construction of endof- pipe facilities. (Ex. 3, EPA Response to CTR-031-005b.) In other EPA responses to various comments, it again confirmed that stormwater is to be treated differently than traditional point source discharges: As further described in the responses to CTR-021-008, CTR-013- 003 and CTR-040-004, EPA believes that the final CTR will not significantly affect the current storm water program being implemented by the State, which includes the requirement to develop best management practices to control pollutants in storm water discharges. As such, EPA believes that inclusion of end-of- pipe treatment costs for storm water are inappropriate. (Ex. 3, EPA Response to CTR-035-044c.) EPA's Comments in CTR to the California Storm Water Task Force included the following: EPA disagrees with the cost estimates provided by the commenter as EPA does not believe that storage and treatment of storm water would be required to ensure compliance with the CTR. (Ex. 3, EPA Response to CTR H-001-001b.) EPA believes that the CTR language allows for the practice of applying maximum extent practicable (MEP) to MS4 permits, along with best management practices (BMPs) as effluent limits to meet water quality standards where infeasible or insufficient information exists to develop WQBELs. (Ex. 3, EPA Responses to CTR-040-004.) Importantly, when adopting the rule EPA specifically determined that CTR was not to have a direct effect on NPDES sources not typically subject to numeric water quality based effluent limits or urban runoff, and that "compliance with water quality standards through the use of best management practices (BMPs) is appropriate." (65 Fed. Reg. 31703 [Ex. 3].)	

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153	5	TMDL	I	Moreover, in a November 22, 2002 EPA Guidance Memorandum on Establishing TMDLs (EPA Guidance Memo, Ex. 4), EPA explained that for NPDES-regulated municipal storm water discharges, any water quality based effluent limit for such discharges should be "in the form of BMPs, and that numeric limits will be used only in rare instances." (EPA Guidance Memo, Ex. 4, p. 6.) EPA recommended that "for NPDES-regulated municipal . . . discharges effluent limits should be expressed as best management practices (BMPs) or other similar requirements, rather than as numeric effluent limits." (Id. at p. 4.) EPA went on to expressly recognize in this Guidance Memo the general difficulties in regulating Stormwater discharges, where it stated that: EPA's policy recognizes that because storm water discharges are due to storm events that are highly variable in frequency and duration and are not easily characterized, only in rare cases will it be feasible or appropriate to establish numeric limits for municipal and small construction storm water discharges. The variability in the system and minimal data generally available make it difficult to determine with precision or certainty actual and projected loadings for individual dischargers or groups of dischargers. Therefore, EPA believes that in these situations, permit limits typically can be expressed as BMPs, and that numeric limits will be used only in rare instances. (EPA Guidance Memo, Ex. 4, p. 4.)	Please see responses to comments Nos. 59, 72 and 144.

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154	5	MEP	General	In addition, the policy of the State of California provides that strict numeric limits are not an appropriate means by which to implement the MEP standard. The State's policy to apply the MEP standard through iterative BMP implementation and not through strict numeric discharge limitations is reflected in prior orders and other documentation from the State Board. (See, e.g., Order No. 91-04, p. 14 ["There are no numeric objectives or numeric effluent limits required at this time, either in the Basin Plan or any statewide plan that apply to storm water discharges." p. 14] [Ex. 5]; Order No. 96-13, p. 6 ["federal laws does not require the [San Francisco Reg. Bd] to dictate the specific controls."] [Ex. 6]; Order 98-01, p. 12 ["Stormwater permits must achieve compliance with water quality standards, but they may do so by requiring implementation of BMPs in lieu of numeric water quality-based effluent limitations."] [Ex. 7]; Order No. 2001- 15, p. 8 ["While we continue to address water quality standards in municipal storm water permits, we also continue to believe that the iterative approach, which focuses on timely improvements of BMPs, is appropriate."] [Ex. 8, emph. added]; State Board Order No. 2006-12, p. 17 ["Federal regulations do not require numeric effluent limitations for discharges of stormwater"] [Ex. 9]; Stormwater Quality Panel Recommendations to The California State Water Resources Control Board – The Feasibility of Numeric Effluent Limits Applicable to Discharges of Stormwater Associated with Municipal, Industrial and Construction Activities, June 19, 2006, p. 8 ["It is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs and in particular urban dischargers."] 1 [Ex. 10]; and an April 18, 2008 letter from the State Board's Chief Counsel to the Commission on State Mandates, p. 6 ["Most NPDES Permits are largely comprised of numeric limitations for pollutants. . . . Stormwater permits, on the other hand, usually require dischargers to implement BMPs"] [Ex.11].) In light of this state and federal authority, any attempt to impose strict compliance with numeric limits at this time--through numeric effluent limits for dry weather dischargers, MALs for wet weather, or waste load allocation from TMDLs--is wholly unsupportable and contrary to law.	Please see response to Comment Nos. 33(MALs), 39(NELs), 79(NELs) and 151(legal).

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155	5	unfunded mandate	General	The Permit's use of more stringent compliance measures than is required by federal law (see Defenders of Wildlife v. Brown (9th Cir. 1999) 191 F.3d, 1159, 1166) triggers an obligation to comply with a series of requirements imposed under State law. As was the case with the prior proposed permit, because the Draft Permit imposes various requirements that go beyond federal law requirements (e.g., compliance with MALs for wet weather runoff, numeric effluent limits for dry weather runoff, strict compliance with TMDL waste load allocations, the complete prohibition of irrigation waters entering the MS4, LID requirements, retrofit requirements and other terms discussed in prior comments), the Regional Board must comply with the Porter- Cologne Act. Specifically, the Board must consider all of the factors and considerations delineated in California Water Code Sections 13000 and 13241 before adopting the Draft Permit. (See City of Burbank v. State Water Resources Control Board (2005) 35 Cal.4th 613, 627.)	The requirements of the Tentative Order do not exceed federal law. The Tentative Order contains requirements more explicit (i.e. detailed) than the federal NPDES storm water regulations, for the purpose of achieving compliance with the CWA provision that MS4 permits "shall require controls to reduce the discharge of pollutants to the maximum extent practicable" (CWA section 402(p)(3)(B)(iii)). As such, the Tentative Order's (space removal) requirements are necessary to comply with federal law, rather than exceed it. 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.) To the extent that information about cost is submitted, the Regional Board will nonetheless consider it. To the extent that information about cost is submitted, the Regional Board will nonetheless consider it. The Fact Sheet for Finding E.6 discusses this matter in further detail. Nothing presented in this comment changes the Fact Sheet discussion. The Regional Board's Tentative Order provides more detail to implement performance standards in the CWA or NPDES regulations. NPDES regulations specify terms and conditions that must, at a minimum, be included in NPDES requirements; they do not limit states or U.S EPA from including other provisions that may be necessary to ensure that municipalities with MS4 reduce storm water pollutants to the MEP. In fact, the Clean Water Act requires the Regional Board to "require … other provisions as the Administrator or the State determine appropriate for the control of such pollutants." (CWA Section 402(p)(3)(B)(iii)) The burden to determine the appropriateness of the required provisions lies with the State rather than the Copermittee, because a discharger cannot self regulate their discharge. No portion of the proposed MS4 requirements exceed the level of "governmental service" (i.e., performance) necessary to reduce pollutants in storm water to the MEP as mandated by Section 402(p)(3)(B)(iii) of the CWA [33 U.S.C. Section 1342(p)(3)(B)(iii)]. While, technically, all NPDES requirements issued by the Regional 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 waters of the United States, including requirements for discharges of storm water in MS4s, implement the provisions of the federal CWA 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 Orange County MS4 exceeds the scope of regulation necessary to implement NPDES regulations for MS4.

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156	5	NEL	C	To be sure, the above-referenced statutory, regulatory, and case authority all clearly confirm not only that municipal dischargers are to be treated differently than other NPDES dischargers, but also that numeric limits should not and cannot be applied to municipal dischargers at this time. "It is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs and in particular urban dischargers." (Numeric Limits Panel Report, [Ex.9 p. 8].) Given that Congress specifically provided a different standard for municipal dischargers-- the MEP standard, and in light of the demonstrated infeasibility of complying with numeric limits at this time (Ex. 9), the Draft Permit's terms that seek to force strict compliance with numeric effluent limits impose impossible requirements. These requirements therefore are unenforceable. (See Hughey v. JMS Development Corp. (11th Cir. 1996) 78 F.3d 1523, 1529- 30.)	Please see response to Comment nos. 25, 33, 39, 79 and 151.
157	5	TMDL	I	A prime example of this impossibility is found in the Draft Permit terms which provide that TMDL waste load allocations incorporated into the Permit will be enforced through "Cease and Desist" orders issued under Water Code section 13331. That law states: "Upon the failure of any person or persons to comply with any cease and desist order issued by a regional board or the state board, the Attorney General, upon request of the board, shall petition the superior court for the issuance of a preliminary or permanent injunction, or both, as may be appropriate, restraining such person or persons from continuing the discharge in violation of the cease and desist order." (Water Code § 13331(a).) These cease and desist provisions plainly presume that the alleged violator has control over the discharge and has the ability to cease "continuing the discharge." But there is no evidence it is possible for municipal dischargers to strictly comply with numeric limits. In fact, the primary purpose of the Numeric Limits Panel Report was to evaluate this very issue, and the Report concluded that it was "infeasible" to do so at this time. In other words, the Report concluded that it is not "possible" for municipal dischargers to achieve compliance with numeric limits.	All references to CDOs and CAOs, in regards to TMDL implementation, have been removed from the Tentative Order. This does not, however, preclude the Regional Board from future consideration of the use of these authorities to address TMDLs. In regards to numeric limits, please see response to Comments 25, 33 and 39.
158	5	NEL	C	Finally, it is well settled that the CWA does not require that municipal dischargers strictly comply with numeric limits. Any attempt by the Regional Board to compel compliance with strict numeric limits plainly requires a consideration of all of the factors and considerations set forth under Water Code Sections 13241 and 13000 before imposition of any such numeric effluent limits (whether through MALs or waste local allocation from TMDLs). But there is no evidence at this time (whether in the record, Fact Sheet, or in any other analysis made public by Regional Board Staff to date), that these mandatory factors and considerations were analyzed.	Please see response to Comments 33, 39, 79, 81, 151 and 155.

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159	5	Overirrigation	B	As was the case with the prior version, the Draft Permit improperly renders municipalities responsible for the discharging activities of third parties that are beyond Dana Point's control. Indeed, read literally, the Permit requires that Dana Point prohibit all non-point source "Landscape irrigation," "Irrigation water," and "lawn water," from entering any storm sewer system. But meeting such a requirement is not just impracticable, it is impossible. (See Hughey, 78 F.3d at 1529-30.) For example, to prohibit all "irrigation" and "lawn" waters from "entering" the MS4, Dana Point would have to adopt and enforce an ordinance that prevents any overwatering from entering the storm sewer, and it essentially would have to require a large percentage of its residents to remove grass from yard landscaping. Such a requirement is not found in the CWA, and as such again triggers the need to comply with Water Code Sections 13000 and 13241. Moreover, if any non-point source irrigation water or other runoff enters the City's storm drain system, the City would be subject to penalties and citizen suits (and attorney's fees) under the CWA, regardless of whether the irrigation waters are the cause of an exceedance of receiving water limitations. It appears that to comply with these measures, Dana Point would need to hire staff to act as full time policing agents of irrigation water runoff.	Please see response to Comments 39, 42 and 44. The commenter misapplies the decision in Hughey v. JMS development, 78 F.3d. The commenter's interpretation of a prohibition of non-stormwater discharges into the MS4 may seem absurd (impossible) on the surface; but their proposed implementation of the prohibition is speculative and is not the expectation of the Tentative Order or the federal regulations. The history of Copermittees prohibiting non-stormwater discharges does not support the commenter's contention. The previous MS4 permit for South Orange County and all other MS4 permits in Southern California prohibit the discharge of non-stormwater to the MS4 with certain case-by-case exceptions. Other examples of prohibited non-stormwater discharges other than overirrigation include powerwashing, commercial car washing and cholorinated swimming pool discharges. Copermittee's programs to comply with the previous Permit's prohibition of non-stormwater discharges did not result in an absurd (impossible) requirement. Clearly, the Regional Board has not expected the Copermittee's to do the impossible in the past, and the Regional Board does not expect the Copermittee's to do the impossible in the future. A reasonable approach to address the prohibition on overirrigation would be through the Copermittee's existing programs to prohibit non-stormwater discharges, e.g. prohibition ordinances, education of the public, response to complaints, progressive enforcement as needed, and to work in concert with the water providers. In addition, the Regional Board expects that the removal of irrigation water (lawn water, residential landscape water, etc.) will require Permittees to incorporate such non-storm water discharges into their current IC/ID programs for detecting and eliminating illicit discharges. The Regional Board does not anticipate that the Copermittee would have to require property owners to remove grass or yard landscaping. As current and past versions of the Order include and have included requirements prohibiting the discharge of non-storm water into the MS4 (see updated Supplemental Fact Sheet), any non-storm water discharge into the MS4 which currently occurs, that is not exempt or subject to a separate NPDES permit, is in violation of the discharge prohibition contained in the Order. Thus, requiring the prohibition of an additional non-storm water discharge is not subjecting the Copermittee to any enforcement mechanisms not already present in the current Order. The prohibition of over irrigation runoff is practicable. The Copermittees already have demonstrated the ability to adopt ordinances prohibiting other non-storm water discharges such as commercial car washing, power washing and chlorinated swimming pool discharges. The Copermittees have developed a program of education, complaint response, and progressive enforcement to address non-storm water discharges. The prohibition of over irrigation

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					would be easily implemented through their existing programs that address non-storm water discharges. The Regional Board realizes that the effectiveness of such measures dealing with over irrigation runoff will not be realized over night. The claim that the City will need to require its residents to remove grass from yard landscaping is a "slippery slope" logical fallacy. The prohibition of over irrigation in the MS4 permit certainly does not require the removal of grass; nor does the Regional Board except a City to go to such extreme measures. The Copermittees will have to exercise due care and discretion in addressing the prohibition on over irrigation to assuage public concerns. A reasonable approach to address the prohibition on over irrigation would be to educate the public, respond to complaints, conduct progressive enforcement as needed, and work in concert with the water providers.
160	5	NEL	C	As noted in prior comments and by the County's concurrent comments, the CWA requires only that city's work to "effectively" prohibit non-storm water discharges and illegal discharges/illicit connections to storm drain systems. (See 40 C.F.R. 122.26 (d)(2)(iv)(B)(1). Under EPA's regulations implementing the CWA, municipalities comply with this requirement by enacting and reasonably enforcing ordinances to prohibit discharges of non-storm water containing pollutants to storm drains. (Id.) The Draft Permit, however, goes much further than federal law requires. It essentially holds municipalities strictly liable for third party discharges and non-point source dry-weather runoff into storm drain systems by making any exceedance of numeric limits--found in the MALs and water quality based effluent limitations incorporated into the Draft Permit--actionable as a violation. Such provisions are contrary to law, and therefore should not be included in the Permit. Moreover, because these terms are not required anywhere under federal law, the Draft Permit is contrary to State law because the Board has failed to comply with Water Code Sections 13000 and 13241 before imposing such provisions.	Please see response to Comments 39, 43, 79, 81, 82, 155 and 165. In addition, past Orders and the Tentative Order prohibit non-storm water discharges into the MS4 and require that Copermittees prohibit non-storm water discharges into the MS4 via ordinances, orders or similar means (see response to Comments 39, 42, 44). As such, any non-storm water discharges into the MS4 that are not exmepted or subject to a NPDES permit would be in violation of the current and tentative Order.

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161	5	Legal	F.1	The Permit's LID and retrofitting provisions (e.g. Section D.3.d, F.3.d) are contrary to law. These retrofitting provisions are beyond the power of the Board to require. For example, there is no existing legislative mandate that requires mandatory structural changes be made to existing developments to limit runoff. But the retrofitting requirements plainly command that cities evaluate candidates for retrofitting. Taken to its logical conclusion, such a provision violates the separation of power clause under the California Constitution. (Cal. Const. Art. 4, § 1; Knudsen Creamery Co. of California v. Brock (1951) 37 Cal.2d 485, 492.) The executive branch of government is charged with enforcing laws, but it cannot adopt laws itself. (Id.) The executive branch also cannot adopt regulations that conflict with local agencies' powers under the State Constitution. The detailed legal enforcement provisions of the Draft Permit, including the provisions requiring enforcement of specific obligations in relation to particular property owners, such as HOAs (section D.3.c.(5)(b)), unduly restrict the inherent legislative power of cities.	The requirement for the Copermittees to implement a retrofitting program is authorized by law under the Clean Water Act 402(p)(3)(B)(ii-iii), California Water Code section 13377 and Federal NPDES regulations 40 CFR 122.26(d)(2)(iv). Permits for discharges from municipal storm sewers shall require controls to reduce the discharge of storm water pollutants to the maximum extent practicable. The requirements for retrofitting are consistent with the maximum extent practicable standard as written. Retrofitting has been conducted throughout the country in diverse communities and watersheds. The requirements for retrofitting as written do not conflict with any local agencies' powers or authorities. Section F.3.d.(4) was specifically written to be within those local agencies' powers.
162	5	Retrofitting	F.3	In addition to compromising the separation of powers doctrine, the retrofitting provisions of the permit act as an underground regulation of the private property owners who are the true subjects of the regulatory command for retrofitting. A regulation enacted without adherence to the Administrative Procedure Act's ("APA") notice and hearing requirements is void. (Tidewater Marine Western, Inc. v. Bradshaw (1996) 14 Cal.4th 557, 573-576) "The APA was designed in part to prevent the use by administrative agencies of 'underground' regulations [citation], and it is the courts, not administrative agencies, which enforce that prohibition." (California Advocates for Nursing Home Reform v. Bonta (2003) 106 Cal. App.4th 498, 506.) In Tidewater Marine, 14 Cal.4th at 569 the California Supreme Court recognized that: "One purpose of the APA is to ensure that those persons or entities whom a regulation will affect have a voice in its creation [citation], as well as notice of the law's requirements so that they can conform their conduct accordingly." Here, the Draft Permit is directly affecting private property owners subject to the "retrofitting" assessment, but there has been no effort to comply with the APA.	The Tentative Order does not place any requirements on private landowners. Rather, Section F.3.d.(4) requires the copermittees to cooperate with private landowners in encouraging retrofitting projects, similar to other retrofitting projects throughout the country such as in Kansas City, KS and Montgomery County Maryland. The actual decision to retrofit on privately held land would be at the discretion of the private landowner. Also, please see response to comment no. 46.

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163	5	Legal	F.3	Moreover, as discussed in regard to various provisions in the prior Draft Permits, the retrofitting provisions are contrary to the California Environmental Quality Act ("CEQA," Public Resources Code § 21000 et seq.) because they change the environmental review process applicable to projects involving retrofitting, and they completely remove the discretion of local governmental entities that expressly provided by law. (See Ex. 2, Dana Point's January 21, 2008 Comments, pages 12-14.)	The Regional Board does not propose to impose requirements that exceed federal law in the CWA and NPDES regulations but may impose requirements necessary to meet the minimum federal MEP standard. Therefore, the Regional Board does not have to comply with CEQA requirements because the Tentative Order's requirements do not exceed the level of regulation necessary to implement the MEP performance standards for stormwater discharges. The requirements are not intended to circumvent or alter CEQA as applied to local agencies in carrying out their authorities. The Tentative Order contains requirements more explicit than the federal NPDES storm water regulations, for the purpose of achieving compliance with the CWA provision that MS4 permits "shall require controls to reduce the discharge of [storm water] pollutants to the maximum extent practicable" (CWA section 402(p)(3)(B)(iii)). As such, the Tentative Order' requirements are necessary to comply with federal law by meeting the minimum federal MEP standard, rather than exceed it. This matter is further discussed in the Fact Sheet discussion for Finding E.6. The Regional Board is not precluded from issuing MS4 requirements that "go beyond" NPDES regulations, either, as in this case by providing more detail to implement performance standards in the CWA or NPDES regulations: NPDES regulations specify terms and conditions that must, at a minimum, be included in NPDES requirements; they do not limit states or U.S EPA from including other provisions that may be necessary to ensure that municipalities with MS4s reduce stormwater pollutants to the MEP. No portion of the proposed MS4 requirements exceed the level of "governmental service" (i.e., performance) necessary to reduce stormwater pollutants to the MEP as mandated by Section 402(p)(3)(B)(iii) of the CWA [33 U.S.C. Section 1342(p)(3)(B)(iii)]. While, technically, all NPDES requirements issued by the Regional 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 waters of the United States, including requirements for discharges of storm water in MS4s, implement the provisions of the federal CWA 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 Orange County MS4 exceeds the scope of regulation necessary to implement NPDES regulations for MS4.

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164	5	Legal	F.1.	In addition, the Draft Permit's LID and retrofitting provisions raise significant constitutional issues by forcing property owners to incur costs of mandated physical changes to the configuration of their property. As such, implementation of the retrofitting provisions plainly implicates the taking provision of the U.S. Constitution and California Constitution, which require that public entities provide just monetary compensation to property owners for private property that is altered to further a public use. The due process clauses of the state and federal Constitutions guarantee property owners "due process of law" when the state "deprive[s] [them] of . . . property." (Cal. Const., art. I, §§ 7, 15; U.S. Const., 14th Amend., § 1.) And the takings clauses of the state and federal Constitutions guarantee property owners "just compensation" when their property is "taken for public use." (Cal. Const., art. I, § 19; U.S. Const., 5th Amend; see also, e.g., Kavanau v. Santa Monica Rent Control Bd. (1997) 16 Cal. 4th 761, 774.)	In no way does the Tentative Order force property owners to incur costs of mandated physical changes to the configuration. The retrofitting program as written in the Tentative Order is voluntary for the private property owner and requires the Copermittees to develop a program encouraging retrofitting for those private property owners. The commenter has misinterpreted the draft language in the Tentative Order. The state's water quality protection requirements within the Tentative Order are authorized by Federal Law, are necessary to meet the federal MEP standard, and are not unfunded mandates. Please see comments #155 and 165.

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165	5	Legal	F.1.	Finally, the LID and retrofitting requirements unlawfully impose on cities unfunded mandates. Any NPDES requirements that are not dictated by federal law must be funded by the state. And because these provisions are not required by federal law, they violate Article XIII B, Section 6 of the California Constitution. (County of Los Angeles v. Commission on State Mandates (2007) 150 Cal.App.4th 898, 915-916.) Despite prior comments on this point, the revised Draft Permit and related materials do not address the unfunded mandates that are being imposed on the Permittees. Contrary to contentions made by the Regional Board on this issue that such unfunded mandates are appropriate where they are being imposed pursuant to a federal program, it is only where the federal program mandates a particular requirement upon the state agency that the exception to Article XIII B, Section 6 for federal mandates applies. Where the federal program provides discretion to the State agency to impose a local program, any mandate imposed upon the local municipality through the exercise of that discretion is considered an unfunded mandate and, as such, is prohibited by the California Constitution. (See Hayes v. Commission on State Mandates (1992) 11 Cal. App.4th 1564, 1570.) It is only when the State has no "true choice" in implementing a federal mandate that the prohibition under the California Constitution can be avoided. (See id. at 1593.) As noted in its prior comments, the Regional Board's imposition of compliance obligations that exceed the CWA, and which are thereby not required by federal law, must be accompanied by state funding to be valid. Accordingly, Draft Permit requirements such as the retrofitting of any public property (e.g., storm drains) clearly must be accompanied by state funding to be valid.	The LID and retrofitting requirements are not unlawful and are not unfunded mandates. The requirements are authorized by the Clean Water Act section 402(p)(3)(B)(iii) and necessary to reduce pollutants to the MEP as mandated by federal law. The contention that NPDES permits and their requirements are unfunded state mandates has been repeatedly heard and denied by the State Water Board. (See Order Nos. WQ 90-3 and WQ 91-08). Indeed, the unfunded state mandate argument was recently heard by the State Water Board when it considered the appeal of the Los Angeles Regional Board standard urban stormwater mitigation plan (SUSMP) requirements. The Los Angeles Regional Board 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 State Water Board in that instance (Order WQ 2000-11). The Board notes that in 2007, the Court of Appeal in County of Los Angeles v. Commission on State Mandates ((2007) 150 Cal.App.4th 898) invalidated a Government Code statute that had exempted Regional Water Board orders from constitutional state mandates subvention requirements. To the extent that basis was relied upon previously by the State or Regional Water Boards to assert that provisions were not unfunded state mandates, such a basis is no longer available; however where, as here, provisions are necessary to meet the federal MEP standard and expand upon existing programs, they do not constitute unfunded state mandates. In addition, because local agencies can pay for compliance with permit provisions by reallocating costs or levying service charges, fees or assessments to pay for implementation, the provisions do not constitute unfunded state mandates requiring subvention. The California 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 CWA 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

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					the responsibilities and costs lie with the local agencies in the first place. 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. 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 commenters' 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. The state's water quality protection requirements within the Tentative Order are authorized by Federal Law, are necessary to meet the federal MEP standard, and are not unfunded mandates. Please see the fact sheet, response to comment #5 in the July 2007 response to comments and response to comment #155 for more information.

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166	5	TMDL	Findings	T.O., page 2, #2, the last statement, “These water quality standards must be complied with at all times, irrespective of the source and manner of discharge.” This is in conflict with the intent expressed by Regional Water Quality control Board (RWQCB) Staff during numerous workshops, the Amendment to the Water Quality Control Plan for the San Diego Basin (9) to incorporate implementation provisions for indicator bacteria water quality objectives to account for loading from natural, uncontrollable sources within the context of a Total Maximum Daily Load, Resolution, R9-2008-0028, as well as subsequently updates in Sections C.1., C.3., D.4., etc. as identified in the T.U. The City feels that the intent of the paragraph is preserved with the removal of this sentence. Please remove said sentence.	Regional Board Resolution No. R9-2008-0028, "A Resolution Amending the Water Quality Control Plan for the San Diego Basin (9) to Incorporate Implementation Provisions for Indicator Bacteria Water Quality Objectives to Account for Loading from Natural Uncontrollable Sources Within the Context of a Total Maximum Daily Loads," has essentially revised the Water Quality Standards for bacteria in water bodies that are addressed by TMDLs. The Water Quality Standards for bacteria, within the context of a TDML, allows for exceedances of the bacteria WQOs, as long as the exceedances are due to natural and background (non-anthropogenic) sources using a "reference system and antidegradation approach" or a "natural sources exclusion appraoch." To date, a TMDL containing either approach has not been fully approved in Southern Orange County. The Bacterial Indicators TMDL for Baby Beach has the option of developing a "natural sources exclusion approach." Once developed, the TMDL must be amended prior to any changes to the MS4 Permit to be consistent with the assumptions and requirements of the TMDL Waste Load Allocations. The requested deletion is not made.
167	5	LID	Finding	T.O., page 6 #13, The City disagrees with the statement “…. The risks typically associated with properly managed infiltration of runoff (especially from residential land use areas are not significant.” Please provide scientific data supporting this statement, appropriate for the soil and geologic conditions found in south Orange County, including an economic evaluation or delete this statement. From experience, the City has found that many of the “management techniques” identified to address the existing clay soils and risks and liabilities associated with landslides have made infiltration for certain projects economically infeasible with a high level of risk of which the City cannot pursue nor approve.	The key phrase is "properly managed." We agree that when not properly managed infiltration of runoff can carry significant risks. The Regional Board expects all Copermittees to properly manage the infiltration of runoff to minimize risks. Please see the USEPA's fact sheets on infiltration basins, infiltration trenches, grass swales, and porous pavement. http://cfpub1.epa.gov/npdes/stormwater/menuofbmps/index.cfm?action=min_measure&min_measure_id=5
168	5	Existing Development	Finding	T.O. page 7, #d. As this T.O. is significantly different than the current permit, we request a longer time to effectively and efficiently update our programs. There are some significant issues that will affect our constituencies in significant ways and the development process must allow time for outreach to garner support. We suggest that you allow 18-24 months in lieu of proposed 12, acknowledging the historical successes of south Orange County copermittees working together, garnering stakeholder support and producing quality products.	One year from the date of adoption of the Order is a sufficient amount of time to update the jurisdictional programs to address the areas of the Order that have changed. The Copermittees are more than familiar with storm water regulations, as are its stakeholders. A change to extend the time to implement requirements is not made at this time.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
169	5	Existing Development	Finding	T.O., page 9 e. Industrial sites are regulated under a State issued Industrial General Permit. Why are requirements addressed here rather than under the industrial permit, resulting in redundancy and confusion? We feel any requirement relating to the regulated industrial sites should be omitted from this Permit and be addressed in the Industrial Permit. We understand that the Industrial Permit is due for renewal and this would be an appropriate time for RWQCB to suggest requirements to be included in the new Order.	This Finding is under the Development Planning section of the Findings. The finding is for the development and re-development of industrial sites, which is under the purview of the Tentative Order. The finding clarifies that the development of industrial sites classified as priority development projects require the implementation of LID to meet the MEP standard. Furthermore, USEPA, in requiring separate storm water permits for industrial dischargers and MS4 owners and operators expected the permits to act in a dual complimentary manner (55 Fed Reg 48000-01). Thus, the Copermittees retain responsibility for industrial development and inspections, which is expected to work in concert with the requirements under the industrial permit when the facility discharges storm water to the MS4. As such, the finding will remain in the Tentative Order.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
170	5	FETD	Finding	T.O. page 14 & S.F.S. page 18– FETDs. We continue to disagree with the Discussion of Finding E.9. We feel that it is appropriate to regulate FETDs within the MS4 Permit, as these facilities are installed and operated to meet the requirements of the Permit and are part of the MS4 system. In addition to our previous concerns regarding FETDs provided in Exhibits 1 and 2 of Attachment A, we offer the following comments in regards to the current FETD language provided in this draft: We encourage consistency and encourage you to consider the language that was proposed in the recent Region 8 draft which captures the intent of the first reiteration of FETD language which we saw in the first draft of this Permit back in 2007. We will also note that the copermittees were working on potential FETD language with previous Permit staff during the first draft Permit process, prior to postponement by the Board, which is significantly similar to the draft language found in the Region 8 draft, and therefore we support it. The draft language in Region 8's Order is provided below for consideration: "Discharges from facilities that extract, treat and discharge water diverted from waters of the U.S: These discharges shall meet the following conditions: (1) The discharges to waters of the US must not contain pollutants added by the treatment process or pollutants in greater concentration or load than the influent; (2) the discharge must not cause or contribute to a condition of erosion; (3) The extraction and treatment must be in compliance with Section 404 of the Clean Water Act; and (4) Conduct Monitoring in accordance with Monitoring and Reporting Program attached to this Order." Please note we suggest the one minor modification to the language in the Region 8 draft, which is underlined. Please also note that the existing 401 Certification and Grant Agreement for our existing Salt Creek Ozone Treatment Facility are also attached for reference in Exhibit B-2 & B-3, respectively.	Please see response to Comments 51 and 70.
171	5	TMDL	Finding	T.O. Page 15, #11 -303(d) list – We suggest that you clarify which water bodies are impacted by the listed pollutants, as we are aware that not all waterbodies in south Orange County are impaired by each of the pollutants listed.	A table has been added to the Findings of the Tentative Order containing the 303(d) listed water bodies for Southern Orange County.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
172	5	TMDL	Finding	T.O. Page 15, #12 The City believes and agrees with statements made by certain RWQCB staff and State Water Resource Control Board (SWRCB) staff during workshops that the language regarding TMLD and WLAs may be premature and should be omitted from the Permit at this time since there are no TMDLs that are approved by the State, Office of Administrative Law and/or EPA to date. The City also deems it necessary for TMDL staff and Permit staff to work together to incorporate the TMDLs into the permit at the appropriate time to retain the intent and implementation strategies that were developed thought the several year TMDL development process. Prior to incorporating TMDLs into the Permit, we suggest that the permit writers work with TMDL staff and also refer to the strategically developed implementation plan(s) that were developed as part of the TMDL.	Regional Board staff from the TMDL and Surface Water Units have had several meetings to discuss the incorporation of TMDLs into storm water permits. This dialogue will continue as final approval of Resolution No. R9-2008-0027, "A Resolution to Adopt an Amendment to the Water Quality Control Plan for the San Diego Basin (9) to Incorporate Total Maximum Daily Load for Indicator Bacteria, Baby Beach in Dana Point Harbor and Shelter Island Shoreline Park in San Diego Bay" nears. The State Board is scheduled to hear and approve the item on 16 June 2009.
173	5	ASBS	A	T.O. page 18, #5 & page 20 #5 – "As ASBS's or SWQPA's are already regulated separately by the State Board, page 18 #5 and Page 20 #5 are redundant and should be deleted from the MS4 Permit."	The Regional Board has removed ASBS/SWQPA language from the tentative Order. Please note ASBS/SWQPAs, like all water bodies, remain subject to receiving water limitations and discharge prohibitions under the Tentative Order.
174	5	Overirrigation	B	T.O. page 19, #2– The removal of landscape irrigation, irrigation water and lawn watering for the list of exempted discharges is problematic and we are concerned that the tentative prohibition will diminish public support of the Permit and the City's water quality protection program. Our residents and businesses will not accept that, without proof, potable water running over grass is a pollutant worthy of illegal declaration. Regarding urban runoff from over-irrigation, please note that copermittees and water districts are working aggressively and cooperatively to address this issue. Please see the attached excerpts from South Coast Water District Water Conservation Ordinance (No. 206) that has already been adopted (Exhibit B-1), covering the majority of Dana Point and parts of Laguna Beach and San Clemente. As we have discussed with your staff, all water districts have or will be adopting similar ordinances. Also, significant water rate increases (34% plus proposed for SCWD, effective July 1, upon approval) and allocations are on the way. Please reconsider whether this comprehensive water conservation approach, along with the new AB1881 requirements that will address new developments, will suffice to address the concern of urban runoff from over-irrigation for this Permit cycle, in lieu of the elimination of the exemption. We all want to reduce runoff carrying pollutants in dry weather and we feel that our proposed approach will receive greater public acceptance and commensurate results without stimulating blow back and rejection by a significant segment of the public, which could result in stalling or setting us back in our efforts to progress in improvements in water quality.	Please see response to comments Nos. 28, 39, 42, 44, 52, and 159. The Copermittees program of education and cooperation with the water districts would likely meet the requirements of the Permit in addition to the Copermittees modifying their existing programs that address non-stormwater to also address overirrigation discharges. The Copermittees are expected to use the proper discretion in conducting education, complaint response, and progressive enforcement to alleviate public concerns. The programs and rate increases by the water district are in response to the current water shortage and are likely to be ceased once the water shortage has been addressed. The water quality impacts from overirrigation discharges will exist in drought years and in surplus years; therefore the Copermittees need to implement a program to address overirrigation. It is our expectation that removal of the exemption to improve water quality will work in concert with conservation efforts aimed at source control.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
175	5	SUSMP		Page 38f.c. – given the options for verification in (c), the word "inspection" in (iii), (iv), (v), (vi), (vii) (viii), and (ix) should be changed to "verification" for consistency, please.	The word inspection was deliberately chosen to be used in section F.1.f.(2)(c). Inspections provide greater assurance that post construction BMPs are properly maintained, operated and implemented. The inspections are limited to high priority BMPs, but a Copermittee may choose to inspect all the BMPs rather than just the high priority BMPs. Self certifications, surveys or other effective means are reserved for those BMPs that are not a high priority.
176	5	Construction	F.2.	T.O. Page 47, (b) iii – The requirement for slope stabilization on all active slopes during rain events regardless of season does not appear to be consistent with the proposed General Construction Permit; nor is practical in many situations. We suggest that the language in the proposed General Construction Permit be reviewed so that this language can be revised to allow flexibility in implementation of erosion and sedimentation control while keeping with the intent of keeping sediment and pollutants on site.	The statewide general construction permit has not yet been adopted and is likely to be further amended; therefore it is not appropriate to attempt consistency with a permit that has not been adopted. We encourage the commenter to bring their concern to the State Board, so that the General Construction Permit may be amended to be consistent with the Tentative Order. The Regional Board's experience is that it is practicable to implement temporary soil stabilization BMPs prior to rain events and this requirement also keeps with the intent of preventing erosion and sediment transport.
177	5	Construction	F.2.	T.O. Page 50 g.1 Please clarify what the RWQCB intends to do with the information provided in the proposed reporting of construction sites with stop work order or high enforcement due to stormwater violations. This information is already reported annually in the annual report. Unless the RWQCB intends to effectively use this instantaneous information, this requirement is an additional administrative task without perceived commensurate benefit. Historically, we know that Dana Point and other south Orange County Permittees have been very proactive in coordinating with RWQCB regarding the regulation of construction sites when needed, including setting up pre-rainy season inspections with RWQCB staff and contractors at high priority sites and also requesting assistance or guidance when challenging issues arise.	The requirement regarding notification of stop work orders or high enforcement is required to provide the Regional Board with additional information in order to evaluate and prioritize construction site inspections. The Regional Board acknowledges that many Copermittees have been historically proactive in regulatory coordination, and the submittal of this information further provides for complimentary enforcement.
178	5	Construction	F.2.	T.O. Page 50 g.2. The requirement to annually notify the Regional Board of all construction sites with "potential" violations is questioned. Virtually every site could fit into this "potential" category at some point, and basically we would be sending the entire construction site inventory. The term "potential" is too hard to define and will lead to widely varying compliance of copermittees. Please remove this requirement.	Please see response to Comment 128.
179	5	Monitoring	F.4	14. T.O. Page 67 & 68, b. The last sentence conflicts with the previous sentences which indicates that GIS is "highly recommended". If GIS is not used, the layers cannot be submitted. We suggest the modification: "The GIS layers of the MS4 map or a hard copy of map, if GIS is not used, must be submitted with the updated Jurisdictional……".	The Tentative Order language has been updated to reflect that GIS is required, not recommended.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
180	5	Monitoring	F.4.	T.O. Page 70, (2), As the water districts serving the City of Dana Point (South Coast Water District, Moulton Niguel Water District and San Juan Capistrano Utilities) are charged with the responsibility of regulating sanitary sewer overflows and serve as the primary spill prevention and response coordination authority, we request that the Regional Board remove this provision so as to reduce duplicity of effort, confusion and the implementation of unnecessary control activities, when an effective program is already in place and regulated.	The Regional Board recognizes that sewage spill containment and cleanup may be the responsibility of agencies not under the Copermittees control or responsibility. It should be noted this comment was previously received and language was relaxed in the 2007 Tentative Order. Language under (2), for sewage spills, was changed to read "management measures and procedures" to reflect the concern that is raised by this comment. It is unclear to the Regional Board why the language should now be removed. The response to the original comment is still applicable and reads: "The Tentative Order includes sewage and non-sewage spills in the requirement for spill prevention and response. Federal regulations clearly define sewage as an illicit discharge that must be addressed by municipalities (see Phase II Final Rule, p.68758). Sewage is an illicit discharge to the MS4 that threatens public health. As such, the Copermittees must implement measures to prevent sewage from entering the MS4 system and must respond to illicit discharges that have entered the system. This section has been revised to clarify that management measures and procedures must be implemented to prevent, respond to, and cleanup spills. When the State Water Board stayed the sewage provision from Regional Board Order No. R9-2002-01, it found that the costs of the requirement did not constitute harm, but agreed that harm could ensue from potential response delay and confusion (Order WQO 2002-0014). Subsequently, the Copermittees and the local sewer agencies have developed mature relationships regarding sewage spill response. As a result, the concerns expressed by the State Water Board are no longer warranted. For instance, the Copermittees have developed and implemented procedures for spill response and sewage spill response. The Model Sewage Spill Response Procedure is outlined in the Copermittees' Proposed 2007 Drainage Area Management Plan (DAMP). According to the 2007 DAMP, regardless of where the spill originates, if the spill has entered or may enter the storm drain system, the Copermittees respond to assist with the cleanup and remediation of the area. Section D.3.a.7 of the Tentative Order includes requirements for measures that must be taken to prevent sewage spills. Examples of measures being implemented by Copermittees include inspections of fats, oils, and grease management at restaurants. Other preventative measures can be implemented during routine planning efforts for new development and redevelopment projects. Similarly, building permit inspections should be used to verify the integrity of the sanitary and storm sewer infrastructure and ensure that cross-connections between the two are avoided.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
181	5	WURMP	G	T.O. Page 70 (1) and page 71 b. The City believes that it would be prudent to update Watershed Runoff Management Plans (WRMPs) concurrently with TMDL bacteria load reduction plans (BLRP) or comprehensive load reduction plans (CLRP), as they will most likely be one comprehensive document. This makes sense as the watershed management areas are consistent with TMDL waterbodies. As we have WRMPs in place and are implementing them, we suggest revising the timeframe for updates to be concurrent with the development of the BLRP/CLRPs to maximize efficiency. Please also coordinate this effort with your fellow TMDL staff, as we as copermittees have already drafted a outline of these plans. The same comments apply to the watershed map. It is prudent that we create a map that can be used for watershed and TMDL planning and implementation and we request that you allow flexibility in the timeframe for development of the map so that the copermttiees can effectively and efficiently prepare a map that will meet TMDL planning requirements.	The WRMP section of the Order has been restructured. Section G has been streamlined to allow Copermittee's to report their WRMP updates annually. The Order does not specifiy when during that year a Copermittee has to submit a report, therefore the Copermittee is able to coordinate reporting WRMP updates with BLRP or CLRP submittals. This change gives the Copermitted flexibility and encourages efficient use of resources.
182	5	WURMP	G	T.O., page 74, (e) (2) RWQCB staff and copermittees agreed to delete the word “each” from this section.	The WRMP section of the Order has been restructured. The term "each" has been removed from this section.
183	5	General	K	T.O., page 85, #3 Annual Reports – During conversations and workshop with RWQCB staff, both RWQCB staff and copermittees agreed that it makes sense to add some language providing flexibility and allowing copermittees to propose an alternative report format and/or annual submittal dates for review and approval by RWQCB. We support language to this effect and look forward to seeing it in a subsequent draft or errata.	Section K. Reporting of the Tentative Order has been revised to allow the Copermittees to propose an alternate reporting criteria and schedule as part of their updated JRMP.
184	5	TMDL	upplemental Fact Shee	S.F.S. Page 19 – No TMDLs have been approved by State Board, Office of Administrative Law and/or EPA and therefore this Finding and other references to WLA or TMDLs should be omitted.	All references to CDOs and CAOs, in regards to TMDL implementation, have been removed from the Tentative Order and Fact Sheet. This does not, however, preclude the Regional Board from future consideration of the use of these authorities to address TMDLs. Two TMDLs for Bacterial Indicators are likely to be approved in the next five years. Title 40 CFR 122.44(d)(1)(vii)(B) requires MS4 Permits to be consistent with the Waste Load Allocation (WLA) assumptions and requirements. Therefore, the discussion on incorporation of WLAs should already have begun. On June 16, 2009, the State Water Resources Control Board approved Resolution R9-2008-0027 amending the Basin Plan to incorporate Total Maximum Daily Loads (TMDLs) for indicator bacteria for Baby Beach in Dana Point Harbor and Shelter Island Shoreline Park in San Diego Bay. Final approvals by the Office of Administrative Law and the USEPA are expected to be garnered prior to adoption consideration of this re-issuance of the MS4 Permit for So. Orange County.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
185	6	LID	F.1	We are disappointed with the Tentative Order. It is inconsistent with state and federal law in absolute terms and does not adequately respond to comments from both EPA and NRDC or reflect the direction of the Board at the conclusion of the last hearing. With respect to low impact development ("LID"), it continues to pursue highly flawed approaches that are vague and ambiguous and fail to implement the federal maximum extent practicable standard. Indeed, the flaws in the LID approach are even more apparent in contrast to the recent adoption by the Los Angeles Regional Water Quality Control Board of LID provisions which require onsite retention of the 85th percentile design storm. The requirements imposed by the Los Angeles Regional Board also require offsite mitigation when onsite compliance is not feasible. Notably, NRDC, other environmental groups, and all of the permittees in Ventura County supported these provisions. During the South Orange County permit workshop held on May 6, staff provided some indication that further modifications of the permit would be forthcoming to make it both clearer and consistent with the federal MEP standard. We strongly encourage this direction.1	The Tentative Order has been modified in the errata sheet to clarify requirements that LID BMPs require onsite retention and/or biofiltration of the 85th percentile design storm and offsite mitigation when onsite compliance is not technically feasible.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
186	6	LID	F.1	The Tentative Order lacks a clear performance standard—tied to onsite retention of stormwater—that requires robust implementation of LID techniques; The Tentative Order's Development Planning Component remains legally inadequate and is not based on the evidence in the record before the Regional Board. As currently written, the Tentative Order does not require any specific level of LID implementation and would, as explained below, essentially allow the Copermittees to regulate themselves and to grant wholesale waivers of otherwise universally applicable SUSMP sizing criteria. There is no stated analysis that supports the staff's proposals or provides even a general assessment of the water quality impact of the proposed approach. Furthermore, the Tentative Order's Development Planning Component fails to address the known water quality problems that staff articulate in the Fact Sheet (See, e.g., Revised Fact Sheet for Tentative Order 2008-001, at 26) and falls well below many other stormwater permits and regulatory documents around the country. In all of these respects, staff have failed to adequately respond to the issues raised when the last draft of the Permit was rejected by the Regional Board, and the revisions in the current draft do not address the fundamental weaknesses of the Tentative Order. While we appreciate the fact that the Tentative Order does require some undefined level of LID implementation unless the Copermittee makes a finding of infeasibility, the Tentative Order remains legally insufficient due to the lack of a numeric performance requirement for LID, the availability of all-encompassing waivers from treatment standards, the improper placement of and failure to define the Tentative Order's 5% "effective impervious area" ("EIA") limitation, and the ill-conceived nature of other provisions. These problems with the Development Planning Component, elaborated below, need to be remedied before the Tentative Order will meet the Clean Water Act's MEP standard for pollutant reduction.	The 5 percent EIA requirement has been removed in favor of requirements that LID BMPs require onsite retention and/or biofiltration of the 85th percentile design storm and offsite mitigation when onsite compliance is not technically feasible.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
187	6	SUSMP	F.1	The Tentative Order contains unlawfully vague and general new development and redevelopment provisions; As noted in our January 24, 2008, letter, which we incorporate by reference herein, the previous draft of the Tentative Order was rife with vague and unenforceable provisions.13 Some of these provisions have been improved in the new draft, but many remain unacceptable. This is particularly problematic where the Tentative Order fails to establish the necessary numeric performance standards which would ensure that the most effective, pollution-reducing BMPs— i.e., LID practices—are implemented to the maximum extent practicable. These flaws are all the more apparent because they stand in contrast to recently adopted LID requirements for Ventura County, adopted on May 7, 2009, by the Los Angeles Regional Water Quality Control Board. The new Ventura County MS4 permit requires that 95% of the volume from the 85th percentile storm be retained onsite through infiltration, harvesting and reuse, or evapotranspiration. If full onsite management of the design storm volume is technically infeasible, the retention obligation may be reduced, but offsite mitigation with equivalent results must be performed (or funds must be contributed to a public mitigation fund in an amount sufficient to offset the project's onsite non-compliance). Notably, this requirement resulted from a collaboration and agreement between NRDC, Heal the Bay, and all of the Ventura County permittees. This is the type of performance standard that is lacking in the Tentative Order. The Tentative Order's LID provisions are still a collection of largely hortatory provisions with no specific measurable outcome. Unfortunately, even the vast majority of the revisions to the Development Planning Component fall into this category, requiring only "assessments" of LID practices or applying LID requirements only "where applicable and feasible." Narrative and subjective terms are, thus, still prominent, e.g.: "The following LID BMPs … shall be implemented … where applicable and feasible," (Tentative Order ¶ F.1.c.(2)), "Buffer zones for natural water bodies, where feasible," (Tentative Order ¶ F.1.c.(3)), "Where feasible, landscaping with native or low water species shall be preferred," (Tentative Order ¶ F.1.c.(7)), "The review … must include an assessment of techniques to infiltrate, filter, store, evaporate, or detain runoff," (Tentative Order ¶ F.1.d.(4)(a)(iv)), "[W]here feasible the Copermittee must take appropriate actions," (Tentative Order ¶ F.1.d.(4)(a)(vi)), "[D]rain a portion of impervious areas," (Tentative Order ¶ F.1.d.(4)(b)(ii)), etc. Such vague provisions would not enable the Regional Board or the Copermittees to measure the outcomes of, or to enforce, the Tentative Order's requirements since implementation could vary enormously.	The Tentative Order has been modified in the errata sheet to with more specific requirements that LID BMPs require onsite retention and/or biofiltration of the 85th percentile design storm and offsite mitigation when onsite compliance is not technically feasible. In addition to the design storm criteria, the Tentative Order includes other specific performance measures, wet weather municipal action levels and dry weather non-storm water numeric effluent limits.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
188	6	SUSMP	F.1.	The control measures included in the Development Planning Component do not meet the "maximum extent practicable" ("MEP") standard of the Clean Water Act, especially given other stormwater control measures being implemented in California and around the U.S.; Section 402(p) of the Clean Water Act establishes the MEP standard as a requirement for pollution reduction in stormwater permits. (33 U.S.C. § 1342(p)(3)(B)(iii).) Regional Board staff have failed to implement this standard effectively, and currently the Permit does little more than pay lip service to superior stormwater management practices commonly implemented around the country. Nonetheless, "the phrase 'to the maximum extent practicable' does not permit unbridled discretion. It imposes a clear duty on the agency to fulfill the statutory command to the extent that it is feasible or possible." (Defenders of Wildlife v. Babbitt (D.D.C. 2001) 130 F.Supp.2d 121, 131 (internal citations omitted); Friends of Boundary Waters Wilderness v. Thomas (8th Cir. 1995) 53 F.3d 881, 885 ("feasible" means "physically possible").) Similarly, in South Orange County, an onsite retention standard based on the effective impervious area of a site would be a technologically feasible approach that would reduce stormwater discharges and pollution far more than the non-specific measures contained in the Tentative Order.20 We have even called to the Regional Board's attention an EPA study which found that LID practices are frequently less costly than conventional stormwater BMPs.21 Regional Board staff have offered no justification for ignoring our and EPA's comments regarding the need for a specific, enforceable, numeric performance standard and no evidence that meeting our proposed onsite retention standard of 3% EIA would be infeasible, assuming that—as we have suggested—the Tentative Order includes an appropriate infeasibility provision tied to a technically equivalent alternative compliance requirement. Indeed, the Tentative Order's inclusion of a 5% EIA limitation (albeit inadequately defined) for hydromodification purposes strongly implies that Regional Board staff, too, believe that this standard could be feasibly implemented in South Orange County. Other Phase I MS4 permits within California (beyond the abovementioned Ventura County MS4 permit), despite their problems, are also heading in this direction. The North Orange County draft permit, for instance, establishes a hierarchy of options (from onsite to regional systems) that each require onsite retention—or biofiltration through LID—of the 85th percentile design storm volume.29 With such precedents in California and in other parts of the country, the Tentative Order's failure to adopt a numeric performance standard beyond the barebones SUSMP hydraulic sizing criteria is particularly remarkable. The decision to	The Tentative Order has been modified in the errata sheet to clarify requirements that LID BMPs require onsite retention and/or biofiltration of the 85th percentile design storm and offsite mitigation when onsite compliance is not technically feasible. This is consistent with the recently adopted Region 8 MS4 permit for North Orange County.

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				waive these bare-bones criteria without even requiring offsite mitigation, as discussed below, evidences an even more flagrant disregard for the MEP standard.	
189	6	General	General	The control measures in the Tentative Order do not constitute "best management practices," as required by law; As detailed in our January 24th Letter, the provisions of the Tentative Order, which remain largely unchanged from previous drafts, are insufficient to constitute "best management practices" ("BMPs"), as required by the Clean Water Act. To reiterate our comments briefly, the Tentative Order, at most, sets forth ideas around which a proposed management program and articulated BMPs could be developed, which is required in the application for an MS4 permit. (See 40 C.F.R. § 122.26.) Missing are the actual BMPs and accompanying performance standards that must be described in the Tentative Order. The closest the Tentative Order comes to identifying actual BMPs is the list of general LID design practices in Section F.1.d.(4)(b). (Tentative Order ¶ F.1.d.(4)(b).) However, these design measures need not be hydraulically sized to treat any particular amount of stormwater. This is tantamount to no requirement at all and does not satisfy EPA's counsel that, among other components, BMPs must be attached to measurable goals that include "a quantifiable target to measure progress toward achieving the activity or BMP." As the examples from EPA's guidance document—included in our January 24th Letter—highlight, merely outlining a general technique with no quantifiable requirement for implementation does not satisfy the Clean Water Act's mandates. The State Water Board has also voiced its support for establishing numeric requirements that apply to stormwater BMPs, stating that, "[t]he addition of measurable standards for designing the BMPs provides additional guidance to developers and establishes a clear target for the development of the BMPs."31 Despite pointing out the necessity of such targets to the Regional Board in our last comment letter, the Tentative Order's site design requirements still fail to include more than a requirement for some undetermined amount of LID implementation. As a result, the provisions of the Tentative Order fail to satisfy EPA regulations and guidanceand are invalid under the Clean Water Act.	The Tentative Order has been modified in the errata sheet to clarify requirements that LID BMPs require onsite retention and/or LID biofiltration of the 85th percentile design storm and offsite mitigation when onsite compliance is not technically feasible. The design storm is a quantifiable target to measure progress toward achieving the activity or BMP. In addition, the Tentative Order includes other performance criteria including wet weather municipal action levels and dry weather non-storm water numeric effluent limitations.

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190	6	SUSMP	F.1	The Tentative Order would allow unlawful waivers from hydraulic sizing criteria and does not adequately require mitigation for non-complying projects; The Tentative Order's waiver section sets forth a skeletal process for allowing projects not to comply with the Permit's already lacking requirements whenever Copermittees deem compliance "infeasible," yet this section would not require any equivalent performance through offsite mitigation or maximize the implementation of stormwater management practices, as required by the MEP standard. Indeed, there are no criteria established by the Tentative Order to determine what constitutes "infeasibility" that would allow for waivers, and there is no evidence in the record to demonstrate that any sites are incapable of meeting the barebones SUSMP sizing criteria. We suggest instead the establishment of an onsite retention standard, such as 3% EIA, with the option for onsite treatment paired with offsite mitigation in situations of technical infeasibility. This type of standard has been adopted in wide-ranging locations around the US, including last week in Ventura County, as mentioned above, and we have submitted expert reports analyzing its feasibility in various locations around California. The waiver section provides the perfect opportunity to adopt far more robust and appropriate requirements regarding offsite mitigation when onsite compliance is infeasible, but despite facts in the record to support such requirements, the Tentative Order has created a blanket waiver of the state-law-backstop hydraulic sizing criteria without even addressing why this is necessary. The Tentative Order's Waiver Provisions Contravene Federal and State Law and Are Ill-Conceived. Through the waiver provision, Priority Development Projects can receive a waiver from "the requirement of implementing treatment BMPs with numeric sizing criteria if infeasibility can be established." (Tentative Order ¶ F.1.d.(7).) Projects receiving waivers must consider all available treatment BMPs;33 however, because the Tentative Order does not define infeasibility, the determination of what is infeasible is left entirely to the Copermittees, which amounts to impermissible self-regulation, as discussed in this letter and in our previous comment letter. In other words, the Tentative Order, as written, could allow qualifying projects to install treatment systems that are incapable of handling more than one milliliter of rainfall, yet this would constitute compliance with the Tentative Order. No offsite mitigation would be required because the waiver provision leaves it to the discretion of the Copermittees to "collectively or individually develop a program [for] a storm water mitigation fund." (Tentative Order ¶ F.1.d.(7)(b).) This is an unlawful result. Federal	The Tentative Order has been modified in the errata sheet to clarify requirements that LID BMPs require onsite retention and/or biofiltration of the 85th percentile design storm and offsite mitigation when onsite compliance is not technically feasible. The Tentative Order includes criteria to define technical infeasibility consistent with Region 8's recently adopted MS4 permit for North Orange County.

law and state law require that all Priority Development Projects, some of which would be exempted from hydraulic sizing criteria by the Tentative Order, meet certain minimum standards. Federal regulations mandate that MS4 permits impose requirements to reduce the discharge of stormwater pollution from new development and redevelopment projects. (40 C.F.R. § 122.26.) The State Water Board—through the Bellflower decision—has gone further and established the SUSMP hydraulic sizing criteria as a compliance floor for all Priority Development Projects.34 A permit cannot meet the MEP standard if it does not impose these criteria to reduce stormwater pollution, yet these criteria are exactly what the Tentative Order waives entirely for projects that meet the Copermittees' own definition of "infeasibility." This is unlawful. Certainly, what constitutes MEP now is not a lesser standard than what constituted MEP nearly a decade ago.

The Requirements for Priority Development Projects that Receive Waivers Are Unlawfully Lax.
For projects that receive waivers of hydraulic sizing criteria, the Tentative Order would apparently require no stormwater management at all except perhaps whichever BMPs the Copermittee has—at its own discretion—found to be feasible. (Tentative Order ¶ F.1.d.(7).) As mentioned above, there is no obligation to undertake offsite mitigation because the requirement to contribute funds for offsite mitigation remains at the discretion of the Copermittees; moreover, the offsite mitigation funding option is tied to avoided cost and thus bears no relationship to water quality results. (Tentative Order ¶ F.1.d.(7)(b).) This runs counter to the several nationwide examples cited above, where offsite mitigation is required in proportion to the extent of onsite non-compliance. It also runs counter to U.S. EPA's recent advice on other MS4 permits in California: "We … recognize that there may be situations where achievement of specified volumetric criteria for management of stormwater via LID design elements may be infeasible due to physical site constraints. The permit should include a clearly defined, enforceable process for requiring off-site mitigation for projects where use of LID design elements is infeasible." "[T]he permit could require the retention of stormwater at an offsite location corresponding to 1.5 times the volume which cannot be practically managed via LID."

Without remedying these very substantial deficiencies in the waiver provisions, the Tentative Order would unlawfully allow many Priority Development Projects to do far less than is required to meet the MEP standard. As mentioned elsewhere in this letter, these deficiencies
also hamstring the Tentative Order's ability to move South Orange County toward compliance with water quality standards in the area's many impaired watersheds. We strongly urge the Regional Board to redraft the Permit such that

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				all Priority Development Projects must meet an onsite retention-based, numeric performance standard (e.g., 3% EIA, properly defined) and, where onsite compliance is technically infeasible, provide offsite mitigation that achieves at least equivalent water quality results (e.g., require the contribution of in-lieu funds sufficient to retain 1.5 times the design storm volume not retained onsite).	
191	6	SUSMP	General	The Tentative Order precludes meaningful Regional Board and public review of critical aspects of the Permit; As discussed in our previous comment letter, the general lack of guidance and requirements for Regional Board and public review of relevant standards and documents in the Tentative Order's provisions would allow the Copermittees to make essentially all meaningful decisions related to stormwater mitigation by themselves. The particularly important provisions of the Development Planning Component that now fail to require Regional Board and public review include: • Updates to Local SSMPs to comply with the Permit (F.1.d.); • Copermittee review of local codes and ordinances to remove barriers to LID implementation (F.1.d.(4)(a)(vi)); • Waivers of numeric sizing criteria (F.1.d.(7)(a)); • Development of programs to require the contribution of funds for offsite mitigation (F.1.d.(7)(b)); • LID Site Design BMP Substitution Programs (F.1.d.(8)); and • Copermittee requirements in SSMPs or WQMPs that establish hydromodification criteria (F.1.h.).	The Tentative Order has been revised to allow a public review of the the updated SSMP and hydromodification management plan.

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192	6	Hydromod	F.1.	The hydromodification provisions are inadequate to prevent adverse geomorphological changes; The Tentative Order includes three requirements for interim hydromodification control criteria, and project applicants can meet the third requirement through three different means. The first and second of these three means improperly establish the "pre-construction" or "preproject" condition as the baseline for analysis and comparison. (Tentative Order ¶ F.1.h.(6)(a)(iii).) This standard is acceptable only for new development on land that has remained in its natural state until the time of construction, but it is wholly unacceptable for infill and redevelopment projects where the land has already been developed. Because of the prevalence of now-antiquated stormwater management practices that focused on peak flow and not on matching discharge rates and durations, pre-construction or pre-project rates and durations for infill and redevelopment sites will almost always represent measurements that we now want to avoid. Imagine, for example, the redevelopment of a 1950s era surface parking lot: under the Tentative Order's standard, a developer could comply with the permit by doing essentially nothing to mitigate the effects of hydromodification—after all, a parking lot constructed in the 1950s would shunt all runoff directly to storm drains as rapidly as possible, resulting in the early, high peak flows that are at the root of the hydromodification problem. Nonetheless, under the Tentative Order, this unnatural "pre-construction" or "preproject" hydrograph would be the standard against which the new project would be measured. Instead of requiring projects not to exceed pre-construction or pre-project runoff rates and durations, the Tentative Order should require projects not to exceed pre-development runoff rates and durations. This will ensure that hydromodification criteria result in measurable progress and stream geomorphology benefits, rather than the institutionalization of detrimental, antiquated stormwater management practices. Technical experts and other jurisdictions have supported this type of standard. The Southern California Coastal Water Research Project, for instance, suggests that "attempting to have the post-development condition match pre-development runoff magnitude and duration should be an initial consideration for all circumstances."38 And Los Angeles County has implemented the following standard: "Mimic undeveloped stormwater and urban runoff rates and volumes in any storm event up to and including the '50-year capital design storm event.'" To address the technical inadequacy of the Tentative Order's hydromodification provisions, the first and second options under the third interim requirement should be changed to reference "pre-development"	The Regional Board agrees that the standard to which post-construction hydrograph matching must occur is the hydrograph resulting from the pre-developed, naturally occurring condition. Therefore, the Tentative Order has been clarified by adding the following sentence: "Where the proposed project is located on an already developed site, the pre-project discharge rate and duration shall be that of the pre-developed, naturally occurring condition." Additionally, the phrase "pre-project" has been replaced with "pre-development (naturally occurring)" to avoid any confusion with the use of this term. Also, specific criteria have been included in section F.1.h that addresses the last part of the comment.

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				conditions as the baseline. (Tentative Order ¶ F.1.h.(6)(a)(iii).) Without this revision, the hydromodification provisions will not meet the MEP standard of the Clean Water Act and will not necessarily ensure the health of aquatic ecosystems and the maintenance of stream geomorphology. 2. The Requirements for Addressing Hydromodification Do Not Establish a Clear Standard for the Copermittees to Meet through their Hydromodification Management Plans. We remain very concerned about the vagueness of the (non-interim) requirements to address hydromodification, and we incorporate our prior comments here by reference. The revisions to these provisions have failed to establish a clear standard that the Copermittees must implement—the closest the new language comes to establishing such a standard is Section F.1.h.(4)(c), but the Tentative Order does not unequivocally state that maintaining Erosion Potential at 1 is obligatory. The Tentative Order should be rewritten to make this a requirement.	
193	6	SUSMP	F.1.	The Tentative Order's applicability criteria for the Development Planning Component must be significantly lowered to meet the MEP standard; The Tentative Order's applicability criteria stand out as exceptionally weak compared to other Phase I MS4 permits in California and must be revised accordingly. The current criteria could hardly be construed as meeting the MEP standard since both the San Francisco Bay and North Orange County Phase I MS4 permits under consideration for adoption, for instance, contain more stringent applicability criteria, generally setting thresholds at 5,000 square feet or, at most, 10,000 square feet.40 The particularly problematic thresholds in the Tentative Order are: the catchall of one acre or whatever the Copermittees collectively identify as an equivalent threshold, (Tentative Order ¶ F.1.d.(1)(c)), the residential threshold of 10 or more dwelling units, the commercial and industrial development thresholds of one acre, and the lack of any automotive repair shop size threshold at all. (Tentative Order ¶ F.1.d.(2).) The Permit should set the catchall at or below 10,000 square feet, commensurate with other California MS4 permits and with the significant, cumulative impacts that projects under one acre can have, while specific land uses that generate especially high levels of pollution should be subject to lower thresholds.	The Tentative Order's designation of a Priority Development Project has been modified to be more consistent with Region 8's recently adopted North Orange County MS4 permit.

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194	6	TMDL	I	The Tentative Order needs to clarify that waste load allocations from adopted TMDLs are enforceable Permit limitations and/or will be included in the Permit; TMDLs establish wasteload allocations ("WLAs")—or the maximum amount of a pollutant that each point source discharger may release into a particular waterway—that constitute a form of water quality-based effluent limitation. (See 33 U.S.C. 1313(d)(4)(A); 40 C.F.R. § 130.2.) Once a TMDL has been adopted, NPDES permits are required to include WLAs and to contain effluent limitations and conditions consistent with the assumptions and requirements of the TMDL from which they are derived. (40 C.F.R. § 122.44(d)(1)(vii)(B).) The Regional Board has adopted two TMDLs for the Orange County Permittees: for Indicator Bacteria Project I – Beaches and Creeks in the San Diego Region, and for Indicator Bacteria Baby Beach in Dana Point Harbor and Shelter Island Shoreline Park in San Diego Bay. However, to date, neither has been approved by the State Board, the Office of Administrative Law ("OAL"), or the U.S. EPA. As such, there are no TMDLs currently in effect for Orange County in Region 9.41 However, the Tentative Order and Fact Sheet state that "[w]ater qualitybased effluent limits for storm water discharges have been included within this Order if the TMDL has received all necessary approvals." (Tentative Order Fact Sheet, at 20-21; see also Tentative Order, at Finding E.12.) The Tentative Order then states that "[a]dopted TMDLs will be addressed as Cleanup and Abatement Orders (CAOs) subject to approval and adoption by the Regional Board in a public process," (Tentative Order, at Finding E.12), and that the Tentative Order will "incorporate adopted TMDL WLAs as numeric limits on a pollutant by pollutant, watershed by watershed basis. Reduction schedules and monitoring requirements will be inserted into this Order as individual Cleanup and Abatement Orders." (Tentative Order ¶ I.) We believe that a superior approach would be to include the WLAs identified in the two adopted TMDLs in the Permit at adoption, with a provision that the WLAs—as well as any interim or early TMDL requirements based on compliance schedules contained in the TMDLs42—are to come into effect for the Copermittees upon completion of the approval process by the State Board, the OAL, and the U.S. EPA. Through inclusion of the WLAs at this stage, the Regional Board can ensure that the permit remains consistent with the assumptions and requirements of the TMDL upon its approval, and that the imposition of adopted WLAs and compliance therewith are clearly identified as a stated condition of the permit. Given that the U.S. EPA has stated that MS4 permits should "explicitly state that the wasteload allocations (WLAs) established by . . . TMDLs are intended to be enforceable permit	First, to clafiry, the Bacteria Project I TMDL has been withdrawn by the Regional Board and will be revised and heard again later this fall. Approval of the revised Bacteria Project I TMDL by State Board, OAL and USEPA may not occur until late 2010 or early 2011. The details of implementation remain in flux. Therefore, it is pre-mature to include the WLAs of the Bacteria Project I TMDL in this Order. The TMDL for" Indicator Bacteria Baby Beach in Dana Point Harbor and Shelter Island Shoreline Park in San Diego Bay" is expected to have garned approval from the State Board, Office of Administrative Law and the USEPA prior to adoption consideration of this re-issuance of the MS4 Permit for So. Orange County. The Tentative Order has been updated to clarify that the final Waste Load Allocations (WLAs) for the Indicator Bacteria TMDL for Baby Beach in Dana Point must be met by the end of the TMDL implementation compliance schedule provided in Resolution No. R9-2008-0027, "A Resolution to Adopt an Amendment to the Water Quality Control Plan for the San Diego Basin (9) to Incorporate Total Maximum Daily Load for Indicator Bacteria, Baby Beach in Dana Point Harbor and Shelter Island Shoreline Park in San Diego Bay." Furthermore, the Tentative Order has also been revised to require that all discharges to Baby Beach in Dana Point meet the Numeric Targets of the TMDL by the end of the compliance schedule in order to be consistent with the assumptions and requirements of the WLAs.

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				effluent limitations and that compliance is a permit requirement,"43 the Tentative Order should be revised to include the adopted TMDLs rather than provide for their delayed incorporation at some unspecified later date.	

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195	6	Legal	General	The Tentative Order allows the discharge of pollutants from new dischargers and sources; Approval of the Tentative Order will authorize the discharge of pollutants to impaired water bodies from “new sources” or “new dischargers” in violation of the CWA’s implementing regulations. 40 C.F.R. § 122.4(i) explicitly prohibits discharges from these sources, stating that: No permit may be issued: … (i) To a new source or a new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards. The owner or operator of a new source or new discharger proposing to discharge into a water segment which does not meet applicable water quality standards or is not expected to meet those standards … and for which the State or interstate agency has performed a pollutants load allocation for the pollutant to be discharged, must demonstrate, before the close of the public comment period, that: (1) There are sufficient remaining pollutant load allocations to allow for the discharge; and (40 C.F.R. § 122.4(i).) Under 40 C.F.R. § 122.2, a “new discharger” is defined as “any building, structure, facility, or installation: (a) From which there is or may be a ‘discharge of pollutants;’ . . . (c) Which is not a ‘new source;’ and (d) Which has never received a finally effective NDPES permit for discharges at that ‘site.’” (40 C.F.R. § 122.2.) A “new source” is defined as “any building, structure, facility, or installation from which there is or may be a ‘discharge of pollutants . . .’” that may be subject to applicable standards of performance under section 306 of the Clean Water Act. (40 C.F.R. § 122.2.) Thus, the Tentative Order may not authorize the development or redevelopment of any building or structure, including, without limitation, a new subdivision, industrial facility, or commercial structure, within the Copermittees’ jurisdiction, if runoff from the new discharge adds any pollutant to discharges from the MS4 that “will cause or contribute to the violation of water quality standards” for a water body impaired for that pollutant. Furthermore, the applicant for the permit must prove the availability of any exception to this provision, as set forth above. In Friends of Pinto Creek v. U.S. E.P.A., the Ninth Circuit Court of Appeals vacated an NPDES permit issued by the U.S. EPA to a new discharger on the grounds that the Copermittees’ “discharge of dissolved copper into a waterway that is already impaired by an excess of the copper pollutant” would violate the CWA. ((9th Cir. 2007) 504 F.3d 1007, 1011.) Citing 40 C.F.R. § 122.4(i), the court stated that “[t]he plain language of the first sentence of the regulation is very clear that no permit may be issued to a new discharger if the discharge will contribute to the violation of water quality standards.” (Id. at 1012.) The	We disagree with the commenter that the Tentative Order will authorize the discharge or pollutants from "new sources" or "new discharger" in violation of the CWA's impelmenting regulations. The permit regulates the discharge from the existing MS4. While new development or redevelopment may change the characteristics of the discharge entering the MS4 and hence the receiving water, each new development or redeveloped area does not constitute a new source or discharge. Further, the current MS4 permit addresses pollutant loads through an iterative process. The Tentative Order has requirements for LID at new development and redevelopment priority development projects to meet water quality standards. Through the Tentative Order's construction, existing development and education components, Copermittees must reduce storm water pollutants to the MEP and meet water quality standards for runoff discharges from new development and redevelopment projects that are not priority development projects. The case primarily relied on in this comment, Friends of Pinto Creek v. USEPA, 504 F.3d 1007, did not involve an MS4 permit. Rather, it involved an individual NPDES permit for an individual discharger discharging directly into a water of the United States. Here, NRDC asks that the Regional Board expand the holding of that case to prohibit discharges into an MS4 system. These are two very different contexts, as the regulatory scheme/NPDES permitting requirements for an MS4 system are distinct from that of an individual discharger discharging directly into federal waters. Thus, to the extent that Friends of Pinto Creek is factually, distinguishable from the current situation, the holding is not applicable to this permit. New buildings developments, and construction projects are not “new discharges” or “new dischargers” unless there is an associated “discharge of pollutants”. 40 CFR 122.2 defines “discharge of a pollutant” as “Any addition of any ‘pollutant’ … to ‘waters of the United States’ from any ‘point source.” Addition of pollutants onto surface area which is thereafter mobilized by surface runoff and drainage, or directly into surface runoff and drainage, that is thereafter channeled into a point source that ultimately discharges into waters of the United States is not in and of itself a discharge of pollutants into waters of the United States. In other words, the definition of “new discharge” or “new discharger” was not intended to reach each and every construction project that is up gradient of an MS4 permit. The various construction projects and restraints thereon in the construction and MS4 permits are not regulated directly as NPDES facilities under CWA section 402 subds. (a) and (b), but rather, under sudbs. (p)(2)(E) and (p)(3) because they may contribute pollutants to storm water that is discharged from a point source to waters of the United States—not because they are themselves point

court noted that a single exception to this rule exists where a TMDL has been performed, and the "new source can demonstrate that, under the TMDL, the plan is designed to bring the waters into compliance with applicable water quality standards." (Id.) Thus, where no TMDL has been completed for a specified water body and pollutant, new discharges that add pollutants that will cause or
contribute to a violation of water quality standards are prohibited absolutely. Additionally, the court in Friends of Pinto Creek observed that unless a TMDL explicitly provides that existing discharges into the impaired water body are "subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards," issuance of a permit for new discharge is also prohibited under 40 C.F.R. § 122.4(i). (Id. at 1013.) In effect, a permit for new discharges may not be issued, even when a TMDL for the relevant pollutant exists, unless it firmly establishes that "there are sufficient remaining pollutant load allocations under existing circumstances." (Id. at 1012.)

For the reasons set forth above, under the holding of Friends of Pinto Creek, the Regional Board is prohibited from approving a permit that allows new sources or dischargers of any pollutant to waterbodies already impaired by that pollutant, unless the Tentative Order demonstrates that an existing TMDL specifically provides sufficient waste load allocations for the discharge.

Even if a TMDL adopted by the Regional Board were to come into effect during the term of the Tentative Order, following the court's holding in Friends of Pinto Creek, the permit could allow new dischargers or sources of pollutants to be approved only in the event that the applicable TMDL explicitly establishes that (1) existing discharges into the impaired water body are "subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards," and (2) additional allocations are available for the specified water body. (Friends of Pinto Creek, 504 F.3d at 1013.) Absent an approved TMDL in effect for a specific waterbody and meeting these conditions, there is no authority for the Regional Board to issue the Tentative Order. In order to be lawful, the Tentative Order must establish measures to ensure that stormwater discharges, from existing or future sources, do not cause or contribute to identified impairments, and the Tentative Order has not done so.

We stress that these concerns highlight the need for the Tentative Order to contain both clearly articulated performance standards for LID-based retention of stormwater onsite and strict limitations on the use of alternative compliance measures in order to address water quality problems associated with urban runoff. One critical means of ensuring that runoff from new sources or dischargers will not contribute additional pollutants to an impaired waterbody

source discharges of pollutants to waters of the United States. As such, the Friends of Pinto Creek case is not on point.

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				is to mandate the proper implementation of LID practices through the imposition of either an EIA standard or an equivalent onsite-retention standard.	

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196	6	Overirrigation	B	The Tentative Order fails to prohibit all non-stormwater discharges; Federal law requires that MS4 permits "shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers." (33 U.S.C. § 1342(p)(3)(B)(ii).) However, the Tentative Order and Tentative Order Fact Sheet state that "the federal regulations . . . included a list of specific non-storm water discharges that 'need not be prohibited.'" (Tentative Order Fact Sheet at 15.) This exception violates the clear language of the CWA and its implementing regulations. Section 402(p)(3)(B)(ii) of the CWA requires that permits for discharge from municipal sewers "effectively prohibit non-stormwater discharges," 33 U.S.C. §1342(p)(3)(B)(ii), and does not create any authorization for exemption of such discharges. The Tentative Order states that "[n]on-storm water discharges, per CWA 402(p)(3)(B)(ii) are to be effectively prohibited unless specifically exempted." (Tentative Order, Finding C.14.) The Tentative Order states that the "following categories of non-storm water discharges are not prohibited unless a Copermittee or the Regional Board identifies the discharge category as a source of pollutants to waters of the U.S. For such a discharge category, the Copermittee must either prohibit the discharge category or develop and implement appropriate control measures to prevent the discharge of pollutants to the MS4 and report to the Regional Board pursuant to Section K.1 and K.3 of this Order." (Tentative Order ¶ B.1.) However, section 402(p) places a clear, mandatory duty on the Copermittee to prohibit non-stormwater discharges to the MS4 system. The Copermittee, or Regional Board, has no discretion to deviate from this requirement. In ascertaining the meaning of a statute, construction must begin with the text. (Duncan v. Walker (2001) 533 U.S. 167, 172.) "If there is no ambiguity, then we presume the lawmakers meant what they said, and the plain meaning of the language governs." (Day v. City of Fontana (2001) 25 Cal.4th 268, 272.) There is no ambiguity present in the CWA's requirement that a permit "effectively prohibit nonstormwater discharges," and the Tentative Order's provision of categorical exceptions stands in clear violation of its terms. Neither the CWA, nor its implementing regulations under 40 C.F.R. §122.26(d)(2)(iv)(B)(1) allow exemptions from the prohibition against non-stormwater discharges, as the Fact Sheet implies. (Tentative Order Fact Sheet, at 10.) The regulations set forth the circumstances under which the Copermittee must specifically design a program to prevent certain illicit discharges: "the following category of non-storm water discharges or flows shall be addressed where such discharges are identified by the municipality as sources of pollutants to waters of the United States." The cited regulation, providing for an enforcement program to "prevent illicit discharges," does not support	The Regional Board contends that the exception language in 40 CFR 122.26(d)(iv)(B) and the Federal Register (55 Fed Reg 47995-47996 and 48037) is clear regarding exempted discharges and discharges covered under a separate NPDES permit. Please see response to Comment 199.

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				the construction, seemingly implemented by the Tentative Order, that certain specified categories of non-stormwater discharges "are not prohibited unless" they are identified as a source of pollution. (Tentative Order ¶ B.2.) Indeed, the interpretation adopted in the Tentative Order, allowing for categorical exemptions for non-stormwater discharges, is not found in the plain language of the regulation, and the Tentative Order's provisions would place the regulations in direct conflict with the overlying statute. As written, the entire scheme of the Tentative Order is inconsistent with both the regulations and the statute that they purport to implement.	

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197	6	Legal	General	The Permit application does not include an assessment of the likely effectiveness of the control measures imposed. A permit application for discharge from a large- or medium-sized MS4 must contain an assessment of controls, including "[e]stimated reductions in loadings of pollutants from discharges of municipal storm sewer constituents from municipal storm sewer systems expected as the result of the municipal storm water quality management program." (40 C.F.R. § 122.26(d)(2)(v).) Neither the application, the Tentative Order, the Tentative Order Fact Sheet, nor other supporting documents include any required information or other discussion of the amount of pollution that will be reduced through its controls. The approval of the Tentative Order without this information fundamentally violates basic precepts of administrative procedure, not only because required evidence in the record is lacking, but also because the findings and related subfindings in the record are therefore devoid of necessary guideposts as to why and how provisions were included or rejected. The Tentative Order does not provide sufficient evidence to demonstrate that the management practices included in the Tentative Order are adequate to meet relevant requirements and water quality standards. The U.S. EPA has previously released guidance purporting to "allow[] permitting authorities to develop flexible reapplication requirements that are site-specific." (61 F.R. 41698.) However, nothing in the CWA's implementing regulations permits such flexibility, and this or other guidance cannot reduce or remove the regulatory requirement that the Tentative Order include estimated reductions in pollutant loadings. It is axiomatic that where agency guidance is inconsistent with an unambiguous statutory scheme or its enabling regulations, the regulations must govern. (See, e.g., Christensen v. Harris County (2000) 529 U.S. 576, 588 ("To defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation"); Davis v. Florida Power & Light Co. (11th Cir. 2000) 205 F.3d 1301, 1307 (rejecting agency policy guidance as inconsistent with its overlying statutory scheme).) In order for the Tentative Order application to meet the requirements of the CWA, the Tentative Order must include an estimate of the pollutant load reduction that it is expected to achieve. Even if the guidance were not in direct conflict with the regulations, the guidance does not in itself specifically exempt permits from including this information. The guidance states that "as a practical matter, most first-time permit application requirements are unnecessary for purposes of second round MS4 permit application;" it does not state that all such information is unconditionally unnecessary. (61 F.R. 41698 (emphasis	The USEPA published an Interpretive Policy Memorandum on Reapplication Requirements for Municipal Separate Storm Sewer Systems (MS4s), (40 CFR Part 122; Federal Register, Volume 61, Number 155). The memorandum explains that MS4 permit applicants and NPDES permit writers have considerable discretion to customize appropriate and streamlined reapplication requirements in subsequent term permits. The memorandum states that "The MS4 permit application requirements at 40 CFR 122.26(d)(1) and (2) apply to the first round permit applications required of large and medium MS4s. The permit application deadline regulations in 40 CFR 122.26(e) (3) & (4) clearly reflect the ''one time'' nature of the Part I & II application requirements for large and medium MS4s." The Memorandum rhetorically asks "Are Initial MS4 Permit Application Requirements Applicable To Permit Reapplication?" and definitively answers "No." Nevertheless, the Report of Waste Discharge submitted by the Copermittees did include an effectiveness assessment of their program. Several program measures do not provide a direct assessment of pollutant load reduction, (e.g. education, fiscal analysis). Some program measures such as street sweeping and trash collection do provide a direct assessment of assumed pollutant load reduction and that information is included in the Report of Waste Discharge. Where the commenter does not agree with the USEPA guidance, the commenter should contact USEPA.

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				added).) The omitted pollutant reduction estimates represent a fundamentally different type of information from that required by most of the other provisions of 40 C.F.R. § 122.26(d)(2), such as identifying already identified "major outfalls," for which repeating the exercise "would be needlessly redundant," especially "where it has already been provided and has not changed." (61 F.R. 41698.) Instead, the required pollutant load reduction estimates are self-evidently relevant to crafting and assessing the core requirements of the new permit. Such estimates are an essential means of determining whether or not the permit will ensure that water quality standards will be met and what improvements can be expected; they are not merely an administrative detail that has no effect on the permit's functionality. The missing information is further indispensable when, as here, the Tentative Order and the provisions included in it represent a substantial change from the previously adopted Permit. Indeed, the Tentative Order itself notes that "[t]he Order contains new or modified requirements that are necessary to improve Copermittees' efforts to reduce the discharge of pollutants in runoff to the MEP and achieve water quality standards." (Tentative Order, Finding D.1.c.) Given changes from the prior Permit, the necessity of basing the Tentative Order on information about its estimated efficacy should be clear. The Tentative Order and application must be revised to include the required estimates.	

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
198	6	LID	F.1.	The Tentative Order fails to set a specific numeric performance standard for the implementation of LID at Priority Development Projects. As a result, provided that a project installs some de minimis LID features, it would comply with the Tentative Order. In effect, LID features would not have to be sized to accommodate any meaningful quantity of stormwater. This is completely contrary to the exhortations of expert agencies and scientists, as described above, or the standard now adopted by the Los Angeles Regional Water Quality Control Board for Ventura County. The specific provisions that fail to establish the necessary, numeric performance standard are the "Low Impact Development Site Design BMP Requirements," which were revised in the current draft. (Tentative Order ¶ F.1.d.(4)(a).) These provisions merely state that "[e]ach Copermittee must require LID storm water practices or make a finding of infeasibility for each Priority Development Project." (Tentative Order ¶ F.1.d.(4)(a)(i).) Nowhere in this section, however, or anywhere in the Development Planning Component is there a requirement that establishes a level of implementation for LID practices. Indeed, the closest thing to a numeric performance standard is the section on "Treatment Control BMP Requirements," which merely mirrors the SUSMP criteria of the State Board's Bellflower decision.17 (Tentative Order ¶ F.1.d(6).) These are not referenced or included as a numeric performance standard in the LID provisions, though, which contain instead the various vague requirements listed above. In terms of requiring onsite retention through LID implementation, the Tentative Order is far from meeting the MEP standard because the Tentative Order merely mandates that "[t]he review of each Priority Development Project must include an assessment of techniques to infiltrate, filter, store, evaporate, or detain runoff close to the source of runoff." (Tentative Order F.1.d.(4)(a)(iv).) This amounts to no requirement at all for onsite retention. The Tentative Order should state: Copermittees must require that each Priority Development Project retain onsite— through infiltration, evapotranspiration, or harvesting and reuse—the design storm volume listed in Section F.1.d.(6)(a)(i). Onsite retention standards of this form are becoming prevalent across the country, as discussed below, and since their implementation is not only feasible, but will result in better stormwater pollution reduction, the Permit cannot meet the Clean Water Act's MEP standard without such a performance requirement. As currently written, the Tentative Order's provisions do no more than encourage the implementation of some, non-hydraulically-sized LID features—just as the last draft of the permit did.	The Tentative Order's requirements regarding the implementation of low impact development practices has been changed to be consistent with Region 8's recently adopted MS4 permit. The state's water quality protection requirements within the Tentative Order are authorized by Federal Law, are necessary to meet the federal MEP standard, and are not unfunded mandates. Please see comments #155 and 165.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
199	6	NEL	C	In an attempt to "assure non-storm water dry weather discharges from the Orange County MS4 into receiving waters are not causing, threatening to cause or contributing to a condition of pollution or nuisance and to protect designated Beneficial Uses," (Tentative Order ¶ C.1), the Tentative Order incorporates "Non storm water dry weather TMDLs . . . in this Order as WQBELs." (Tentative Order Fact Sheet, at 21.) Generally speaking, we approve of the Regional Board's use of numeric limits to assure that water quality standards are met, and of including provisions that Copermittees must monitor progress toward and attain numeric standards for discharges from the MS4 system. While this provision represents a positive step toward preventing illicit discharges of non-stormwater to the MS4 system, the appropriate means of implementing the requirements of section 402(p) is not through the use of "dry weather TMDLs,"54 but by effectively prohibiting discharges of non-stormwater altogether. To the extent that the Regional Board will incorporate numeric limitations on pollutants in non-stormwater discharges, Section C must, at a minimum, be revised to assure that the permit does not allow for non-stormwater discharges containing any quantity of pollution to occur, as opposed to only prohibiting those discharges that exceed the numeric limits. The Tentative Order states that Copermittees "shall monitor for and attain the non-storm water dry weather numeric limits" incorporated into the Order as a means of compliance. (Tentative Order ¶ C.5.) Under 40 C.F.R. § 122.26(d)(2)(iv)(B)(1), the Tentative Order must prohibit the discharge of any pollutant in non-stormwater discharges to waters of the United States, not just pollutants that exceed the numeric standards identified in Section C. In order to avoid confusion, the language of Section C must be revised to explicitly state: (1) that compliance with the Tentative Orders' numeric limitations does not constitute compliance with the CWA's requirement that nonstormwater discharges be "effectively prohibit[ed]," or (2) that categories of non-stormwater discharge which the Regional Board believes are exempt from this prohibition may not discharge any pollutants, regardless of whether they exceed numeric limitations. Though we question the Regional Board's authority to exempt any categories of nonstormwater discharge from section 402(p)'s prohibition against discharges to the MS4 system, we note with approval the Tentative Order's decision to remove landscape irrigation, irrigation water and lawn watering from the list of exempt discharges, effectively prohibiting discharge from these sources. (Tentative Order ¶ B.2.) Lawn irrigation has been identified as a "hot spot" for nutrient contamination in urban watersheds—lawns "contribute greater concentrations of Total N, Total P and dissolved phosphorus than other urban source areas … source research suggests that nutrient concentrations in lawn runoff can be as much as four times greater than other	Language in the Tentative Order has been updated to reflect that all non-storm water discharges are prohibted unless specfically exempted and not a source of pollutants to waters of the United States. This language has been modified to clarify that compliance with non-storm water numeric limits does not exempt Copermittees from effectively prohibiting non-storm water discharges that are not exempt or covered under a separate NPDES permit (see response to Comments 11, 41 and 77). The Regional Board does not agree that all non-storm water discharges are required to be effectively prohibited, as under 40 CFR 122.26(d)(iv)(B) certain categories of pollutants are exempt from the effective prohibition requirement and need not be addressed unless identified as a source of pollutants (see also 55 Fed Reg 47995-47996 and 48037). The Regional Board expects any non-compliance with non-storm water numeric effluent limits to result in the following: identification of illicit discharges, exempted categories that need to be addressed, and/or NPDES permit(s) that have discharge into the MS4 that is/are not meeting discharge requirements.

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				urban sources such as streets, rooftops or driveways." 55 Given the strong evidence that these discharges are consistent sources of pollution to the MS4 system and waters of the United States within the Copermittees' jurisdictions (see Tentative Order Fact Sheet at 5, 8-13, 22), we strongly support the Regional Board's decision in this regard. In total, the Tentative Order's approach does not uphold the CWA's mandate that Copermittees "effectively prohibit non-stormwater discharges into the storm sewers." (33 U.S.C. § 1342(p)(3)(B)(ii).) Given the evidence that pollution from non-storm discharges constitutes a serious and ongoing problem in receiving waters under the jurisdiction of the Copermittees, we underscore that, as with our comments in Section IV, these concerns emphasize the need for LID-based, onsite stormwater retention requirements, since these approaches will reduce nonstormwater runoff from new development to zero when properly implemented.	

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
200	7	General	General	During the last public hearing on the Draft Permit, in February, 2008, the SDRWQCB Board directed Board Staff to revise the permit to achieve greater consistency with Phase I MS4 permits throughout the state, and to provide stakeholders and the regulated community with a meaningful opportunity to assist in the development of the revisions. Unfortunately, the Draft Permit was released without cooperative input from the regulated community prior to its release and, more significantly, is entirely inconsistent with other Large MS4 Permits issued throughout the state. Indeed, a brief comparison of the Draft Permit with the North Orange County MS4 Permit that is likely to be adopted by the California Regional Water Quality Control Board, Santa Ana Region ("SARWQCB") on May 22, 2009, reveals that there is a significant disparity between the two permits. The North Orange County MS4 Permit is of particular concern because many of the Copermittees, including the City, are subject to both the North Orange County Permit, and the Draft Permit. Inconsistencies between the two permits create bureaucratic hurdles that cost the City time and valuable resources. Furthermore, the conspicuous disparity between the permits are likely to cause confusion among the public, and discourage public acceptance and participation in clean water efforts. In addition to the consistency issues, the Draft Permit largely conflicts with guidance from the State Water Resources Control Board ("State Board") and the United States Environmental Protection Agency ("EPA"). This deviation from agency guidance, and industry practice is most stark in the Draft Permit's Numeric Effluent Limits ("NEL") and Municipal Action Level ("MAL") requirements. As described more fully below, these aspects of the Draft Permit exceed the standards for municipal discharges set forth in the Clean Water Act and/or completely ignore State Board studies on whether such provisions can be feasibly implemented in MS4 permits. The City's specific comments on the Draft Permit follow.	Please see response to Comments 24, 25, 33 and 39.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
201	7	NEL	C	The Draft Permit attempts to impose a higher compliance standard for dry weather discharges. Pursuant to this heightened standard, the Draft Permit imposes NELs for dry weather discharges from the MS4. The Draft Permit states that this heightened standard is warranted because the Clean Water Act requires MS4 permits to prohibit discharges of non-stormwater, and dry weather flows constituted non-stormwater. The Clean Water Act clearly defines the discharge requirements for MS4 permits. Pursuant to the Clean Water Act, NPDES permits may be issued on a system or jurisdiction-wide basis, and must include a requirement to effectively prohibit nonstormwater discharges into the storm sewer, and must require controls to reduce the discharge of pollutants from the storm sewer to the maximum extent practicable. (33 U.S.C. § 1342(p)(3)(B).) The Clean Water Act does not distinguish between wet weather and dry weather discharges, and thus does not support a heightened standard for discharges of non-stormwater from MS4s.	Please see response to Comment 39.
202	7	NEL	C	Moreover, the NELs in the Draft Permit directly conflict with the findings of the State Water Resources Control Board's ("State Board") Blue-Ribbon Panel Report on the feasibility of numeric effluent limits in MS4 permits. After an exhaustive investigation into the feasibility of numeric effluent limits and action levels, the Blue Ribbon Panel found "[i]t is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs and in particular urban discharges." (Blue Ribbon Panel Report, pp. 8.) Nonetheless, the Draft Permit includes NELs for dry weather flows. When this inconsistency was brought to the attention of Regional Board staff, it was dismissed on the grounds that the Blue Ribbon Panel report applied only to wet weather flows. As stated above, the Clean Water Act makes no such distinction.	Please see response to Comment 25.
203	7	Legal	C	While the SDRWQCB may have the authority to impose restrictions in Waste Discharge Requirements that exceed the requirements of the Clean Water Act, when imposing such restrictions, the SDRWQCB must comply with applicable State laws. (City ofBurbank v. State Water Resources Control Board (2005) 35 Cal.4th 613; see also Defenders of Wildlife v. Brown (9th Cir. 1999) 191 FJd, 1159, 1166.) These include but are not limited to the California Environmental Quality Act, and Water Code sections 13241 and 13000. The Draft Permit does not comply with these requirements. Imposing NELs in the Draft permit will result in numerous unintended consequences, including the possibility that the Copermittees will be held liable for mandatory minimum penalties for exceeding the NELs. For that reason, the City requests that the SDRWQCB remove the NEL requirements from the Draft Permit.	NELs do not exceed the requirements of section 402 of the Clean Water Act. Nonetheless, the Board will consider any economic information that is submitted. Please see response to Comments 39, 41, 42, 43, 79, 81, 82, and 155.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
204	7	MAL	D	The Draft Permit includes MALs. Pursuant to the Draft permit, beginning in the fourth year after adoption of the permit, discharges from the MS4 that exceed the MALs create a presumption that the permittee is not complying with the Maximum Extent Practicable ("MEP") standard. In other words, the permittee would be presumed to be in violation of the permit. The decision to include MALs in the Draft Permit ignores guidance from the State Board and the EPA, as well as the MS4 Permits adopted by other Regional Boards. The MALs in the Draft Permit directly conflict with the State Board's Blue·Ribbon Panel Report findings. The MALs recommended by the Blue Ribbon Report were to be used as a management tool to indicate when additional Best Management Practices ("BMPs") are necessary, not a point of compliance. In contrast, the MALs in the Draft Permit are tied to MEP compliance and as a result are effectively NELs. As stated above, the Blue Ribbon Panel found that NELs for municipal BMPs and urban discharges are not feasible. By imposing NELs by a different name, the Draft Permit flatly ignores the Blue Ribbon Report's recommendations.	Please see response to Comment 33.
205	7	MAL	D	Additionally, the Draft Permit's attempt to tie compliance with the MEP standard to non· compliance with MALs is not supported by the Clean Water Act. The MEP standard is designed to allow the Copermittees flexibility to implement effective and feasible BMPs to address stormwater pollution. This interpretation of the MEP standard is supported by the EPA. (See 64 Fed. Reg. 68721,68754 (Dec. 8, 1999) ["EPA has intentionally not provided a precise definition of MEP to allow maximum flexibility in MS4 permitting. MS4s need the flexibility to optimize reductions in stormwater pollutants on a location by- location basis"].) It is also endorsed by the State Board. (State Water Board Order WQ 2000·11 at p. 20 ["MEP requires permittees to choose effective BMPs, and to reject applicable BMPs only where other effective BMPs will serve the same purpose, the BMPs would not be technically feasible, or the cost would be prohibitive"].)	Please see response to Comment 33.
206	7	MAL	D	Defining MEP compliance with a single MAL standard violates the intent of the Clean Water Act to give the municipal permittees the discretion and flexibility to do use BMPs to prevent and/or treat discharges from their MS4s. This is the approach taken by the other Regional Boards in Southern California when issuing MS4 Permits. Neither the recently adopted Ventura County Large MS4 Permit, nor the North Orange County Large MS4 Permit includes NELs or MALs.1 The Draft permit should reflect the national and statewide guidelines on MALs. For that reason, the SDRWQCB should either revise the Draft Permit to meet the recommendations from the Blue Ribbon Panel, or remove the MALs from the Draft Permit.	Please see response to Comment 33. Please note that regardless of the permit elements included or excluded from other Regional Board's MS4 permits, the San Diego Regional Board may include or exclude permit requirements as it deems necessary by State and federal law. For further, discussion please see response to Comment 24.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
207	7	Urban Runoff	General	The Draft permit has removed the word "urban" from everywhere it formerly modified the word "runoff'. This universal change suggests that the Copermittees are responsible not just for urban runoff, but all runoff. Holding the Copermittees to this heightened standard exceeds the jurisdiction and intent of the Clean Water Act. MS4 Permits are NPDES Permits. Pursuant to the Clean Water Act, NPDES permits regulate point source discharges. By definition, agricultural discharges are not point sources, even when they are discharged from a conveyance that would meet the definition of a point source. By removing the term "urban" from the Draft permit, the Draft Permit would hold the Copermittees liable for agricultural and other non-point source discharges that enter and exit their MS4. Because agricultural discharges are not point sources, they are not subject to regulation with NPDES permits. Attempting to include agricultural discharges in the Draft Permit therefore exceeds the Clean Water Act's jurisdiction. The history of the Clean Water Act demonstrates that it was intended to regulate urban runoff rather than agricultural sources and other non-point discharges. Indeed, when issuing the MS4 Permit regulations in 1990, EPA stated, "it is the intent of EPA that [stormwater] management plans and other components of the programs focus on the urbanized and developing areas of the county." (55 Fed. Reg. 47989, 48041 (Nov. 16, 1990).) The urban discharge focus is reflected in the San Diego Region Basin Plan which discusses the problem of stormwater runoff in terms of urbanization and cites to EPA Guidance limiting regulation of stormwater to urban sources. (See San Diego Basin Plan, pp. 4-78, 4-79.) There is simply no support for the Draft permit's attempt to expand the scope of regulation by adding additional sources of regulated discharges. By removing the term "urban" from the Draft Permit, the SDRWQCB has potentially enlarged the scope of regulation to include agricultural discharges, other traditional nonpoint source discharges, and naturally occurring pollutant discharges. As stated above, regulation of these discharges is not within the scope of the Clean Water Act.2 The City therefore requests that Draft Permit be revised to make clear that it only pertains to "urban" discharges.	Please see response to Comment No. 47.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
208	7	Retrofitting	F.3.	Section FJ.d of the Draft Permit requires the Copermittees to develop a plan to retrofit existing development within their jurisdiction. Specifically, each permittee must implement a retrofitting program that: • Solves chronic flooding problems, • Reduces impacts from hydromodification, • Incorporates Low Impact Development ("LID") principles, • Supports stream restoration, • Systematically reduces downstream channel erosion, • Reduces the discharges of stormwater pollutants from the MS4 to the MEP, and • Prevents discharges from the MS4 from causing or contributing to a violation of water quality standards. These requirements are inconsistent with other recently issued MS4 Permits. More importantly, they are infeasible. While the Copermittees have traditional land use authority to impose requirements on new development as a condition of development, there is no similar authority to require property owners to retrofit existing development. The Draft Permit ignores this lack of authority and goes as far as to require the Copermittees to identify existing developments that are sources of pollutants and then evaluate and rank them to prioritize retrofitting. (Draft Permit, section FJ.d(l)-(2).) Additionally, because the City has limited authority to impose retrofit requirements on existing development within its jurisdiction, the Draft Permit's retrofit provisions will result in an allocation of resources that is not likely to benefit clean water. For example, the City will be required to dedicate significant resources and time to identify and inventory existing sites and then complete evaluations and prioritization of these sites for retrofits. These intensive activities will divert resources, time, and funding away from other vital permit related programs. Because the Copermittees have little authority to implement the Draft permit's existing development retrofit requirements, the City requests that the be removed from the Draft Permit.	Please see response to Comments 46, 136 and 162.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
209	7	Overirrigation	B	The Draft Permit has eliminated irrigation water as an exempt discharge. The federal stormwater regulations include a list of categories of "exempt" non-stormwater discharges or flows. (40 CFR l22.26(d)(2)(iv)(B)(l).) The Copermittees' illicit discharge and illegal disposal program must address these discharges or flows when they have been identified by the Copermittees as sources of pollutants to waters of the U.S. (Id.) Where individual sources of discharge are identified they need to be addressed on an individual basis. This approach is supported by the EPA. (See Part 2 Guidance Manual at p. 6-33.) This is a sound approach to addressing pollutants in irrigation water. While irrigation runoff may act as a conveyance of pollutants in some instances, whether it is a conveyance of pollutants needs to be evaluated on an case by case basis. This is because the tendency of irrigation water to convey pollutants is dependant on the pollutants and the source of those pollutants. Moreover, many of the pollutants that may be conveyed by irrigation overflows are naturally occurring, are regulated by the State under different permits or programs, or are diffuse and uncontrollable by the Permittees. Potable irrigation water itself is not a pollutant. Therefore, it is inappropriate to regulate irrigation runoff as a pollutant.	Please see response to Comment no.s 28, 52, 75, and 174.
210	7	Overirrigation	B	Furthermore, enforcing discharges of potable irrigation water from residential homes presents numerous challenges for the City. Residents without a significant water quality background are unlikely to agree that potable irrigation water is a pollutant. This will discourage public acceptance and participation in the water quality program, a program whose foundation is outreach and public education.	Please see response to Comment #s 28, 52, 75, and 174.
211	7	Overirrigation	B	Lastly, it is also important to recognize that irrigation runoff is a significant water supply issue. The City, the other Copermittees, and water districts throughout the region are working toward limiting excessive irrigation runoff through numerous water conservation programs and ordinances. Therefore, reduction of irrigation runoff will be achieved through other means, and does not need to be regulated in the Draft Permit. Regulation as a water supply issue has the added benefit of public acceptance and participation in conservation programs. This will allow the benefits of fewer irrigation overflow discharges to occur without undennining public support for the City's water quality program. The City therefore requests that the exemption for landscape irrigation be restored.	Please see response to Comment #s 28, 52, 75, and in particular 174. It is our expectation that removal of the exemption to improve water quality will work in concert with conservation efforts aimed at source control. Data discussed recently at the Water Conservation Summit (http://www.waterconservationsummit.com/ReTHINK_Water_-_Maureen_Stapleton.pdf) clearly indicate that voluntary actions are not enough to reach the conservation needed by the water districts. Therefore, it is not accurate to state public acceptance and participation has been sufficiently achieved for water conservatrion.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
212	7	SUSMP	F.1	Draft Permit Section D.I.f. requires Copermittees to maintain a watershed based database to track and inventory approved treatment control BMPs. It additionally requires Copermittees to verify, on an annual basis, that the BMPs are being maintained and operated effectively. Compliance with this section will require a significant commitment from Copermittee staff, and may require the addition of staff. The value of the outlay of funds that compliance with this section will require is questionable in comparison to the overall benefit to stormwater quality. This section should be removed, or the Permit should be revised to allow for inspection and verification on an as needed basis.	This permit provision is necessary due to findings from audits of the Copermittees and recommendations from USEPA. The permit section requires that the Copermittees inspect at least the high priority post-construction BMPs annually and gives latitude to the Copermittee in deciding what post-construction BMPs are a high priority. The Copermittees may employ other less costly measures, such as self certifications, for low and medium priority BMPs. The Copermittees latitude in determining high priority BMPs and the use of measures other than inspections for other priority BMPs gives the Copermittees the flexibility needed to comply with this provision within their existing programs and constraints.
213	7	Hydromod	F.1.	During preparation of the Fourth Draft of the North Orange County Permit, the land development provision of the permit were the subject of a series of stakeholder meetings and subsequent comments by the EPA. These sections of the SARWQCB permit containing the land development provisions were revised and are currently scheduled for consideration of adoption by the SARWQCB on May 22,2009. The City requests that SDRWQCB staff include the same or very similar land development provision within the SDRWQCB Draft Permit to facilitate consistency and feasible implementation between the two regions within Orange County. As state above, this issue is very important to the City as it will be required to implement both programs within its jurisdiction. The North Orange County Permit's development provisions are more flexible than those currently included in the Draft Permit. It was nonetheless accepted by the EPA, the Copermittees, the building industry, and interested environmental groups. Those provisions represent mutually agreeable design standards that should be adopted in the Draft Permit.	The language in section F.1.h describing the hydromodification management requirements have been substantially revised. Nevertheless, the requirements are not identical to the hyromodification management requirements described in Order No. R8-2009-0030. The requirements described in the Tentative Order are more stringent than Order No. R8-2009-0030 because they require that the Copermittees develop a Hydromodification Management Plan (HMP) to identify a range of flow rates and durations that will result in increased potential for erosion, and also implement hydrologic controls measures to mitigate for such flows. Under Order No. R8-2009-0030, the Copermittees must ensure that post-project hydrograph mimics the pre-project hydrograph for a 2 year frequency storm event. Because the range of flows to be controlled under the Tentative Order will likely include larger storms than the 2 year frequency storm event, the Copermittees regulated under the Tentative Order are likely to automatically comply with Order No. R9-2008-0030. Please see response to Comment No. 4 for a discussion of LID requirements that are substantially similar to those required by Region 8.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
214	7	Existing Development	F.3.	Draft Permit Section D.3.a.(5) requires Copermittees to design and implement a street sweeping program based on criteria which includes optimizing the pickup of "toxic automotive byproducts" based on traffic counts. Although the Permit does not specify what pollutants it is trying to capture, one can only assume that this provision is aimed at commonly utilized automotive products such as oil, gasoline, transmission fluid, brake fluid, brake dust and radiator fluids. Because the term is not defined, however, it could be broad enough to include air-deposited byproducts of combustion. Street sweeping, and street sweepers in general, were not designed to be the primary means of collecting these by-products. It is therefore unlikely that street sweeping will be effective at collecting many of them, including any liquids that have soaked into the pavement. Additionally, whether such by-products are deposited on a given street is not necessarily a function of the traffic volume on that street. There does not appear to be a direct correlation between traffic counts and the effectiveness or need for street sweeping. There are other pollutants such as litter, debris, and grass clippings etc. that could be detrimental to stormwater quality that are de-emphasized by the Permit's focus on traffic counts. This section should therefore be revised to both specify the types of pollutants the Copermittees should be seeking to reduce with their street sweeping programs, and to provide the Copermittees with the discretion to utilize street sweeping in a manner that maximizes its effectiveness.	This comment is a repeat comment previously raised by the City of Lake Forest, City of Laguna Hills, City of Aliso Viejo, City of Dana Point and County of Orange in regards to a previous version of the Tentative Order (R9-2007-0002). The section protested by the City of Lake Forest (D.3.a.5 for "toxic automotive byproducts") was removed in the July 06, 2007 Response to Comments. The requirement has not been present in Tentative Orders R9-2008-001 or R9-2009-002. Thus, the requested change was made almost two years ago and further changes are not warranted.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
215	7	Existing Development	F.3	The North Orange County permit, which the City will also be required to implement, no longer includes a mobile business tracking requirement. Instead, the North Orange Permit requires the County, as the principle permittee to develop a program over the next permit term that could be implemented by all of the Copermittees. This approach is preferable to the language in the Draft Permit because it gives the Copermittees the flexibility to develop a program they mutually agree upon. For that reason, the City requests that the SDRWQCB either remove the mobile business provisions from the Draft Permit, or replace them with language similar to that in the North Orange County permit. Draft Permit Section F.3.b.(3) requires the Copermittees to develop and implement a program to reduce the discharge of pollutants from various types of mobile businesses. This section requires Copermittees to develop a listing of mobile businesses, and requires the Copermittees to develop and implement a number of measures to limit the discharge of pollutants from them. As a practical matter, these requirements will be very difficult to enforce for the following reasons: 1. What constitutes a mobile business is not well defined; 2. Mobile businesses operate in multiple jurisdictions and cannot be tracked as to time and place; 3. Mobile businesses may operate on private property out of the City's view; and 4. Additional staff time will be required to roam the City looking for mobile businesses. The Fact Sheet that the SDRWQCB has issued in support of the Permit states that the Permit has targeted mobile businesses for special attention because the Copermittees reported that discharges from such businesses have been difficult to control with existing programs. Rather than finding a solution for this problem, the Permit directs Copermittees to implement a number of non-descript solutions that will not necessarily make regulation of mobile businesses any easier. The SDRWQCB should therefore revise this section of the Permit to provide the Copermittees with the discretion to focus on mobile sources when they feel it is necessary, or if they identify mobile businesses as a significant source of stormwater pollution within their jurisdiction.	Please see response to Comment 24, 29 and 256. Due to the nature of mobile businesses, it is unclear why the Copermittees should "focus on mobile sources when they feel it is necessary, or if they identify mobile businesses as a significant source of stormwater pollution within their jurisdiction". Mobile businesses should be focused upon for illicit discharges as part of the IC/ID program at all times, and should implement BMPs to reduce pollutants in storm water to the MEP. It is unclear how the Copermittees would distinguish what constitutes necessity and when a mobile business is a significant source of pollutants.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
216	7	General	H	Draft Permit Section F. requires the Copermittees to conduct an annual fiscal analysis of the capital, operation, and maintenance expenditures necessary to implement the Permit's requirements. This section additionally requires each analysis to "include a qualitative or quantitative description of fiscal benefits realized from implementation of the stormwater protection program." A review of the Fact Sheet indicates that the Permit is requiring the Copermittees to conduct an economic benefits analysis of their respective stormwater programs. This requirement is unnecessarily duplicative. As described in the Report of Waste Discharge, the Copermittees have already committed to develop a fiscal reporting strategy to better define the expenditure and budget line items included in the fiscal report. Furthermore, the SDRWQCB is already required to take the economic benefits and burdens of their actions into account when issuing stormwater permits. (See City of Burbank v. State Water Resources Control Board (2005) 35 Cal.4th 613; and California Water Code § 13263.) Requiring the Copermittees duplicate these requirements is a waste of resources that could be better spent on implementing other Permit provisions. Accordingly, this section should be modified to encourage rather than require the Copermittees conduct such an analysis. This section of the Permit additionally requires each Copermittee submit a business plan that identifies a long term funding strategy for program evolution and funding decisions. The Copermittees do not always have information on the future sources of funding as it is not often readily available. This makes production of such a document difficult. The SDRWQCB does not need to know the funding sources for each Copermittee's stormwater program. Requiring such a report is overreaching in a manner that will unnecessarily cost the Copermittees additional time and resources. This section of the Permit should therefore be modified to encourage rather than require the Copermittees develop a business plan.	Section H has been expanded in order to develop more useful and meaningful fiscal reporting. Please see response to Comment Nos.141 and 142. In regards to the Copermittees assertion that they have proposed a similar program in their Report of Waste Discharge, that document is not a binding or enforceable document. When drafting the Tentative Order, the permit writers consider the information provided in the Report of Waste Discharge by the Copermittees. The ad hoc funding of storm water programs in some jurisdictions may lead to Permit non-compliance. This requirement will improve the long-term viability of storm water programs and thus Permit compliance leading to better protection of water quality standards. The difficulty in providing information on the future sources of funding would only be where that funding has not been identified. Not identifying future funding for the storm water program puts in jeopardy in multi year planning and implementation for projects (structural and non-structural) that are needed to reduce pollutants in storm water discharges to meet water quality standards. Please note that the Business Plan requirement (H.3) has been removed from the Tentative Order.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
217	7	unfunded mandate	General	The Draft Permit includes numerous requirements that exceed the requirements of federal law. While the SDRWQCB has the authority to include such requirements in the Draft Permit, it must comply with the statutory requirements set forth in the California Porter Cologne Water Quality Control Act. (City o fBurbank v. State Water Resources Control Bd. (2005) 35 Cal. 4th 613.) This includes making the findings required by Water Code sections 13000, 13241 and 13263. Additionally, as these requirements represent state, rather than federal, mandates, if they are included the final permit, the Copermittees are entitled to reimbursement from the State for the costs associated with implementing them. (California Constitution, Article XIII B, § 6.)	The state's water quality protection requirements within the Tentative Order are authorized by Federal Law, are necessary to meet the federal MEP standard, and are not unfunded mandates. Please see comments #155 and 165.
218	8	ASBS	B	The City of Laguna Beach has reviewed the language pertaining to ASBS in the Tentative Order and suggests removing #5 from page 18 and #5 from page 20. The City is not opposed to using ASBS drainage as criteria for identifying LID retrofit opportunities as seen on page 66 of the Tentative Order. Possible alternative language in place of the deleted text may read: "Dry and we weather discharges into ASBS or SWQPAs are separately regulated by the State Board" The City feels that adding an ASBS discharge prohibition to the permit is not necessary because the ASBS discharge prohibition is covered in much more detail by the (draft)"Special Protections for Selected Storm Water and Nonpoint Source Discharges into Areas of Special Biological Significance" issued by the State Board. Having two branches of the same agency regulating the ASBS is simply an extra burden on City and State personnel with no measurable water quality benefit. Laguna Beach has focused water quality control and storm water BMP efforts in the Heisler Park ASBS over the past several years and has achieved measureable results. The ASBS language in the permit is not necessary to further these efforts. Since the City faces enforcement actions from the State Board for illegal discharges outside the NPDES permit, the City requests the deletions noted above.	The Regional Board has removed ASBS/SWQPA language from the tentative Order. Please note ASBS/SWQPAs, like all water bodies, remain subject to receiving water limitations and discharge prohibitions under the Tentative Order.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
219	9	Existing Development	B	Federal and state laws require that commercial buildings install fIre suppression systems the majority of which include standard ceiling sprinklers. These systems are seldom used, resulting in water typically sitting in piping for fIve years, or until required testing results in its discharge. During that time, harmful pollutants such as chemicals, rust, oils, disease-causing agents, nitrates, minerals and bacteria build up in the standing water and are discharged onto open surfaces and into storm drains. It has been estimated that sprinkler technicians flush about 2.35 gallons of water per square foot through piping during testing. California has roughly 460,000 to 550,000 commercial buildings containing between 6.6 billion to 7.0 billion square feet of space (based on extrapolations from the Energy Information Administration report Overview of Commercial Buildings 2003). At 2.35 gallons per square foot, about 2.9 billion to 3.2 billion gallons of polluted water are discharged from buildings every year. The vast majority of this amount drains into our oceans and waterways while the remainder is left to percolate into the water table, a source of fresh water for many cities. Several California municipalities, in compliance with Federal Clean Water Act and the NPDES, require sprinkler technicians to capture polluted fire sprinkler discharge at the source and to transport it to purification centers. Moreover, there are other emerging developments that are more portable, easier to use and capable of processing water at the source. They include the newly developed portable water cleaning process of Hydro(gen) Innovations Inc. and Abtech Corporation's Smart Sponge called the EcoSmart Filter which is used in draining maintenance. Given that there are newer technologies and easier means for fire sprinkler companies to contain and clean polluted water, it is imperative that the California EPA and Water Quality Boards move to the next step - mandating building owners and managers and fire sprinkler technicians to clean polluted water before discharging it into public storm drain systems. This would also require ensuring that there is oversight and authority to cite and prosecute so that laws are being met and that those involved are acting within the requirements of state law.	To date, no municipalities (Copermittees) have identified discharges or flows from fire fighting as significant sources of pollutants to waters of the United States. Thus, under 40 CFR 122.26(d)(B)(1), such flows are not required to be addressed as illicit discharges. The Federal Register (55 Fed Reg 48037), however, states that: "In the case of fire fighting it is not the intent of these rules to prohibit in any circumstances the protection of life and public or private property through the use of water or other fire retardants that flow into separate storm sewers. However, there may be instances where specified management practices are appropriate where these flows do occur (controlled blazes are one example)." The Regional Board contends that the flushing of building fire suppression systems (e.g. fire sprinklers), constitutes a fire fighting maintenance activity. The Federal Register (55 Fed Reg 48037) allows the Director to "include permit conditions that either require municipalities to prohibit or otherwise control any of these types of discharges where appropriate." The Regional Board has identified that maintenance of building fire suppression systems results in a discharge that contains waste, and as such new language has been added requiring Copermittees to address these maintenance activities as illicit discharges.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
220	10	General	Finding	To support the programmatic approach to water quality and water body protection that has taken place in southern Orange County, the Regional Board should incorporate into the Final Order two new Findings in Section D.4 Watershed Runoff Management as follows: d. The South Orange County municipal storm water permits have, since the first term permit, directed the co-permittees to implement methods of coordinating land use planning at the watershed scale and to address the impacts of development on water resources as early in the planning process as possible. In response to those pelmit requirements, the County and cities in South Orange County developed processes to review and approve land use plans in a way that implemented these requirements. The County's approval of the Ranch Plan embodies the results of this process, and exemplifies what can be achieved when the co-permittees and the development community embrace the goals and intent of the water quality regulatory program. e. The San Juan Creek Watershed and Western San Mateo Creek Watershed Special Area Management Plan and Southern Subregion Habitat Conservation Plan, both regional watershed-based planning programs, will contribute to the protection of beneficial uses through i) the conservation and management of the Southern Subregion Habitat Reserve and its associated Aquatic Resource Conservation Areas and ii) implementation of the site design, source control, treatment control, and hydromodification control measures contained in the Conceptual Water Quality Management Plan for Priority Development Projects within the SAMP and HCP Study Areas.	It is not appropriate for the Tentative Order to include findings or requirements for a specific development project. Where appropriate, the Tentative Order may be changed to address commonalities in all new development. While Regional Board staff participated in an advisory role for the SAMP process, the Regional Board addresses dredge and fill impacts to waters of the United States that require a federal permit by issuing individual 401 Water Quality Certifications, pursuant to Section 401 of the Clean Water Act. As such, these findings are not included in the Tentative Order.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
221	10	LID	F.1	The proposed development project critetia and requirements contained in Section F.l (i.e., Sections F.l(c), F.l(d)(4), and F.l.(h)(6») do not provide for Projects that have addressed these requirements through the development and application of basic principles of hydrology and geomorphology at the sub-watershed and watershed scale. For example, the first LID BMP on page 26 of the Revised Tentative Order states "Conserve natural areas, including existing trees, other vegetation and soils". In our case, this LID BMP has been accomplished at the watershed scale resulting in 20,868 acres of RMV lands that will be preserved as open space (including all main stem creeks) and dedicated to a Habitat Reserve over time. Table 1 (attached) takes each Site Design BMP, Buffer Zone and Infiltration and Groundwater Protection requirement from this section and illustrates how this has been achieved at the watershed and sub-watershed scale on RMV. Additionally, an excerpt from the WQMP that summarizes the Watershed Planning Principles and approaches taken by RMV to implement these principles is provided in Attachment 1. Because of the protections to water quality and water bodies achieved through watershedbased projects such as the Ranch Plan, the Regional Board should define Watershed Planning as an alternative and co-equal approach to the project-specific requirements as follows: Suggested Language Insert for the Tentative Order Section F. 1.(c) (p. 27): Suggest insetiing the following new item (8) to Section F.l.(c): "Alternative Performance Critetia for Watershed-Based Projects. Where a Project has been prepared using watershed and/or sub-watershed based water quality, hydrologic, and fluvial geomorphologic planning principles that meet the intent of the criteria and reguirements of this Order, such standards shall govern review of Projects with respect to Section F.l.of this Order and shall be deemed to satisfy this Order's requirements for LID/site design, buffer zone, infiltration and groundwater protection standards, source control, treatment control, and hydromodification control standards."	We agree with the commenter on the importance of watershed and sub-watershed based planning and development to protect water quality. The Tentative Order's requirements have been changed to allow regional LID treatment approaches.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
222	11	General	General	As described in the Little Hoover Commission Report (January 2009), policies developed on a Regional Water Quality Control Board (Regional Board) by Regional Board basis result in ineffective and inefficient stormwater programs. The Little Hoover Commission Report specifically states: The Commission found a critical need for a more unified regulatory agency that has clear priorities and procedures that can be implemented throughout the state. While current statutes give the State Water Resources Control Board ample authority to direct the nine Regional Water Quality Control Boards, in practice the regional boards are too independent, with differing policies and processes on even some of the most important statewide issues. (Page 93) Many of the Findings and Provisions set forth in the Draft South OC MS4 Permit represent significant shifts in policy on issues that are of statewide importance. Several of these are identified herein and as described are inconsistent with the Federal Regulations, State policy as established by the State Water Resources Control Board (State Board), and/or current statewide practices and understanding. Such significant changes in policy related to the administration and implementation of the NPDES Phase I MS4 stormwater permit program should be addressed by the State Board, through the development of a statewide policy and should not be independently implemented by the San Diego Regional Board.	Please see comment #24 regarding consistency on a statewide level.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
223	11	NEL	B	The NPDES Phase I MS4 permits issued in California since 1990 have reflected a clear understanding that Clean Water Act (CWA) section 402(p)(3)(B)(iii), which defines that the "discharge of pollutants" must be reduced to the Maximum Extent Practicable (MEP), also applies to the discharge of pollutants that may exist in non-stormwater. This understanding reflects the reality that, although the discharge from a MS4 may constitute a point source to the receiving water, the sources of the pollutants are often "non-point" in nature. Additionally, unlike industrial wastewater discharges, pollutants that may be in both wet and dry weather runoff are not under the direct control of the MS4 Permittees and cannot practicably be regulated or eliminated as though this were the case. Dry weather non-point source discharges can be described as akin to other property related land use violations - on a long-term basis they can be managed, but never eliminated. The Draft South OC MS4 Permit proposes to re-define the performance standards, and exclude non-stormwater from being subject to the MEP performance standard and require strict prohibition similar to an industrial wastewater discharge. Implementing MS4 permit provisions that deviate from the MEP performance standard should not be made at the discretion of Regional Board staff. If the Regional Board believes that such a shift in policy or standard is necessary, the Regional Board should pursue a statewide policy through the State Board. Not doing so continues to impose inconsistent and ineffective regulations upon the regulated community, an outcome which was criticized in the Little Hoover Commission report. Additionally the strict prohibition of non-stormwater discharges as required in the Draft South OC MS4 Permit is contrary to the Final Phase I Regulations, 55FR222, on Page 48037 which state: EPA is clarifYing that section 402(P)(3)(b) of the CWA (which requires permits for municipal separate storm sewers to 'effectively' prohibit non-stormwater discharges) does not require permits for municipalities to prohibit certain discharges or flows of non-stormwater to waters of the United States through municipal separate storm sewer systems in all cases. Accordingly 122.26(d)(2)(iv)(B)(l) states that the proposed management program shall include: "A description of a program including inspections, to implement and enforce an ordinance, orders or similar means to prevent illicit discharges to the municipal separate storm sewer system. " As clearly stated in the regulations, the 'effective' prohibition of non-stormwater discharges does not require 'strict' prohibition, but rather a management program focused on prohibiting illicit discharges to the MS4 system. Further, the clear intent of the Federal regulations is that only those exempted non-stormwater discharges that are found to be illicit discharges be managed. It was not expected that whole classes of exempted discharges would be prohibited.	Please see response to Comments 39, 43, 44, 52, and 77.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
224	11	Overirrigation	B	The Draft South OC MS4 Permit removes landscape irrigation, irrigation water and lawn watering (collectively, "irrigation runoff') from the list of conditionally-exempted discharges. Regional Board staff has asserted that data submitted by the Orange County MS4 Permittees supports this action. However, the Orange County MS4 Permittees do not draw the same conclusions from their data. In any case, the data leading to the Regional Board's conclusion is specific to Orange County, and as such, incorporation of a similar requirement in Riverside County would be inappropriate and unwarranted. Nevertheless, the Riverside County Permittees have identified the following issues with the approach the Regional Board is taking in the prohibition of irrigation runoff.	This Tentative Order applies to South Orange County. The applicability of removing the exemption for Riverside County is best addressed at the time of reissuance of the permit for their region. Please see response to Comments 28, 52, 75, 77, and 174. Furthermore, the Federal Register (55 Fed Reg 48037) clearly states that "the Director may include permit conditions that either require municipalities to prohibit or otherwise control any of these types of discharges where appropriate."
225	11	Overirrigation	B	At the May 6th public workshop Regional Board staff stated that their "hands were tied" and that the Regional Board is "required" to prohibit discharges of irrigation runoff. On the contrary, when conditionally exempt discharges are determined to be a source of pollutants to receiving waters, there is no requirement that they be outright prohibited. Both the Final Phase I Rule V.55 No. 222, page 48037 and 40CFR 122.26 (d) (2) (iv) (B) (I) clearly state that these "non-stormwater discharges or flows shall be addressed (emphasis added) where such discharges are identified by the municipality (emphasis added) as sources of pollutants to waters of the United States." Finding C.14 in the Draft South Orange County MS4 Permit inappropriately adds onto this language by stating that "Exempted discharges identified as a source of pollutants are required to be addressed through prohibition. The term 'addressed' does not implicate nor require prohibition, but instead, and as described in the above referenced final rule, should consist of a "program, including inspections, to implement and enforce an ordinance, orders or similar means to prevent (the discharge) to the municipal storm sewer." The Federal regulations clearly do not require the prohibition of irrigation runoff and as such (and not withstanding the other comments herein on this matter) the language in Finding C.14 should be removed.	The Regional Board maintains that exempted non-storm water discharges that are identified as a source of pollutants are to be "addressed" via effective prohibition. Please see response to Comments 52 and 77. The reference from 40 CFR 122.26(d)(iv)(B) reads as follows: "A description of a program, including a schedule, to detect and remove (or require the discharger to the municipal separate storm sewer to obtain a separate NPDES permit for) illicit discharges and improper disposal into the storm sewer. The proposed program shall include: (1) A description of a program, including inspections, to implement and enforce an ordinance, order or similair means to prevent illicit discharges to the municipal separate storm sewer system; this program shall address all types of illicit discharges, however the following categories of non-storm water discharges or flows shall be addressed where such discharges are identified…" The Regional Board maintains that exempted discharges that are identified as a source of pollutants are to be prohbited and subsequently addressed by the Copermittees as illicit discharges.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
226	11	Overirrigation	B	An MS4 Permittee's ability to eliminate irrigation runoff as required in the Draft South OC MS4 Permit is akin to any government's ability to eliminate crime or homelessness. It is something that can be managed, but never eliminated. In the April 3rd Public Workshop, Regional Board staff stated that they intend to use discretion when enforcing this permit provision, and not necessarily enforce it in every instance, pending a determination by Regional Board staff as to whether reasonable controls had been implemented. This statement reveals that even San Diego Regional Board staff does not believe that an outright prohibition of irrigation runoff is reasonable or enforceable. Yet, the Draft South OC MS4 Permit includes findings and provisions that would nevertheless put the MS4 Permittees in unavoidable non-compliance and subject to citizen suits for noncompliance under the Clean Water Act. It is the responsibility of the Regional Board to develop permits that have clear and attainable requirements. A programmatic approach to addressing non-point sources of pollution (instead of prohibition) is especially appropriate in the case of irrigation runoff, where outright prohibition would effectively require the MS4 Permittees to commit significant financial and staffing resources in tracking down and enforcing against every potential source of irrigation runoff including broken sprinklers, overspraying nozzles, inappropriately set residential sprinkler timers, etc. The language in the Draft South OC MS4 Permit should instead be revised to promote control of irrigation runoff through various programs such as public education and cooperative programs with water purveyors, rather than inappropriately prohibiting this discharge. Despite implementation of an extensive and expensive program to attempt to enforce a prohibition on irrigation runoff, it is unlikely that such a program could ever be successful in completely eliminating this discharge, again resulting in unavoidable non-compliance. Additionally, when evaluating the economic considerations of a strict prohibition of irrigation runoff, implementation of such a program would provide little benefit to designated beneficial uses relative to the significant costs that would be required. The Permit writers and the Orange County Permittees should be working together to define appropriate county-specific programs that can be written into the Draft South OC MS4 Permit to address this issue.	Please see response to Comments 39, 42, 43, 44, 159 and 160. To be clear regarding enforcement, the Regional Board's goal is to enforce any alleged violation of the Permit that they identify. The Regional Board, however, has the discretion to choose the level of enforcement befitting the nature and extent of the violation and the limited resources available to respond. Violation of this discharge prohibition would be handled simliarly to any other violation of permit provisions. The permit does not dictate to the Copermittees the manner of compliance with the prohibition. The proposed changes simply remove the exemptions against the prohibition. It will be up to the Copermittees to determine the manner of compliance, types of new ordinances needed and programs necessary to comply with the discharge prohibition.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
227	11	Urban Runoff	General	Through Finding C.2 and removal of references to 'urban' runoff, the Draft South OC MS4 Permit makes the Permittees responsible for exceedances of water quality standards irrespective of the source and manner of discharge. While MS4 Permittees have successfully developed and implemented effective programs to control sources of pollution under their jurisdiction, typically there are entities within a watershed over which the Permittees have no authority/ability to regulate, including: • Tribal entities • Federal installations • State facilities • Agricultural operations Additionally, some pollutants discharged from natural sources and conserved lands can cause MS4 discharges to exceed water quality standards. Identification and characterization of the sources of these natural loads is often beyond the technical and fiscal resources of the MS4 Permittees. Despite the inability of MS4 Permittees to regulate the quality of discharges from these sources, the California Rule establishes that if any of these lands are upstream of lands under the jurisdiction of the Permittees, the Permittees must accept tributary flows from these areas, and these flows and any pollutants contained therein will inevitably enter the Permittees' MS4. The Draft South OC MS4 Permit stipulates that in the event these flows contribute pollutants that cause or contribute to an exceedance of water quality standards in receiving waters, the Permittees will be held in violation despite the fact that they have no regulatory authority to control these sources. In contrast, State law specifically grants the Regional Board responsibility and authority to directly regulate the discharges from the entities not under the jurisdiction of the MS4 Permittees and has the responsibility to correct water quality standards to accommodate background pollutant concentrations from natural sources. The USEPA has authority to regulate Federal facilities and tribal entities not under the jurisdiction of the Regional Board. It is inappropriate for the Regional Board to attempt to transfer the responsibilities of the Regional Board and the USEPA to MS4 Permittees, and hold them responsible for the actions of dischargers over which they have no jurisdiction.	Please see the response to Comment No. 47. In addition, since the Copermittees own and operate their MS4s, they cannot passively receive discharges from third parties (Federal Register 68766). Having the legal authority to terminate a storm water discharge to the MS4 can be a powerful tool for the Copermittees to effectively control those storm water discharges and to compel implementation of best management practices (BMPs) from various entities. Commenters cite this discussion as requiring Copermittees to terminate or cut-off access by various third parties to their MS4, which could lead to unintended damage from flooding. The Fact Sheet, however, clearly explains that the development and implementation of a comprehensive BMP-based program is appropriate for controlling the contribution of pollutants into the MS4 system. Preventing or terminating access of pollutants to the MS4 is one of the BMPs that must be available for the Copermittees to use at their discretion.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
228	11	Urban Runoff	Finding	The Riverside County Permittees generally support the proposed addition of Section D.4 to the Draft South OC MS4 Permit in the tentative updates dated May 5, 2009, which clarifies that the intent of the permit is not to regulate natural sources and conveyances. However, the subsequent requirement to demonstrate that the likely and expected cause of the exceedance is non-anthropogenic in nature can be difficult and expensive for some constituents (i.e., pH, total dissolved solids, total suspended solids, metals, bacteria, etc.). In order to adequately demonstrate this, MS4 Permittees would be obligated to spend a significant amount of resources for each exceedance, even when the source of the exceedance may be found to be from natural sources or sources that have otherwise not been adequately regulated by the Regional Board or USEPA under existing or needed permits. This difficulty is also reflected in our comments below pertaining to the applicability of Water Quality Based Effluent Limits in stormwater permits.	The referenced finding was removed from the Tentative Order following discussion with the interested stakeholders. Where an MS4 system receives runoff from natural areas, the MS4 system unnaturally converts the discharge from a non-point source to a point source discharge. The MS4 system does not allow for natural infiltration and attenuation of pollutants and could concentrate pollutants at the discharge point to ultimately cause an exceedance of water quality standards. The finding is not found in the MS4 permit adopted for San Diego County.
229	11	NEL	C	The Panel of Experts commissioned by the State Board to determine the appropriateness and applicability of numeric effluent limits to stormwater discharges (hereinafter referred to as the Blue Ribbon Panel), stated in their 2006 Report: "It is not feasible at this time to set enforceable numeric effluent criteria for ... urban discharges". Despite and contrary to the recommendations of this State Board-commissioned report, the Regional Board staff has proposed Water Quality Based Effluent Limits (WQBELs) as both Wet Weather and Dry Weather Compliance metrics in the Draft South OC MS4 Permit. The Riverside County Permittees object to the use of WQBELs as compliance objectives in MS4 permits for the same reasons as presented in that report, and due to the distributed (non-point) and quite often random nature of the source(s) of the pollutants of concern. As stated previously, the Riverside County Permittees have significant concern where the Draft South OC MS4 Permit departs from current State policy. Inasmuch as Regional Board staff has indicated their intent to use the South OC MS4 Permit as a model for the MS4 permit to be issued to Riverside County, the Riverside County Permittees proactively outlined more appropriate approach for Municipal Action Levels in their January 2009 ROWD that warrants consideration in the development of their MS4 permit.	Please see response to Comment 25 and 33.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
230	12	Finding	Finding	Change [Finding C.1] to: "may" contain waste	This comment was addressed in the July 2007 response to comments. It says: "The Findings are appropriately supported and have not been revised. Finding C.1 states that "runoff contains waste." This was supported in State Water Board Order WQ 2001-15, which reviewed the previous San Diego County MS4 Permit (Regional Board Order No. R9-2001-01). Discharges from MS4s to receiving waters are considered point source discharges to be regulated by NPDES requirements. Finding C.3 notes that discharges from MS4s may cause or threaten to cause conditions of pollution, contamination, or nuisance. The Fact Sheet relies on national and local water quality studies to support this conclusion. "Clearly, not all storm water discharged from MS4s is waste. Much of it is precipitation. That storm water, however, can pick up waste and pollutants along its path to and through the MS4. The Copermittees must ensure implementation of storm water BMPs to limit the amount of pollution that is discharged with the precipitation from the MS4s. Limited storm water monitoring conducted by the Copermittees demonstrates this, and the Tentative Order includes requirements to conduct storm water monitoring at storm drains to better assess the conditions (Attachment E). Runoff also includes dry-weather discharges. In southern Orange County, dry-weather runoff has been increasingly monitored under the existing MS4 Permit. The data demonstrates significant amounts of pollution that cannot be attributed to nonanthropogenic sources."
231	12	Finding	Finding	Table 2a says "Aliso Creek uses the term "toxicity." Specify what kind of toxicity?	Aliso Creek is 303(d) listed for toxicity. Listings for toxicity are based on the evaluation of data from required MS4 monitoring, SWAMP monitoring and any other applicable data source. The Regional Board evaluates any acute and chronic effects on organisms (e.g. Hyalla azteca) and compares sampling data to LC50 values, controls, etc. to determine toxicity.
232	12	Finding	Finding	Finding says: "Municipal storm water...discharges are likely to contain.. ." Change to: "may" contain	Please see response to Comment No. 230.
233	12	Finding	Finding	Discharges exempted are still required to be addressed through prohibition if they are identified as a source of pollutants. If specific types of discharges are known to be a source of pollutants and contribute to the degradation of water quality, they should not be exempt. The finding should state that discharges identified as asource of pollutants should be addressed and not include discharges that are known sources of pollutants as exempt.	Finding C.14 has been clarified to prevent confusion.
234	12	Finding	Finding	Non-storm water discharges...are to be effectively prohibited… Prohibiting flow will dry up wetlands; violation of US Army Corps of Engineers permit	The Clean Water Act requires non-storm water discharges to be effectively prohibited (402(p)). It is unclear how the prohibition of non-storm water discharges will violate a US Army Corps of Engineers permit.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
235	12	MAL	Finding	Basing MALs on nationwide MS4 data is not appropriate for this region.	Please see response to Comments Nos. 37 and 90 as the MALs have been updated to reflect regional data.
236	12	WURMP	Finding	This is a very important finding that should be kept within the permit as finalized and should be included in future MS4 permits throughout the region. Change to: "Watershed management of runoff does not require Copermittees to expend resources outside of their jurisdictions".	The proposed change is already in the March 13, 2009 Tentative Order and has been present since the release of Tentative Order R9-2007-002.
237	12	unfunded mandate	Finding	Finding claims that the permit is not an unfunded mandate with one reason listed as "the local agency...[has] the authority to levy service charges, fees, or assessments sufficient to pay with this Order." The finding should acknowledge that under State law, local agencies cannot levy assessments or property related fees without a majority vote of the affected electorate or affected property owner.	The state's water quality protection requirements within the Tentative Order are authorized by Federal Law, are necessary to meet the federal MEP standard, and are not unfunded mandates. Please see comments #155 and 165.The commenters request to identify the existing State law is superfluous because it only addresses one avenue for the Copermittee to raise funds. The fact sheet demonstrates that numerous activities contribute to the pollutant loading in the municipal separate storm sewer system. Local agencies can levy service charges, fees, or assessments on these activities, independent of real property ownership. (See, e.g., Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles (2001) 24 Cal.4th 830, 842 [upholding inspection fees associated with renting property].) The ability of a local agency to defray the cost of a program without raising taxes indicates that a program does not entail a cost subject to subvention. (County of Fresno v. State of California (1991) 53 Cal.3d 482, 487-488.)
238	12	unfunded mandate	Finding	Finding E.6 states one reason why the permit is not an unfunded mandate is that the copermittees have "requested permit coverage... in lieu of numeric restrictions on their discharges." Yet MALs are a condition imposed within this permit and the technical fact sheet in the discussion of finding D.1.h confirms that MALs are a form of numeric limits If MALs remain a requirement, the finding should not be made that this permit does not constitute an unfunded mandate.	This language for the Tentative Order has been changed to reflect that the language applies to numeric limitations for discharges of storm water from the MS4. The state's water quality protection requirements within the Tentative Order are authorized by Federal Law, are necessary to meet the federal MEP standard, and are not unfunded mandates. Please see comments #155 and 165.
239	12	General	General	All references to human health need to be removed This is not a public health permit	Within the San Juan Hydrologic Unit for Southern Orange County where the Copermittees MS4s discharge, all inland surface waters and coastal receiving waters have been designated as having or the potential to have the Contact Water Recreation 1 beneficial use per the San Diego Basin Plan. This beneficial use includes uses of water for recreational activities involving body contact with water, where ingestion of water is reasonably possible. These uses include, but are not limited to, swimming, wading, water-skiing, skin and SCUBA diving, surfing, white water activities, fishing or use of natural hot springs. To protect this beneficial use, the Tentative Order appropriately references public health.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
240	12	NEL	C	Table 3: MBAS, all metals MBAS AL is lowered. Metals #'s are not correlated to a hardness... how to intepret this?	The Tentative Order updates includes chages to metal criteria according to receiving water hardness per the Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California..
241	12	MAL	D	This section is not consistent with D.1.h and the discussion of the finding in the Supplemental Fact Sheet. The fact sheet states "Compliance with MAL levels is considered at least compliant with the Maximum Extent Praticable (MEP) regulation for storm water" and explains why "MALs have been determined to be the appropriate regulatory measurement of achieving the [MEP]." Permit section D.3 should be revised to state "compliance with MAL levels is considered compliant with MEP."	Please see response to Comment 33. It is important to note that MAL monitoring results which do not exceed MALs do not create a presumption that MEP is being met, nor does it exempt Copermittees from implementing other programs and requirements under the Tentative Order.
242	12	unfunded mandate	D	The finding states one reason why the permit is not an unfunded mandate is that the copermittees have "requested permit coverage... in lieu of numeric restrictions on their discharges." The technical fact sheet in the discussion of finding D.1.h confirms that MALs are a form of numeric limits. Remove the requirement for MALs, a form of numeric limits.	Please see response to Comment 33. The state's water quality protection requirements within the Tentative Order are authorized by Federal Law, are necessary to meet the federal MEP standard, and are not unfunded mandates. Please see comments #155 and 165.
243	12	SUSMP	F.1	An NPDES permit should address pollution of surface waters and clarify what level of effort is considered MEP. Pest control is handled by other regulations. Remove	The Regional Board received comments from the Orange County Vector Control District on the 2007 draft of the Tentative Order. When not properly designed or maintained, certain BMPs implemented or required by municipalities for runoff management may create a habitat for vectors. Post construction BMPs must not be a nuisance to the public; therefore, it is appropriate that the BMPs be designed to prevent vector issues. The Tentative Order includes universal requirements to address vectors rather than prescriptive requirements, because the specific requirements are more appropriately applied by local vector control agencies.
244	12	LID	F.1	It is very challenging to incorporate LID when widening public roads. Allowance for building BMPs in roadways outside of the project footprint would allow for more successful implementation of LID in context of the watershed. Provide more latitude for applying the LID substitution program to roads, highways and freeways, with measures to ensure that the substitution attains equivalent water quality benefit.	The Tentative Order's requirements for low impact development have been modified to be consistent with Region 8's recently adopted MS4 permit for North Orange County. The substitution program is to be developed by the So. Orange County Copermittees.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
245	12	Hydromod	F.1.h	Requiring all PDPs to achieve less than 5% EIA may be infeasible, particularly if the definition of a PDP includes redevelopment of an existing roadway. Also, requirements for a mandatory maximum EIA tend to be counter to smart growth goals which are a better approach when viewed at the watershed level. Either remove the requirement since LID requirements already exist in the permit, or provide more allowance for determining feasibility and allow exceptions for projects that are consistent with a smart growth master plan.	The Regional Board has removed the language requiring maximum 5 percent EIA from the interim hydromodification requirements. Please see section F.1.d.(4) of the Tentative Order for LID requirements.
246	12	Hydromod	F.1.h	Allowance for in-stream controls is appropriate but need to provide more clarification on what is meant by requirements "geomorphically referenced channel design techniques." Provide additional clarity.	The above referenced term has been deleted from the Tentative Order.
247	12	Hydromod	F.1.h.	Requiring curve hydrograph matching and less than 5% EIA and LID, seems redundant. If a project applicant significantly demonstrates hydrograph matching and includes LID where appropriate according to the site specific feasibility study, then that should be sufficient. For small projects it may be more effective to allow the applicant to incorporate a specified level of LID instead of hydrograph matching or a maximum EIA. Requiring continuous simulation modeling would be very unreasonable for small projects; therefore the nomograph or other simpler methods should be offered as an option. Consider revising interim hydromodification requirements based on this rationale.	The Regional Board agrees that both curve-matching and 5 percent EIA criteria are redundant. The EIA discussion has been removed from this section of the Tentative Order.
248	12	WURMP	G	"Goal ofthe work plan to is to..." Typo	The typo has been corrected.
249	12	Existing Development	F.3	Establishes deadline for flood control retrofit evaluation. This requirement would require a substantial effort on behalf of Copermittees due to the high number of these types of structures. Therefore, the City suggests a phased or tiered evaluation approach be considered.	Comment Noted. Provision F.3.a(4) shall be modified to as follows: The inventory and evaluation must be completed and submitted to the Regional Board in the second year Annual Report after issuance of this Order.
250	12	Existing Development	F.3.	Allows for Copermittees to "optimize" their municipal sweeping programs based on several factors (land type, season, trash pick-up schedules, etc.) as opposed to our Permit that requires mandatory sweeping frequencies dependant on trash volumes. The City views this approach as more efficient means of conducting its jurisdictional street sweeping programs as it affords Copermittees greater flexibility in making decisions and the ability to tailor fit solutions based on the often unique challenged faced by Copermittees. The City further encourages the Regional Board to apply this adaptive approach to other municipal programs as the City feels it would result in both more efficient programs and enhanced compliance.	Comment noted.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
251	12	Existing Development	F.3.	Sections (a) and (b) are redundant. The City recommends deletion of section (b) as the implementation of the provisions in section (a) would maximize pollutant reductions by providing greater flexibility to Copermittees to manage their programs.	Provision F.3.a.(7)(b) has been retained within the Order. Please note that as an illicit discharge into the MS4, sewage infiltration is to be eliminated, not reduced (please see response to Comment 39). 40 CFR 122.26(d) requires that Copermittees use controls, as necessary, to limit the infiltration of sewage into the MS4 system. As an illicit discharge, it is expected that these controls will prevent and eliminate infiltration and seepage from the sanitary sewer. The controls listed under section (b) are BMP measures that currently should be a part of the Copermittees IC/ID program to prevent and eliminate illicit discharges. It is unclear how deletion would provide greater flexibility, as Copermittees are already required to implement these BMPs.
252	12	Existing Development	F.3.	Permit adds new subheading text "Added "ESAs and 303(d) Listed Waterbodies' Recommend support of this provision since it's already in our permit, but the Orange County Permit just places more attention to these two waterbodies.	Development and urbanization especially threaten environmentally sensitive areas (ESAs), such as water bodies designated as supporting a RARE beneficial use (supporting rare, threatened or endangered species) and CWA 303(d)-impaired water bodies. Such areas have a much lower capacity to withstand pollutant shocks than other areas. In essence, sites and sources that are ordinarily insignificant in impacting the environment may become significant in a particularly sensitive environment. Therefore, additional control to reduce pollutants from new and existing development and commercial/industrial sites and sources may be necessary for areas adjacent to or discharging directly to an ESA. ESAs are defined in the Order as "Areas that include but are not limited to all CWA Section 303(d) impaired water bodies; areas designated as Areas of Special Biological Significance by the Basin Plan; water bodies designated with the RARE beneficial use by the Basin Plan; areas designated as preserves or their equivalent under the Natural Communities Conservation Program within the Cities and County of Orange; and any other equivalent environmentally sensitive areas which have been identified by the Copermittees."
253	12	Existing Development	F.3.b.	Deleted "as necessary to comply with this Order." Recommend that this text be included in this provision in order to provide flexibility. Our permit has this text in the same provision.	Comment noted. Presence or absence of the language does not reduce the Copermittee's flexibility to comply with this Order. No change to the permit is made at this time.
254	12	Existing Development	F.3.b	Other sites and sources with a history of unauthorized discharges. This will add an unknown number to the inventory.	Provision F.3.b.(1)(a)(i)[z] is listed so that a Copermittee does not exclude a site or source from their inventory just because the category has not been listed in [a] throuhg [y]. This subprovision also further refines the scope of what is expected by the included language "with a history of un-authorized discharge to the MS4." Therefore, no changes to the Tentative Order are made.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
255	12	Existing Development	F.3.b	Permit requires, besides implementing BMPs design and implementation, that additional measures be based on inspections, incident responses, and water quality data. This is a new language provision, which is not in our Permit. Recommend support of this provision because it provides guidance on how to design "additional measures."	Provision F.3.b(2)(d) is a straight forward requirement that directs Copermittee's to implement BMPs at commercial or industrial facilities or require facility owner/operators to implement previously designated BMPs at the facilities to reduces discharges of storm water pollutants from the MS4 to the MEP, and prevents discharges from the MS4 from causing or contributing to a violation of water quality standards. "Additional measures" are those BMPs or other measures that when implemented (as seen/learned during past inspections or past implementation history) are successful in reducing discharges of storm water pollutants to the MS4 to the MEP, and preventing discharges from the MS4 from causing or contributing to a violation of water quality standards. No change to the permit is warranted.
256	12	Existing Development	F.3.b	This provision is in our permit but as a standalone provision - "Regulation of Mobile Businesses." Draft Orange County Permit transfers this provision to the BMP subsection. Recommend support of this provision, since it's currently in our permit, and it appears the transfer is intended to place more attention on BMP implementation for this business type.	The Regional Board notes the City of San Diego's support for this provision. Provision F.3.b.(3) requires each Copermittee to develop and implement a program to reduce the discharge of pollutants from mobile businesses to the MEP. Mobile businesses are service industries that travel to the customer to perform the service rather than the customer traveling to the business to receive the service. Examples of mobile businesses are power washing, mobile vehicle washers, carpet cleaners, port-a-potty servicing, pool and fountain cleaning, mobile pet groomers, and landscapers. These mobile services produce waste streams that could potentially impact water quality if appropriate BMPs are not implemented. Order No. R9-2002-01 also requires BMP implementation for certain mobile businesses (e.g., mobile vehicle washing and mobile carpet cleaning). The requirements of Order No. R9-2009-0002 are not significantly different from the existing requirements. The Order specifies mobile businesses for special attention based on reports from the Copermittees that mobile businesses have been difficult to control with existing programs. Mobile businesses present a unique difficulty in storm water regulation. Due to the transient nature of the business, the regular, effective practice of unannounced inspections is difficult to implement. Also, tracking these mobile businesses is difficult because they are often not permitted or licensed and their services cross Copermittee jurisdictions. Mobile businesses that operate within a municipality may be based in another municipality or even outside the Region. The Order takes into account the difficulties in regulating mobile businesses. Because BMPs have been developed already, but communication with mobile businesses may be difficult, the Order provides broad flexibility to the Copermittees for developing a targeted program within the Commercial portion of each JURMP.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
257	12	Existing Development	F.3.b	Permit contains a new reporting requirement. The Copermittee will be mandated to notify the Regional Board of any facilities with potential SW violations prior to the rainy season. Recommend deletion of this provision; already provide this information in our JURMP annual report and periodic reports to the Regional Board.	No modification to the Order is made. Provision F.3.b(4)(b) is the standard requirement to report non-compliant sites to the Regional Board and is consistent with the reporting requirements of Provision K. The section provides more specific reporting requirements to enable the Regional Board to evaluate and prioritize inspections. Since the Annual JRMP is submitted to the Regional Board on or before September 30 prior to the wet season (October 1 - April 30) this requirement is not duplicative. Language has been added to clarify that the information may be provided in the JRMP. Please also see response to Comment No. 178.
258	12	Existing Development	F.3.b	Annually notify the Regional Board, prior to the commencement of the wet season of all Industrial Sites with potential violations of the General Industrial Permits. Recommend deletion of this provision. This is an extra reporting requirement. We already report this to the Regional Board in our Annual report as well as throughout the year as inspections occur.	Please see response to Comment 257.
259	12	Existing Development	F.3.b	At a minimum 20 percent of sites inventoried are to be inspected (excluding mobile sources and food facilities) must be inspected each year. Recommend deletion of this provision. This lowers the percentage of inspections but does not give credit for inspecting food facilities to meet the 20% inspections. Food facilities must still be inventoried and included in the overall number that is used to calculate the 20%. This would result in us inspecting approx. 50% of our inventory every year (-10,000/year).	Provision F.3.b.(1) requires a Copermittee to establish an inventory of commercial sites/sources that could contribute a significant pollutant load to the MS4. Eating or drinking establishments, including food markets, are listed as commercial site/sources to be included within an inventory. Provision F.e.b.(4)(c) describes the frequencies by which a Copermitte must inspect those facilities on the inventory excluding mobile sources and food facilities, therefore a Copermittee would subtract the number of food facilities, mobile automotive washing, and mobile carpet cleaners from their inventory before taking 20 percent to determine the number of inspections required each year. The intent of Provision F.3.b(4)(c) is to give the Copermittee flexability to inspect the top 20 percent of their worst commercial / industrial sites for storm water violations each year. The requirement is flexible such that the facilities that are included in that 20 percent may change from year to year. Inspection requirement for food facilities is covered under Provision F.3.b(4)(d).
260	12	Existing Development	F.3.b	Each food facility must be inspected annually This dramatically increases the number of inspections required.	No change is made to Provision F.3.b.(4)(d). Restaurants are potential significant sources of storm water pollutants therefore, inspection of their business practices as they impact storm water are necessary. To be efficient, Code enforcement officers trained in multiple disciplines may be able to visit a restaurant and inspect under multiple programs.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
261	12	Existing Development	F.3.b.	Permit requires each food facility to be inspected annually. This is a new inspection requirement, and will result in a dramatic increase to inspection inventory because provision requires inspection of each food facility annually. Recommend deletion of this provision. Although the data is not in, the WURMP inspections program is attempting to identify certain food facilities (outdoor eateries vs. indoor eateries) which may be more prone to pollutant generation. It will not be efficient to inspect food facilities that are NOT prone to storm water contamination which this provision proposes to do by requiring inspection of each food facility.	No change is made to Provision F.3.b.(4)(d). Restaurants are potential significant sources of storm water pollutants therefore, inspection of their business practices as they impact storm water are necessary. To be efficient, Code enforcement officers trained in multiple disciplines may be able to visit a restaurant and inspect under multiple programs.
262	12	Existing Development	F.3.b	Permit adds this new provision "To the extent that third part inspections are conducted to fulfill requirements of this Order, the Copermittee will be responsible conducting and documenting quality assurance and quality control of 3rd party inspections." This provision provides flexibility for the Copermittee to decide how to evaluate and conduct quality assurance of third party inspections. Our permit contains these requirements: certification program, inspection form templates, etc, which the Orange County permit does not contain. Recommend support of this provision due to flexibility	Provision F.3.b.(4)(e) is intended to be flexibile in allowing a Permittee more discretion to develop its third party inspection program to be efficient and effective. No additional change to the language is made at this time. Please see response to Comment No. 135.
263	12	Retrofitting	F.3.	The first statement says Copermittee must "require" retrofits, but subsequent sentence says "shall encourage". It is not clear to what degree these retrofits are voluntary or mandatory, or how many retrofits would be sufficient to satisfy the permit conditions. Retrofits are only feasible where there is a willingness of property owners to participate. Additionally, there will be a huge fiscal burden to implement this requirement and we think focusing the limited resource on implementing LID's in new development proiects is alot more efficient. Recommend deletion of this requirement	The Regional Board has updated language to clarify that retrofits are to be done when feasible and considered a high-priority. The tentative Order has appropriate regulations addressing the constraints with retrofitting on privately held land. Please see response to Comments 46, 136 and 162.
264	12	Retrofitting	F.3.d.	Depending on the size of the retrofit program, it may be challenging for municipalities to accommodate the costs of monitoring the ongoing maintenance. Suggest further evaluation of the fiscal effects.	Please see response to Comment Nos. 46, 136, 162 and 263.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
265	12	WURMP	G	Permit states that there must be an annual assessment of receiving water quality and use the information to effectively update BMP information and select management practices in response to the annual evaluation which is based on the annual assessment. Improvements to the receiving waters most likely cannot be observed after only a single year of implementing a specific BMP or specific suite of BMPs. Additionally, for a number of BMPs, implementation spans more than one year between concept and construction. Revise the two sections to allow for longer term assessment of the receiving waters for the purpose of setting priorities and updating BMPs strategies for each watershed.	The WRMP section of the Order has been restructured. Section G has been streamlined requiring one Watershed Workplan that covers the 5 year permit cycle and annual watershed review meetings. If assessment of a BMP requires more than one year, the Copermittee would report it during the annual watershed review meeting within a public setting. Assessments taking uncharacteristically long periods of time will be closely evalauted by the Regional Board and may trigger issuance of investigative or cleanup and abatement orders.
266	12	WURMP	G	The draft Permit states that Copermittees must implement and assess activities that improve the high priority water quality problems. While the City agrees with the intent of this requirement, it is important to note that a program that is structured in a way that mandates implementation of only activities guaranteed to be successful will serve as a major impediment to innovative approaches and ultimately improvements in program efficiencies that can lead to superior protection and improvement of water quality. This is seemingly in conflict with the intent of the increasingly complex effectiveness assessment in Section J, which would mandate additional layers of assessment as a way of forcing program improvements. Incorporating greater incentives, rather than additional restrictions to watershed activity implementation and additional components to effectiveness assessment, if structured in away that encourages innovation and mandates improvements (rather than only mandating guaranteed outcomes). The WRMP section of the Permit should be restructured to facilitate adaptive management where innovation is encouraged and attainment of greater efficiencies through program improvements is required. For example, Section F.3.a.5 requires the implementation of a municipal street sweeping program that optimizes pickup of trash and debris.	The WRMP section of the Order has been restructured. Section G has been streamlined requiring one Watershed Workplan that covers the 5 year permit cycle and annual watershed review meetings. Annual watershed review meetings are required to be appropriately noticed and open to the public. The state's water quality protection requirements within the Tentative Order are authorized by Federal Law, are necessary to meet the federal MEP standard, and are not unfunded mandates. Please see comments #155 and 165.
267	12	WURMP	G	The Work Plan appears to require the same information that the Watershed RMP Annual Report requires. Remove the requirement of the Work Plan entirely or require the Work Plan to be a section within the Watershed RMP Annual Report to make reporting more efficient.	The WRMP section of the Order has been restructured. Section G has been streamlined requiring only one Watershed Workplan that covers the 5 year permit cycle and annual watershed review meetings. Annual watershed review meetings are required to be appropriately noticed and open to the public.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
268	12	WURMP	G	This requirement conflicts with the Regional Board TMDL program. Additionally, there appear to be no economic considerations and time schedule included in this permit condition. Remove this requirement due to its duplication with the Regional Board's existing TMDL program. Additionally, these programs are very costly to implement in all watersheds every year and don't consider using information from one watershed across to another watershed. If this condition remains, it needs to be included in the economic analysis.	Provision G.c.(2) has been modified to include TMDLs as one of the factors a Copermittee can use to identify their highest priority water quality problems. If a Copermittee identifies a TMDL as their highest water quality problem, work on the TMDL can be used towards compliance with the requirements of Section G, the Watershed Runoff Management Program. Efficient use of resources was considered when developing section G. Allowing a Copermittee to count the work done on a TMDL as compliance with the Watershed component of the Order is considerate of the need to use resources efficiently.
269	12	TMDL	I	No need for other enforcement actions inside of a permit. The City questions the need for any additional enforcement mechanisms within a permit which can apply numeric limits. Recommend removal of other enforcement mechanisms from permit.	All references to CDOs and CAOs, in regards to TMDL implementation, have been removed from the Tentative Order and Fact Sheet. This does not, however, preclude the Regional Board from future consideration of the use of these authorities to address TMDLs.
270	12	General	J	Per the definition in Attachment C, environmentally sensitive areas include 303(d) listed waterbodies. It is therefore redundant and inefficient to require assessment for both 303(d) waterbodies and for environmentallv sensitive areas. Remove either Section J.1.a(1} or J.1.a(2).	The commenter is correct that Environmentally Sensitive Areas (ESAs) do include 303(d) listed waterbodies. The Regional Board, however, does not agree that the inclusion of two separate sections is redundent. 303(d) listed waterbodies have been identified as impaired and, depending upon identified impairment sources, require a reduction of storm water pollutant loadings to the MEP, which may include further investigation into sources of pollutants in MS4 storm water discharges. This will likely entail different measures of assessment as well. The Copermittees may choose to establish different priorities under Section J.1.a.1 for 303(d) listed waterbodies than under Section J.1.a.2 for ESAs due to the impairment. Furthermore, while ESAs do include 303(d) listed waterbodies, ESAs also include other waters the Copermittees may determine need different types of management and measurements of outcome.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
271	12	General	J	Requires Copermittees to establish annual assessment measures for reducing discharges of pollutants into 303(d)s and ESAs for all six outcome levels, and then annually conduct each measure to evaluate its outcome to determine effectiveness. Because Copermittees generally implement both larger jurisdictional programs and even smaller targeted watershed activities at scales larger than individual drainage areas of water bodies, the new 303(d) and ESA components to the effectiveness assessment program would result in a cumbersome assessment effort that would result in repetitious reporting of assessment information for individual water bodies. It is understood that the fundamental purpose of the assessment program is to facilitate improvement of Copermittee efforts. Rather that require additional detailed layers of assessment that will likely yield proportionately little new information, the Permit should be restructured to facilitate adaptive management where innovation is encouraged and attainment of greater efficiencies through programimprovements is required. For example, see comment regarding Section G.1.e.	The effectiveness assessment states the objective for 303(d) listed water bodies as "Reduce pollutant loadings" and for ESAs as "Prevent MS4 discharges from causing or contributing to conditions of pollution, nuisance, or contamination." A separate detail of assessment is appropriate for 303(d) listed waterbodies as they have already been listed as pollutant impaired. The Environmentally Sensitive Areas also deserve a specific assessment to preserve and restore their unique character. In this way, the high priority water quality issues will receive a high level of attention, consistent with USEPA and CASQA guidance for prioritization. The Order provides flexibility to establish the actual metrics for each assessment outcome level. The Order also provides the Copermittees flexibility to develop objectives for the general program components based on the CASQA guidance.
272	12	General	K	Copermittees must include Reporting Checklist in each Annual Report (see attachment D for details).	This comment is noted.
273	12	Monitoring	N	Unclear where the samples are to be collected if the flow is diverted away from the outfall (Coastal Storm Drain Monitoring). State where the samples should be collected. (Before the diversion?)	Section 5 of Attachment E: Coastal Storm Drain Monitoring has been removed and replaced with Regional Bacteria Monitoring. This new section provides flexibility for Copermittees to participate in a regional monitoring effort, which is expected to reduce cost and redundancy.
274	12	Monitoring	N	Unclear of the purpose of storm event sampling (Coastal Storm Drain Monitoring). Are there action levels or are the results strictly for comparison? State what if any follow-up actions are required for storm event sampling.	Please see response to Comment 273.
275	12	Monitoring	N	Weekly sampling was determined to be unnecessary and would be excessive with over 100 monitoring stations (Coastal Storm Drain Monitoring). Change the sampling frequency to monthly (as it is currently).	Please see response to Comment 273.
276	12	Monitoring	N	Unclear how special investigation stations are selected (Coastal Storm Drain Monitoring). State selection criteria or considerations for specialinvestigation stations.	Please see response to Comment 273.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
277	13	General	General	The current Storm Water Permit for South Orange County (Order No. R9-2002-0001) imposed a very comprehensive and prescriptive set of storm water management and regulatory requirements on the City of Laguna Niguel and the other Co-Permittees. The Draft Permit substantially expands the requirements and prescriptions of the Current Permit without clear or compelling supportive findings, evidence or rationale. As a general comment, the City believes that the Draft Permit remains too prescriptive and limits the discretion and flexibility of the City to implement storm water management programs and practices that are appropriate, sensible and practical for our community. The City requests that the Regional Board carefully review and reconsider the new requirements of the Draft Permit. Wherever possible, maximum storm water management and program discretion and· flexibility should be left to the Co-Permittees.	MS4 permits become more prescriptive following several permit cycles. The body of knowledge and science behind protecting water quality increases and therefore, so do the MS4 requirements. The Tentative Order has balanced the Copermittee's need for flexibility by defining the minimum level of requirements through the Permit that are necessary to meet the MEP standard.
278	13	General	General	A cursory comparison of the Draft Storm Water Permit for South Orange County and the Current Storm Water Permit for San Diego County reveals material differences and many new regulations and requirements that are proposed to be imposed on the South Orange County Co-Permittees. These include, but are not limited to, the following: • Removal of the word "urban" to describe the runoff discharge that is regulated by the Storm Water Permit • Removal of landscape irrigation, irrigation water and lawn watering from the categories of non-stonn water discharges that are not prohibited by the Storm Water Permit • Establishment of Non-Storm Water Dry Weather Numeric Effluent Limits • Establishment of Stonn Water MuniCipal Action Levels • Implementation of a Retrofitting Program for Existing Development • Requirement to submit a Municipal Stonn Water Funding Business Plan The City requests that the Regional Board cite the specific legal authority for the proposed inclusion of each of the above-referenced items in the proposed Storm Water Permit for South Orange County. The City further requests that the Regional Board identify the specific water quality issues and conditions that differentiate South Orange County from San Diego County and warrant the imposition of these new and different requirements on the South Orange County Co-Permittees.	Please see the supplemental fact sheet for the specific legal authority. Please also see comment #24 regarding consistency with other Permits.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
279	13	LID	F.1	The Draft Storm Water Permit imposes additional requirements on New Development and Significant Redevelopment Projects. The current International / National / State economic climate suggests that this is a most inappropriate time to saddle the development community with costly new requirements such as Low Impact Development Site Design and Treatment Control BMPs, and Hydromodification Assessments and Management Strategies. The City requests that the Regional Board carefully review and reconsider the necessity, appropriateness and timing of these new requirements.	The Copermittees have two years to develop and implement the low impact development and hydromodification requirements. It is unclear what the economic climate will be in two years. Furthermore, USEPA has found that implementing low impact development is often actually cheaper than conventional storm water treatment controls and, in some cases, could increase property values. Low impact development measures also address hydromodification by retaining onsite the runoff flows.
280	13	unfunded mandate	General	The City believes that many of the new.regulations and requirements in the Draft Storm Water Permit exceed the requirements of the Clean Water Act. As such, these new regulations and requirements must be considered and evaluated in accordance with applicable provisions of the State Porter Cologne Act. If such regulations and requirements are included in the Final Storm Water Permit, the City believes that they would constitute unfunded State mandates.	The state's water quality protection requirements within the Tentative Order are authorized by Federal Law, are necessary to meet the federal MEP standard, and are not unfunded mandates. Please see comments #155 and 165.
281	13	Economic	General	As mentioned above, the imposition of new regulations and requirements on the private development community could not come at a worse time in light of the current economic climate. The same can be said about the financial impacts of the Draft Storm Water Permit on the Municipal Co-Permittees. Many of the Co-Permittees are anticipating year-over-year declines in municipal revenues in numerous revenue categories (i.e. Property Tax, Sales Tax, Real Property Transfer Tax, Planning and Building Fees, Interest Income). Yesterday, the Governor proposed a FY 09-10 State Budget Alternative that may "borrow" $2 Billion from local government property tax revenues for up to three years. Against this backdrop, it will be challenging for the Co-Permittees to maintain current funding levels for our existing Storm Water Management Programs. This may be an appropriate time to extend the current South Orange County Storm Water Permit for an additional 3-5 years without burdening the Co-Permittees with new requirements and costs. At the very least, the Regional Board should make every effort to ensure that the new South Orange County Storm Water Permit is "cost-neutral" to the Co-Permittees.	The low impact development and hydromodification requirements have been modified to be more consistent with Region 8's recently adopted MS4 permit for North Orange County. In addition, those programs have two years to be developed and implemented. Please see comment #279 for more information. The USEPA conducted a study that in some cases LID was actually cheaper than conventional treatment technologies and increased home values. The monitoring requirements have also be designed to remain cost neutral. Please see response to comment no. 317.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
282	13	Overirrigation	B	The Draft Storm Water Permit removes landscape irrigation, irrigation water and lawn watering from the categories of non-storm water discharges that are not prohibited. In effect, this change requires the Co-Permittees to enact and enforce ordinances that prohibit any water from leaving private or public property and entering the MS4, apparently under a zero-tolerance standard rather than to the maximum extent practicable. The City questions the legal authority of the Regional Board to unilaterally declare that these categories of urban runoff are now to be deemed prohibited discharges. The City further believes that these changes will not be accepted or tolerated by the general public and may compromise continuing public education and pollution prevention programs. The City requests that the Regional Board keep these non-storm water discharges in the non-prohibited categories.	Please see response to Comment #s 28, 52, 75, and 174. Please also see comment # 77. Non-storm water discharges identified as a source of pollutants must be addressed under federal law.
283	13	NEL	C	c. - Non-Stonn Water Dry Weather Numeric Effluent Limits D. - Municipal Action Levels I. - Total Maximum Daily Loads The Draft Storm Water Permit proposes to incorporate enforceable numeric effluent limits at the end of every pipe for both dry weather and storm flows for numerous constituents, including those subject to TMDLs. Available data already suggest that these provisions will place the Co-Permittees in immediate and continuous violation of the Permit. This situation leaves the Co-Permittees responsible for greatly expanded monitoring, as well as vulnerable to penalties and third-party litigation. It is unknown and uncertain whether it is technically or economically feasible to bring all discharges into full compliance. The City believes that these proposed new requirements greatly exceed and overreach the Co-Permittee's basic legal obligations under the Clean Water Act to implement an iterative sequence of BMPs to reduce the discharge of pollutants to receiving waters to the maximum extent practicable. It is our understanding that no other MS4 permit in the entire country imposes numeric effluent limits at the end-of-pipe for such a broad range of constituents. The City requests that the Regional Board delete these provisions from the Permit	Please see response to Comments 39, 42, 43, 44, 79 and 82. The Regional Board has modified sampling requirements for non-storm water numeric limits to provide the Copermittees with the flexibility to adjust monitoring to best match exist levels of effort under the IC/ID program monitoring. Please see response to Comment 317 for further discussion.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
284	13	LID	F.1.	The City is concerned about the appropriateness of encouraging Site Design BMPs that "infiltrate" or "filter" runoff close to the source of runoff. Many areas of Laguna Niguel and South Orange County have experienced slope failures and landslides attributable to storm water and non-storm water causes. Given local soil and geological conditions, it may be more appropriate to discourage Site Design BMPs that "infiltrate" or "filter" runoff. As mentioned before, the City is also concerned about the financial impact of such requirements on New Development and Significant Redevelopment Projects. The City requests that the Regional Board carefully review and reconsider the necessity, appropriateness and timing of these new requirements.	The Tentative Order already includes specific language to address the commenter's concern as Section F.1.c.(6) covers "Infiltration and Groundwater Protection." The City has the flexibility to apply more restrictive requirements on infiltration BMPs. The Tentative Order also provides a waiver for when it is technically infeasible to infilitrate on site.
285	13	Retrofitting	F.3	This section requires each Co-Permittee to implement a retrofitting program that solves chronic flooding problems, reduces impacts from hydromodification, incorporates Low Impact Development, supports stream restoration, systematically reduces downstream channel erosion, reduces the discharges of storm water pollutants from the MS4 to the MEP, and prevents discharges from the MS4 from causing or contributing to a violation of water quality standards. First, it is difficult to imagine the scope and cost of performing the retrofitting evaluation required by Section F.3.d. Second, even if such an evaluation was performed, the Co-Permittees have no legal authority to compel private landowners of existing developments to implement or cooperate on retrofit projects. The City requests that the Regional Board delete Section F.3.d from the Storm Water Permit.	The section has not been deleted from the Tentative Order. Retrofitting is a needed requirement to address pollutant load discharges from existing development that are not meeting water quality standards. Although the section lists several "goals", the requirement does not include an enforceable time schedule to meet that goal. The Regional Board realizes the limitations the Copermittees have in requiring private landowners to retrofit existing developments. Section F.3.d.(4) has been revised to reflect those limitations. Please also see response to comment Nos. 46, 136, and 162.
286	13	Economic	H.	This section requires each Co-Permittee to submit a Municipal Storm Water Funding Business Plan that identifies a long-term funding strategy for the Storm Water Management Program. Since the Co-Permittees have no legal authority to impose new, significant Storm Water Program revenue sources without voter or property-owner approval, the long-term funding strategy for most Co-Permittees is limited to using existing General Fund revenues to support the local Storm Water Program. This is an unnecessary administrative requirement that will not provide any useful information to the Regional Board or Co-Permittees. The City requests that the Regional Board delete Section H.3 from the Storm Water Permit.	This comment was addressed in the 2007 response to comments. This section has been expanded in order to develop more useful and meaningful fiscal reporting. However, the Business Plan requirement has been removed from the Tentative Order.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
287	13	Overirrigation	B	The summary report for the SEEP grant project just completed by the South Orange County Copermittees in partnership with the water supply agencies. What's interesting about the findings is they suggest that, in this region due to peculiarities of local geology, reducing the volume of landscape irrigation runoff may increase the relative proportion of subsoil water seepage in the storm drains, and end of driving the concentrations of certain geologically-derived constituents UP, even while overall discharge loads go DOWN. The SEEP study shows this effect for phosphates. The County has done some source investigations showing that the same may be true in some locations for several metals (cadmium, nickel, zinc).	The Regional Board has reviewed the findings of the SEEP study and disagrees with the conclusion that reducing or eliminating the volume of landscape irrigation runoff will increase concentrations of discharges. Notwithstanding disagreement regarding the findings by the Regional Board, the commenter appears to present the argument that the possibility of one source of pollutants warrants the allowance of a non-storm water discharge that has been identified as a source of pollution. The Regional Board is concerned as the Copermittees have identified landscape irrigation as a source of the pollutants that are specifically impairing the waterbodies (303(d) listed, see Finding C.7) that are receiving the non-storm water discharge. If after irrigation runoff is effectively prohibited another pollutant source is revealed to be problematic, it will be addressed at that time. Furthermore, the Regional Board finds it disturbing that the commenter appears to favor discharges which contain larger mass loads of pollutants in lower concentrations than smaller mass loads with potentially higher concentrations, even given the scenario is such where both would be a source of pollutants. The Regional Board maintains that federal regulations make it clear that dilution is not a substitute for treatment of discharges pursuant to federal requirements(40 CFR 122.45(f)).
288	14	Existing Development	F.3	Here is my concern . I have spoken to several Cities in South OC. They have made it clear that as a Co Permitte, they take their direction from the County as Primary Permitee. When I have spoken to the County, their interpretation of the current Permit is that a Mobile Car Wash & Detail operation can go onto private property, detail an engine using a degreaser and knock all the grease, grime, gas, anti freeze, etc to the ground. Spray toxic acid as a cleaner for BMW rims with nasty break dust build up, etc. And as long as the water does not leave the property and enter the public right of way today, then no harm no foul. Another example is that sometimes people focus on making sure the soaps are biodegradable . but if you apply a soap, then hose it to the ground, the fish cannot distinguish the good water from the waste water. Same thing I argue with the irrigation. It is not that water hitting the conveyance system it is that the water coming off the property contains fertilizers, pesticides, pet waste, etc. I am suggesting that the Permit be prescriptive in the intent and clearly communicate that it is trying to capture contaminants and pollution, not contain the water. We require this with a Traditional Boulevard Car Wash, so why not hold a Mobile Car Wash to Commercial standards? The pollution created today is Non Point Source Pollution, clearly, and will become tomorrow's Storm Water Pollution.	Finding C defines the characteristics of the discharges regulated by the Order and brings focus to the pollutants in runoff and their potential to impact receiving waters. Provision F.3.b.(3) addresses requirements for Mobile Businesses and documents the Regional Boards intent to focus on reduction of pollutants in runoff rather than total elimination of runoff from a location. The Regional Board is aware of the potential water quality impacts from mobile car washers and addressed the discharge in this Section of the permit.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
289	14	Existing Development	F.3	In my previous Comments sent, I outlined the ProntoWash model, which since we started debating the new Permit a year ago has seen tremendous increases. I welcome the competition, think it is great. But both water conservation requirements I(cleans with 1 Pint of Water) and now the requirement to control run off in San Diego & LA . not yet anywhere in Orange County !!!!!!!!!! This model continues rapid expansion based on those compelling events. I also listed many reasonable options for the traditional wash with a bucket & hose or pressure washer where a zero discharge standard can be achieved. I say reasonable because in the LA Cities that have implemented this standard, they have many Mobile Car Wash & Detailing companies that have achieved permission to operate. Like the NRDC . I also suggest that that is evidence of "Practicable". I do not think "prohibit non storm water discharges" Permit language is prescriptive, and does not necessarily trigger a material change from current BMP's. Unfortunately, I do not have a suggestion for appropriate language. New to this. But something that clearly says prohibit from ever reaching the MS4 to necessitate a change in BMP's.	Comment noted.
290	14	Existing Development	F.3.b	Solutions . I have several in the industry, competitors some might say, who have and will work with me and the Cities / Counties to work together on reasonable BMP's. One idea we are pushing is to get the County of Orange to do a County wide permit. Where all businesses, on a set criteria, can go to the County, pay a fee, and validate the process and chemicals used will satisfy the BMP's. Will save all a bunch of time and money! Lastly, if you do not intend to remove Home Car Washing from Exempt, I suggest you button up the Commercial Mobile Car Wash now, so you can make the leap in 5 , or so, years. Home Car Wash - I agree with the gentleman from Dana Point. Makes no sense to remove Landscape Irrigation and leave Home Car Washing. The State of Washington utilized the Car Wash Run Off Effluent Impact Study (I acquired it from the web site of the International Car Wash Association) as a basis for their Department of Ecology to change how Home Car Washing is done. To prevent Non Point Source Pollution and Dry Weather discharges, the Dept of Ecology requires residents to pull their car to the landscape, use a a natural filter to wash a car at home. They have deemed the driveway as a conveyance. I suggest you not utilize the same study to "build a body of knowledge", but to reasonably act.	Comment noted.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
291	14	Existing Development	F.3.b	Again, I think the State of Washington Dept of Ecology satisfies proof of Practicable! I have all the bells & whistles for my homes irrigation. Smart Timer, everything. Based on the last stakeholder's meeting, I had my Mesa Consolidated Water come out, they could not improve my efficiencies, nor provide a solution to prevent my irrigation from watering my sidewalk and traveling into the curb & gutter. So I brought out a landscaper. Almost $1,000 to make the necessary changes prevent the violation. Which, any code enforcer will never see because my Smart Timer comes on at 4 am, and the new conservation requirements and in some cases Ordinaces prohibit watering during the day or hours the Enforcement will be working. Practicable with that cost and lack of enforcement opportunity? The solutions to prevent run off from the Home Car wash can be achieved with as little as no cost to $25 for a berm or waterless spray bottles and micro fiber towels. Seems more Practicable to me!	Comment noted.
292	15	Urban Runoff	General	• The current draft has removed “Urban” from the term ”Urban Runoff”. Runoff is a general and vague term and Permittees should not be on the hook to address all sorts of runoff. The goal of the NPDES permit is to control urban runoff, and this phrase should not be altered.	The goal of the NPDES permit is not specifically "to control urban runoff" as the commenter states. An overall goal for the NPDES permit is not specifically stated in the Tentative Order. However, the NPDES permit is required by the federal clean water act, which states its objective as "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Therefore, the NPDES permit implements the objective of the Clean Water Act. The term "urban runoff" only appears once in the Clean Water Act and that is in response to a specifically funded program to address pollution in the Great Lakes. The term "urban runoff" does not appear in section 402(p) which regulates storm water discharges from municipal storm systems. In addition, the term "urban runoff" does not appear in the code of federal regulations section CFR 122 that implements the storm water requirements in the Clean Water Act. Please see Comment No. 47 for more information.
293	15	General	Finding	• Finding C.15 states that this Order is not intended to address naturally occurring pollutants or flows except where the MS4 has altered or concentrated those natural pollutants or flows. The City believes the nature of the MS4 is to concentrate flows, and if natural occurring pollutants enter the MS4, the Permittees should not be held accountable for these pollutants.	The referenced finding was removed from the Tentative Order following disagreement from the interested stakeholders. Where an MS4 system receives runoff from natural areas, the MS4 system unnaturally converts the discharge from a non-point source to a point source discharge. The MS4 system would not allow for natural infiltration and attenuation of pollutants and could concentrate violations at the discharge point to ultimately cause an exceedance of water quality standards. The finding is not found in the MS4 permit adopted for San Diego County.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
294	15	Overirrigation	B.	In the current draft of the subject Order, landscape irrigation, irrigation water, and lawn watering, have been removed from the "Non-Storm Water exempt discharges" table in Section B.2. The Cities are currently working with water agencies to develop and implement control measures to reduce irrigation runoff into the MS4. The foregoing discharges should remain on the exempt discharges list in the proposed fourth term permit so that the co-permittees are given an opportunity to demonstrate the effectiveness of their efforts to reduce and eventually eliminate irrigation runoff into the MS4. Direct removal of these discharges from the exemption may have a negative impact on the progress the Cities are making on this issue. The City proposes the following alternate language be added, "The Co-permittees shall work with local water purveyors to implement measures in order to eliminate irrigation runoff."	Please see response to Comment #s 28, 52, 75, and 174.
295	15	Monitoring	D.	• Section D.4.e(2)b of the Tentative Order imposes new requirements that the Permittees conduct an investigation or document why a discharge does not require an investigation, within two business days of receiving dry weather field screening results that exceed action levels. This timeframe is not reasonable. The Board Staff has responded to this comment claiming that this section does not require a fully completed investigation; rather it requires the Co-Permittees to begin conducting an investigation. This clarification should be in the Tentative Order so the City is clear of the Board's requirements.	The Regional Board agrees that the requested change is reasonable. The Tentative Order updates have been changed to include the modified language.
296	15	Existing Development	D.	• Section D.4.h.1 and 2 states that co-permittees must implement management measures and procedures to contain and clean up sewage spills. It also directs the copermittees to implement a mechanism whereby they will be notified of all sewage spills. As the Water Districts regulate sanitary sewer overflows, the City would prefer this section be removed as to avoid duplicity of effort. However, if it is to remain, the City proposes the following language modification to Section D.4.h.2, "Each co-permittee must implement management measures and procedures to prevent, respond to, contain and clean up sewage from any such notification."	Please see response to Comment 180.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
297	15	LID	F.1	• The Tentative Update document dated May 5, 2009 contains a new section F.1.d.(4)(c), which requires that LID structural site design BMPs to be sized and designed to ensure capture of the 85th percentile storm event for all flows from the development in accordance with Section F.1.d.(6)(a)(i) and Section F.1.h. This section should be modified to allow capture of the difference in volume between the 85th percentile storm event for the pre-development condition and the 85th percentile storm event for the post-development condition. Moreover, the term "capture" implies retention, and this is not feasible everywhere due to site constraints. The term "capture" should be removed from the language, so that the Co-Permittees are given the flexibility to treat and release, where feasible.	The Tentative Order includes waiver criteria that give the Copermittees the flexibility to require treat and release BMPs where onsite retention is not technically feasible. The Tentative Order's requirements regarding the implementation of low impact development practices has been changed to be consistent with Region 8's recently adopted MS4 permit. Treating only the delta volume of a storm is not meeting the MEP standard and not protective of water quality. The 85th percentile storm event is consistent with State Board Order No. WQ-2000-011, with the County's drainage area management plan and with other southern California MS4 permits.
298	15	Economic	H.	Section H.3 of the Order requires the submission of a "Municipal Storm Water Funding Business Plan" by the end of the permit term. The Plan would identify the longterm funding strategies for program evolution and funding decisions along with planned funding methods and mechanisms for Municipal Storm water Management. City Staff has stated its' concerns on this section in both of the previous Tentative Order drafts and yet this section remains unchanged. Staff believes this provision is inappropriate, improper and unjustified. The City has consistently funded its Storm Water Management obligations and there is no evidence to suggest otherwise. Moreover, the City submits a Fiscal Analysis in its Annual reports, also known as Jurisdictional Urban Runoff Management Plans (JURMP or LIP). The Board Staff claims that the Business Plan is not subject to approval and does not restrict the Co-Permittees to the implementation of any of the methods in the plan. If that is the case, there shouldn't be any need for the Business Plan. Furthermore, the mere existence of the requirement of a Business Plan in the Tentative Order makes it the purview of the Board regardless of the Staff's comment. And, the Board should not work towards a funding mandate nor take any steps to involve itself in the Budget preparation of another governmental agency. The City's budget is available for all to see as a public record and should suffice to respond to any staff concerns about funding commitments. This provision should be deleted from the Tentative Order.	This comment was addressed in the 2007 response to comments. This section has been expanded in order to develop more useful and meaningful fiscal reporting. However, the Business Plan requirement has been removed from the Tentative Order.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
299	16	LID	F.1	First of all, we understand that the Orange County permittees desire consistency between the LID requirements adopted by the Santa Ana and San Diego Regional Boards. As noted in our letter to the Santa Ana Regional Board dated May 8, 2009 (which we provided to you earlier), with a few relatively minor clarifications, we would be comfortable with the requirements of the Santa Ana Regional Board's permit for North Orange County (May 1, 2009 version). As discussed below, however, we have certain concerns with the LID requirements of the March 13, 2009 draft permit proposed by the San Diego Regional Board as well as the tentative update of April 29, 2009. If the adopted Santa Ana Regional Board North Orange County permit satisfactorily addresses EPA's May 8 comments, we would support direct incorporation of the North Orange County permit's LID provisions into your South Orange County permit. We will continue to consult with you regarding the status ofthe North Orange County permit.	The Tentative Order's requirements regarding the implementation of low impact development practices has been changed to be consistent with Region 8's recently adopted MS4 permit.
300	16	LID		a) We believe the draft permit should be revised to more clearly incorporate numeric criteria for LID implementation. This has been a priority of ours in our review of draft MS4 permits across the State including the recently-reissued permit for Ventura County and for the North Orange County permit. In the South Orange County permit, numeric LID criteria should be included in section F.1.d.4 of the permit, entitled "Low Impact Development Site Design BMP Requirements." This section of the draft permit describes LID BMPs, but does not include numeric performance criteria. We recognize that in a subsequent section of the permit, section F.l.h which, addresses hydromodification, there is a section entitled "Interim Requirements for Large Projects" (section F.1.h.6) which calls for the reduction of Effective Impervious Area (EIA) to less than 5%. While we support including an interim hydromodification requirement, to avoid confusion over the permit's expectations for LID, we believe the permit would be improved by including numeric criteria in the LID section F.1.d.4. An example of this recommended approach is the permit adopted by the Los Angeles Regional Board for Ventura County on May 7,2009. This permit includes numeric criteria in the LID sections ofthe permits, and also contains appropriate, separate criteria for hydromodification.	The Tentative Order's requirements regarding the implementation of low impact development practices has been changed to be consistent with Region 8's recently adopted MS4 permit. This includes a numeric criteria that LID BMPs are required that retain onsite and/or biofilter the 24 hour 85th percentile storm event.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
301	16	LID	F.1.	b) We would also point out that the South Orange County permit lacks storm sizing criteria to use in conjunction with the EIA requirement. The absence of such criteria resulted in criticism of an early version of the draft Ventura County permit. Additionally, we would note that the latest draft North Orange County permit no longer contains the 5% EIA requirement, but instead establishes numeric LID performance criteria in terms of a design storm volume. We are supportive of both the design storm volume approach proposed by the Santa Ana Regional Board and the 5% EIA approach used by the Los Angeles Regional Board for the Ventura County permit.	The Tentative Order's requirements regarding the implementation of low impact development practices have been changed to be consistent with Region 8's recently adopted MS4 permit. This includes a numeric criteria that LID BMPs are required to retain onsite and/or biofilter the 24 hour 85th percentile storm event.
302	16	LID	F.1.	c) We believe the South Orange County permit should include specific requirements for alternative programs when permittees conclude that implementation of LID is infeasible. However, the existing provisions in the permit related to waivers (sections F.1.d.7 and F.1.d.8) do not address this concern. Section F.1.d.7 is entitled "Waiver Provision for Numeric Sizing of Treatment Control BMP Requirements" and provides waivers for treatment requirements rather than LID. Further, section F.I.d.8, entitled "LID Site Design BMP Substitution Program" is written to substitute for "some or all treatment control BMPs." Our concern is with the draft permit's LID section (section F.I.dA.a.i) which refers to a "finding of infeasibility" that permittees may make if LID implementation is not practical for a given project; additional clarification is needed concerning the circumstances when LID would be considered "infeasible."	The Tentative Order's requirements regarding the implementation of low impact development practices have been changed to be consistent with Region 8's recently adopted MS4 permit. The LID substitution program has been modified to contain specific criteria for determining the technical infeasibility of LID BMPs. The section has also been clarified that LID BMPs are required at all sites, but where technically infeasible may then be substituted with conventional treatment control devices.
303	16	LID	F.1.	a) New language would be added in section F.I.d.(4)(a)(i) which would require LID practices or participation in the LID substitution program of F.1.d.(8)(d). However, the permit still does not clarify the circumstances when LID would be considered infeasible (see comment I.c above) or require the permittees to develop such criteria for submittal to and approval by the Regional Board (as does the current draft of the Santa Ana Regional Board's permit). Further, the revised section F.I.d.(8)(d) seems misplaced (and is confusing) in that it is located within section F.I.d.(8) which sets forth an optional program to substitute LID for treatment controls.	The Tentative Order's requirements regarding the implementation of low impact development practices have been changed to be consistent with Region 8's recently adopted MS4 permit. The Tentative Order now specifies the circumstances when LID would be considered technically infeasible. The Copermittees are to develop the Substitution Program and submit it to the Regional Board. The Regional Board will accept public comments on the draft Program and the Executive Officer will determine the need for a Public Hearing prior to deciding upon the adequacy of the program in meeting permit requirements.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
304	16	LID	F.1.	b) A new section F.I.d.(4)(c) would be added to the permit which would require capture of a design storm. However, the permit also provides a rather open-ended list of acceptable LID BMPs. We would recommend that acceptable LID measures be limited as suggested in the first comment in our May 8 letter to the Santa Ana Regional Board on the proposed North Orange County permit, in which LID is defined in terms of the way the BMP performs. The concern in our May 8 letter is that certain BMPs (even biofiltration which is listed in the North Orange County permit) may not necessarily perform consistent with LID principles, unless additional operational requirements are specified. Such concerns would also apply to certain BMPs on the list in your permit such as detention ponds and constructed wetlands.	The acceptable list of LID BMPs has been removed from the Tentative Order. Additional operational requirements have been placed on the design and implementation of LID biofiltration BMPs.
305	16	TMDL	Finding	We believe that additional clarification is needed concerning the consistency of the draft permit with approved TMDLs. Finding E.12 for the permit indicates the permit includes applicable wasteload allocations (WLAs) that have been adopted by the Regional Board and approved by the State Board, Office ofAdministration Law and EPA. However, we are not aware of any such WLAs for the MS4s subject to the permit. Table I in the fact sheet for the permit notes that certain TMDLs have been adopted by the Regional Board, but have not yet been approved by EPA. There is also a reference in the fact sheet to dry weather TMDLs included in section C of the draft permit, which apparently have received all the necessary approvals. Again, however, we are not aware of these TMDLs and the fact sheet should provide full and clear information concerning the approval status ofTMDLs with WLAs applicable to the MS4s. Even if no applicable WLAs have been approved by EPA, it is helpful for the fact sheet to clarify this matter. Further, if applicable WLAs are approved by EPA prior to Regional Board adoption ofthe permit, they should be included in the permit. We are also pleased by the apparent intent of the Regional Board as indicated in Finding E.12 and Section I of the draft permit to express permit effluent limits, when necessary to ensure consistency with applicable WLAs, as numeric effluent limits. Numeric limits provide greater assurance of consistency with WLAs than the alternative of BMPs which are sometimes used, given the uncertainty in the performance ofmany ofthe BMPs commonly used for stormwater pollution control.	The Tentative Order has been updated to clarify that the final Waste Load Allocations (WLAs) for the Indicator Bacteria TMDL for Baby Beach in Dana Point must be met by the end of the TMDL implementation compliance schedule provided in Resolution No. R9-2008-0027, "A Resolution to Adopt an Amendment to the Water Quality Control Plan for the San Diego Basin (9) to Incorporate Total Maximum Daily Load for Indicator Bacteria, Baby Beach in Dana Point Harbor and Shelter Island Shoreline Park in San Diego Bay." Furthermore, the Tentative Order has also been revised to require that all discharges to Baby Beach in Dana Point meet the Numeric Targets of the TMDL by the end of the compliance schedule in order to be consistent with the assumptions and requirements of the WLAs. On June 16, 2009, the State Water Resources Control Board approved Resolution R9-2008-0027 amending the Basin Plan to incorporate Total Maximum Daily Loads (TMDLs) for indicator bacteria for Baby Beach in Dana Point Harbor and Shelter Island Shoreline Park in San Diego Bay. Final approvals by the Office of Administrative Law and the USEPA are expected to be garnered prior to adoption consideration of this re-issuance of the MS4 Permit for So. Orange County.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
306	16	Urban Runoff	General	You had asked for our views on the proposed replacement of the term "urban runoff', which was commonly used in the previous permit, with the terms "stormwater" and "non-stormwater" as the discharges regulated in the new permit. We would support this revision since it is actually more consistent with the terminology used in the EPA stormwater regulations at 40 CFR 122.26. However, we would point out that the new Finding C.14 and the discussion in the fact sheet incorrectly indicate that industrial stormwater discharges are subject to the maximum extent practicable (MEP) discharge standard in the Clean Water Act (CWA). Section 402(P)(3)(B) of the CWA provides that only municipal stormwater discharges are subject to the MEP standard; section 402(P)(3)(A) provides that industrial runoff is subject to all applicable requirements of sections 402(P) of the CWA, and section 301 of the CWA which includes BAT/BCT effluent limits and water quality standards compliance.	Comment noted that the removal of the term "urban runoff" is more consistent with federal storm water regulations. The Tentative Order and Supplemental Fact Sheet have been clarified as requested to reflect that Industrial Storm Water discharges are not subject to the MEP standard.
307	16	NEL	C	You also asked for our views on whether numeric effluent limits would be appropriate for non-stormwater discharges. As noted above in our comments on LID and TMDLs, we are seeking to ensure that permits include clear, measurable and enforceable requirements. We believe that the use of numeric effluent limits for non-stormwater discharges would be a significant step in the right direction and we support the proposed limits. In previous MS4 permits, the non-stormwater discharges addressed in the permits have typically been regulated through best management practices (BMPs) pursuant to 40 CFR 122.44(k) for the same reason that stormwater discharges themselves are often regulated by BMPs, which is the lack of good information about the discharges and the difficulty in deriving appropriate numeric effluent limits. This issue was recognized in a 1996 EPA guidance on water quality-based effluent limits for stormwater discharges which is cited by the fact sheet. However, the guidance also indicates that as additional information becomes available, more specific limits should be considered. As noted in the fact sheet, additional information has become available to the Board about the discharges over the years, and we agree that the numeric effluent limits are now appropriate.	Comment noted. The Regional Board appreciates the support of the USEPA as they are, arguably, the foremost experts on federal statutes regulating MS4 discharges.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
308	17	General	General	RE: Tentative Order No. R9-2007-0002 NPDES, No. CAS0108740 I am a resident of Laguna Beach and live a couple of blocks from Aliso Creek and State Park. I am writing to you to add my voice in support of the Board's efforts to force the cities, that are contributing to the pollution of Aliso creek and cause its toxic soup to flow into our Oceans, to clean up their acts. I understand there have been many half hearted efforts to reduce this toxic discharge. These efforts have been, apparently, more cosmetic than real as the flow of polluted runoff during dry weather is continuing to increase. Thre are many ways that a city can prevent the discharge of polluted water into our watercourses and then into the ocean. It is time that your Board took real, forceful action to insist that the polluting cities take appropriate action. The Board has a clear path: * Insist Cities divert polluted runoff to inland SOCWA facilities for treatment and reuse as reclaimed water. * Force capture of MS4 discharges for filtration and local beneficial reuse. * Levy substantial fines against offending subwatershed, cities, homeowner associations, golf courses and others with elevated dry season discharge rates and against offending inland water districts for failing to control urban runoff. Please know that you have many residents behind you in this effort. You have the regulatory as well as the moral authority to make a difference. Building the SUPER project, as proposed by Orange County is a red herring. It is just another band aid that will do nothing to control and reduce polluted runoff into our watercourses. The SUPER Project is now seen as an effort to divert the Waterboard's attention away from the real culprit in this pollution. We hope you will not fall for these stall tactics. Thanks! Armando Baez 30792 Driftwood Drive, Laguna Beach, Ca. 92651	Please see response to Comment 1, 3, 6, 14, 16, 82. In regards to the SUPER Project, the project will be subject to a Clean Water Act 401 Water Quality Certification from the Regional Board. The 401 Certification requires the evaluation of avoidance, minimization and mitigation measures taken by the applicant for the proposed project. It is expected that the SUPER project applicant will address the commenters concerns on the project within the 401 process.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
309	18	General	General	The City of Mission Viejo shares its concerns with the County of Orange over the lack of permitting consistency with the North Orange County draft MS4 permit (Tentative Order R82009- 0030). We believe the lack of permitting consistency will lead to confusion by private developers, businesses, and residents over storm water regulatory requirements. While your staff has acknowledged that they will likely incorporate the North Orange County permit's land development provisions, they are reluctant to eliminate other areas of inconsistency. As the County points out, this disinclination will erode the credibility of the regulatory framework for stormwater in California and will confound the ability of local governments, including Mission Viejo, and the regulated community to effectively address a key environmental mandate at a time of unprecedented fiscal constraint. It is therefore necessary for us to continue to seek revisions to the Tentative Order supportive of a cohesive and cogent alignment of the North and South County pennits on the basis that consistency is important to the credibility of our respective efforts to manage urban runoff and is vital to sustaining the obvious cost effectiveness of a single and coordinated Countywide program in Orange County.	Please see the response to comments #24 on consistency between permits. The state's water quality protection requirements within the Tentative Order are authorized by Federal Law, are necessary to meet the federal MEP standard, and are not unfunded mandates. Please see comments #155 and 165.
310	18	NEL	C & D	The insertion of MALs and NELs is inconsistent with the State Water Board's Blue Ribbon panel report on the feasibility of numeric effluent limits. And, this conclusion continues to be the published position of USEPA on this issue.	Please see response to Comments 25, 33 and 39. The commenter has misinterpreted the findings of the State Board's Blue Ribbon Panel and the USEPA's published position. In regards to the position of USEPA, please see Comment 307.
311	18	NEL	C & D	The finding by the Regional Board staff that non-stonnwater discharges are not subject to the maximum extent practicable standard and therefore subject to water quality based effluent limits is not supported by law. Clean Water Act section 402(p) (3) (B) (ii) clearly states that discharges from municipal stonn sewers shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewer. We argue that the section does not require a full prohibition but rather an effective prohibition. The City agrees with the County in that the technology based standard for non-stonnwater discharges is "effectively prohibit" just as "maximum extent practicable" is the technology based standard for stonnwater discharges.	Please see response to Comment 33, 77 and 78.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
312	18	NEL	C	The City is concerned with exposure to significant risk in complying with the Tentative Order. The County of Orange has completed a comparison of existing dry weather discharges with the selected NELs noted below. Constituent Hydrologic Unit Percentage of time NELs Total Dissolved Solids* Group 1 74.5 Total Dissolved Solids* Group 2 97.1 Total Phosphorus19> Group 1 and 2 93.0 Nitrate + Nitrite Group 1 and 2 93.8 Fecal colifonn Group 1 and 2 90.0 Nickel (dissolved) Group 1 and 2 0.3 Copper (dissolved) Group 1 and 2 9.5 Cadmium (dissolved) Group 1 and 2 18.1 *A factor of 0.6 was multiplied by the specific conductance measurements to estimate IDS @Proposed NEL was compared to measurements of reactive orthophosphate as P As a result, the City of Mission Viejo could face enforcement action for not complying with all the NELs. Where there is exceedance, the City may be faced with mandatory minimum penalties (MMPs) under Water Code §§ 13385 and 13385.1. In addition, noncompliance with the NELs may subject the City to additional enforcement actions imposed by the Regional Water Board and through third party actions under the citizen suit provisions of the Clean Water Act.	Please see response to Comment 82.
313	18	NEL	C	The use of numeric limits for non-stormwater discharges is premature. Extensive work has already been performed by the Stakeholders Advisory Group on the Bacteria I TMDL for San Diego Region Beaches and Creeks, which involved multiple parties environmental groups and the regulated community alike. The TMDL program provides the safety net for ensuring that our water bodies are protected in the most reasonable and effective manner. The direct translation of water quality objectives into numeric effluent limits bypasses the TMDL process. It is likely that some of our non-stormwater discharges will exceed the NEL but have no effect on the receiving water quality or beneficial uses. But under the proposed Order, the City may be obligated to expend considerable resources without a reciprocal water quality benefit. This is poor public policy and use of public funds.	Please see response to Comment 83.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
314	18	Overirrigation	B	The prescribed prohibition on irrigation runoff also needs to be very carefully considered. The City believes this outright prohibition would erode general public support for the City's and County's Storm Water Program. We believe implementation of the prohibition would risk eroding general public support for a Program that is successfully fostering a stewardship ethic in residential environments. For example, cities may be faced with issuing citations to a homeowner for irrigation runoff; whereas, the neighbor next door is free to wash his car in his driveway under the current Tentative Order exemption for residential car washing. There is also concern that the provision would force the expenditure of scarce resources on an issue that is already being addressed by water districts dealing with water conservation imperatives.	Please see response to Comment #s 28, 52, 75, and 174. The Regional Board is working within the parameters set forth in the federal regulations to remove exemptions to non-storm water discharge prohibitions. If the City of Mission Viejo has evidence that residential car washing is causing or contributing to a condition of pollution in receiving waters, the Regional Board would appreciate receiving the information.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
315	18	Existing Development	F.3.	Page 69, Part F.3.h., of the Tentative Order states: "Each Copermittee must prevent, respond to, contain and clean up all sewage and other spills that may discharge into its MS4 from any source (including private laterals and failing septic systems.) Spill response teams must prevent entry of spills into the MS4 and contamination of surface water, ground water and soil. Each Copermittee must coordinate spill prevention, containment and response activities throughout all appropriate departments, programs and agencies so that maximum water quality protection is available at all times." For many cities (including the City of Mission Viejo), implementation of this provision is simply not feasible. For example, the City does not own or operate its own sewage system. All of the sewer systems in Mission Viejo are owned, operated, and maintained by water districts. These agencies have their own separate NPDES Permit. The City does not have the equipment or expertise to manage a sewage spill of any size, and its staff is not adequately trained to respond to potential spills. All of the water districts in Mission Viejo already respond to sewer spills (including sewer spills from private laterals). Furthermore, this provision is duplicative in the sense that the Regional Board is seeking to make the Permittees responsible for a task already delegated to the water districts. By making the City responsible for sewer spills, there is a high risk of creating confusion in determining who will respond to a spill (water district or City), who is responsible for the associated cost and reporting, etc. This issue is made even more troubling by the fact that the State Water Resources Control Board ("State Board") previously issued a stay of this very same issue in the prior generation of the NPDES Permit.l After extensive hearings and briefing on the matter, the State Board issued Order WQO 2002-0014 on August 15, 2002, granting a stay as to this provision. In that Order, the State Board held: "The record shows that three separate water districts operate these sewers within Mission Viejo, and are regulated by a sanitary sewer NPDES permit issued by the Regional Board. Mission Viejo alleged that the duplication of effort that would ensue by having Mission Viejo also be responsible for preventing and responding to sanitary sewage spills could lead to delayed responses as agencies try to determine jurisdiction and primary responsibility. Orange County's cost table for the upcoming year estimated total copermittee costs of $56,512 to implement this requirement. While these costs, by themselves do not constitute substantial harm, we find that the duplicative nature of the costs, combined with potential response delay and confusion, do." (State Board Order WQO 2002-0014, p. 6.) In deciding to grant a stay as to this provision, the State Board concluded: "The regulation of sanitary sewer overflows by municipal storm water entities, while other	Please see response to Comment 180.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
				public entities are already charged with that responsibility in separate NPDES permits, may result in significant confusion and unnecessary control activities. For example, the Permit appears to assign primary spill prevention and response coordination authority to the copermittees. While the federal regulations clearly assign some spill prevention and response duties to the copermittees, we find that the extent of these duties is a substantial question of law and fact." [State Board Order WQO 2002-0014, p. 8. (emphasis added.)] Given the previous findings of the State Board on this same issue, and given that none of the factual reasons supporting this decision have changed, the Regional Board should remove or modify this provision so as to reduce duplicity of effort and the implementation of unnecessary control activities. As an alternative, the City recommends that the Regional Board consider adopting language similar to that contained in State Board Order No. 2006-0003 titled: "Statewide General Waste Discharge Requirements for Sanitary Sewer Systems" ("Order"). This Order applies solely to municipalities and other public entities that own or operate sanitary sewer systems greater than one mile in length that collect and/or convey untreated or partially treated wastewater. Adopting this caveat would not only serve to accomplish the primary goals behind the provision, but would also ensure Statewide consistency among Water Board regulations. If the Regional Board is concerned that the City will not work in cooperation with the water districts or provide notification to the water districts regarding spills that are initially reported to the City, the Regional Board could add additional language/requirements. For example, the following condition could be added, "For the Permittees that do not own or operate sanitary sewer systems and are exempt from the responsibility for spills, said Permittees shall develop a program to notify the Agency responsible for the sewage spill and shall provide assistance to the responsible Agency as necessary to prevent sewage from entering the MS4." Please note for the record that the City of Mission Viejo already has these procedures in place.	

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
316	18	LID	F.1	More recently the County provided the Santa Ana RWQCB with a more detailed conception of a framework for land development. It predicates permit compliance on management of the 85th percentile storm volume, presumes the application of LID BMPs based upon a prioritized consideration of infiltration, capture and re-use, evapo-transpiration, and bio-retention/biofiltration, and requires treatment of residual runoff volumes for which the application of LID BMPs has been determined to be infeasible at site, sub-regional and regional scales. The framework also integrates options for water quality credits and provides for alternate compliance approaches including participation in a watershed project and contributions to an "in-lieu" fund. It also explicitly recognizes bio-retention/bio-filtration BMPs as LID BMPs and the continued and entirely legitimate contribution of effective structural BMPs such as constructed wetlands and detention ponds to the practice of stormwater quality management. The City agrees with the County and the other Permittees that it is imperative that there be a uniform countywide development standard for water quality protection. Consequently, the framework language that is currently being supported by both the North Orange County Permittees and staff of the Santa Ana Regional Board should be the starting point for discussion with respect to the subject Tentative Order.	The Tentative Order's requirements regarding the implementation of low impact development practices has been changed to be consistent with Region 8's recently adopted MS4 permit.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
317	4	Economic	Attachement E:MRP	The specific comments provided below are intended to ensure that any changes to environmental monitoring requirements are based on careful strategic assessments of the current effort to ensure that revisions ultimately continue to most effectively support DAMP implementation. Also, at a time of unprecedented fiscal challenge there can be no required commitment of additional resources to environmental monitoring. Any new monitoring requirements will require offsetting and compensatory reductions in existing monitoring obligations.	The Regional Board does not agree that "any new monitoring requirements will require offsetting and compensatory reductions in existing monitoring programs." The commenter does not provide any regulatory language or evidence to support this assertion. Furthermore, USEPA (61 Fed Reg 43761) has addressed the question regarding the quantity of storm water monitoring required for MS4 NPDES permits: "The amount and types of monitoring necessary will vary depending on the individual circumstances of each storm water discharge. EPA encourages dischargers and permitting authorities to carefully evaluate monitoring needs and storm water program objectives so as to select useful and cost-effective monitoring approaches. For most dischargers, storm water monitoring can be conducted for two basic reasons: 1) to identify if problems are present, either in receiving water or in the discharge, and to characterize the cause(s) of such problems; and 2) to assess the effectiveness of storm water controls in reducing contaminants and making improvements to water quality." The Regional Board maintains that it considers monitoring needs and program objectives when requiring monitoring. The Regional Board has considered the position of the Copermittees when evaluating the Tentative Monitoring and Reporting requirements and significant reductions and modifications have been made to the Tentative Order in an effort to maintain a cost-neutral monitoring program. The latest draft of the Tentative Order eliminates multiple monitoring requirements and allows the Copermittees to substitute participation in regional monitoring programs. These actions are expected to be more cost efficient and prevent redundancy.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
318	4	Monitoring	Attachement E:MRP	The 6-hour holding time for samples of indicator bacteria limit the length of time that sampling teams can spend in the field and do not allow sampling of some episodic events. A typical day of Bioassessment monitoring at three locations requires 8 hours in the field for PHAB assessment, and collection of benthic macroinvertebrate, water quality, and toxicity testing samples. Mass Emissions monitoring of stormwater runoff can occur on weekends and holidays when contract laboratory services are not available. Most importantly, monitoring bacteriological quality of stormwater at Mass Emissions site will not produce useful information since access to flood control channels is prohibited during periods of stormwater runoff and the Mass Emissions monitoring sites are generally great distances upstream of the coastal receiving waters. Proposed Modification: Exempt monitoring of bacteriological quality at Bioassessment sites and during stormwater events at Mass Emissions sites.	The Regional Board finds the exemption of Bioassessment sampling from bacteriological sampling to be a reasonable request. The Tentative Order has been updated to reflect the exemption. The Regional Board finds the exemption of Mass Loading sampling from bacteriological sampling to not be a reasonable request. The information provided to support this exemption is not of sufficient concern to warrant the exemption. The commenter's concerns with monitoring at Mass Loading stations include the monitoring itself, distance from coastal receiving waters, and availability of laboratory services and are addressed as follows: The comment regarding monitoring accessibility for mass loading stations and holding times appears to assume composites are required for bacteriological sampling. This is not the case, as II.A.1.d.2 clearly states grab samples are to undergo bacteriological analysis. The comment regarding the distance from coastal receiving waters is concerning, as coastal receiving waters are not the only waters which have REC-1 as a designated Beneficial Use. Inland surface waters within Southern Orange County are all classified as having REC-1 as a Beneficial Use or potential Beneficial Use. Lastly, the accessibility of laboratory services within Southern Orange County is not a sufficient reason for exempting water quality sampling. Furthermore, with the exception of the initial storm event, the remaining mass loading language allows for flexibility in choosing sampling dates.
319	4	Monitoring	Attachement E:MRP	Monitoring for oil and grease concentration will not detect lighter petroleum fractions such as gasoline and diesel. Oil and grease has rarely been detected in 5 years of monitoring in the Dry Weather Reconnaissance Monitoring Program. Proposed modification: Collect a grab sample for oil and grease during stormwater runoff monitoring at Mass Emissions and Ambient Coastal Receiving Water sites. Collect a grab sample for total petroleum hydrocarbons whenever a sheen is observed	As in Comment 318, sampling for Oil and Grease as required in the Order shall be done using grab samples for Mass Loading stations. The Regional Board agrees with the commentor's proposal that total petroleum hydrocarbons only be tested if a sheen is observed. The Tentative Order has been updated to reflect this modification.
320	4	Monitoring	Attachement E:MRP	A Stormwater Monitoring Coalition (SMC) review of Bioassessment data collected in Southern California has shown that at sites where flow is year-round there is no statistical difference in IBI scores between the spring and fall seasons. Proposed Modification: Modify the sampling frequency for Bioassessment to once a year.	The Regional Board finds this a reasonable request at this time. The Tentative Order has been updated to reflect the proposed changes.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
321	4	Monitoring	Attachement E:MRP	The waiver of a single, annual Bioassessment monitoring event to alternatively conduct a study on the effects of PHAB modification on WARM, WILD, and/or COLD beneficial uses of inland receiving waters would not constitute a quid quo pro exchange of resources. The special study would be much more costly. Proposed modification: The Regional Board should offer a more equitable option for alternative monitoring. One option could be reallocation of saved resources from a once-per-year sampling frequency (proposed above) to a collaborative SMC study on the effects of PHAB modification.	The Regional Board is amenable to providing flexibility and to the Copermittee's requests to address emerging issues or identified potential problems. The language under II.A.2.b.1 of the Tentative Order has been changed to allow Copermittees to propose and conduct (upon approval of the Regional Board Executive Officer) special studies or participate in regional special studies. This is also clarified in II.5.b for Regional Monitoring Programs.
322	4	Monitoring	Attachement E:MRP	It is unclear why the Pearl Street drain is included in the list of priority drains for special investigations. In the latest PEA submittal, Figures C-11.16b and C-11.16c show that none of the 51 samples collected from the surfzone near the drain outlet contained concentrations of indicator bacteria above the AB-411 single sample standards. Proposed Modification: Remove special study requirement for the PEARL street drain. The requirement that all special investigations be concluded by June 30, 2011 does not provide adequate time for determining if conditions in receiving waters are protective, or likely to be protective, of beneficial uses (I.B, Question 1). In order to answer Question 1 sufficiently, an epidemiological study must be conducted. The Doheny State Beach epidemiology study has shown that these methods are quite expensive and require a significant commitment of resources. Question 4 will be best answered when the methods of Microbial Source Tracking are more refined. Extending the reporting period for the special investigations will provide a better basis to address the Regional Board's concern about sources of bacteria and impacts on beneficial uses.	Section 5 (Coastal Storm Drain Monitoring) has been removed from the Tentative Order.
323	4	Monitoring	Attachement E:MRP	The requirement that the new Inland Aquatic Habitat monitoring program be implemented by the beginning of the rainy season 2010 does not provide adequate time to develop this new monitoring program nor reallocate staff resources from the existing monitoring program. Furthermore, Regional Board staff must recognize that any increase in any specific element of the monitoring effort will need to be offset by strategically considered compensatory reductions in other elements. Proposed modification: Program implementation of this new monitoring program should be postponed until the end of storm season 2010-11.	Please see response to Comment 317 regarding the commenter's statement that "Regional Board staff must recognize that any increase in any specific element of the monitoring effort will need to be offset by strategically considered compensatory reductions in other elements." Section 6 (High Priority Inland Aquatic Habitats) has been removed from the Tentative Order.

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
324	4	Monitoring	Attachement E:MRP	II.B.1 Wet Weather Runoff Monitoring – MS4 Outfall Monitoring [page 15 and May 5 updates] See comment above with respect to implementation schedule. Proposed modification: Program implementation of this new monitoring program should be postponed until the 2010-2011 monitoring year. II.B.2 Wet Weather Runoff Monitoring – Source Identification Monitoring [page 15] The requirement that the new Source Identification monitoring program be implemented within each watershed and must begin no later than the 2008-2009 monitoring year occurs during a timeframe prior to permit adoption. Proposed modification: Program implementation of this new monitoring program should be postponed until the 2010-2011 monitoring year to allow the Permittees adequate time to develop this new monitoring program and integrate it into the next budget cycle (2001-11).	The Regional Board finds these to be reasonable requests for the Wet Weather Runoff Monitoring requirements. The Tentative Order has been updated to reflect the changed dates.
325	4	Monitoring	Attachement E:MRP	The 1-hour composite sampling requirement (if flow is observed) will make monitoring of three sites in a single day (by a single team) difficult because of holding time requirements for bacteriological samples. Proposed modification: Dry Weather Reconnaissance monitoring should be conducted with grab samples. Composite sampling should be considered as an ancillary assessment tool for use when additional source identification efforts are deemed necessary.	The Regional Board finds this to be reasonable request. The Tentative Order language has been updated to reflect the proposed changes.
326	4	Monitoring	Attachement E:MRP	The requirement that the Planned Monitoring Program be submitted September 1st of every year, beginning on September 1, 2009, does not allow adequate time for analysis of the monitoring data from the prior year as it is affected by management actions undertaken throughout the MS4, subject of the annual Performance Effectiveness Assessment. Proposed modification: Rather than additional reporting requirements to describe routine monitoring efforts, Board staff and the Permittees should conduct an annual meeting after submission of the Annual Report to discuss the content of the report and any changes to the monitoring program or suggestions for special studies. This approach will promote a more collaborative relationship between the Permittees and Board staff and may help streamline the renewal of future permits.	Comment noted. Please see response to Comment 183. In addition, the Regional Board proposes that the appropriate format to discuss the content of the monitoring annual report, including any changes or suggestions, would be for the Copermittees to include the monitoring in the annual watershed review meetings (see response to Comment 267).

Comment No.	Commenter	Subject	Section	Specific Comment	Comment Response
327	4	Monitoring	Attachement E:MRP	The requirement that the Receiving Waters and Urban Runoff Monitoring Annual Report be submitted October 1st of every year, beginning on October 1, 2010, does not provide adequate time for relevant analysis of the monitoring data collected in the 12-month period immediately prior to the proposed reporting date. Previous annual reports were submitted on November 15th of each year and assessed the results of monitoring activities conducted in the 12-month period ending 4 ½ months prior to the reporting date. Proposed modification: The Receiving Waters and Urban Runoff Monitoring Programs Annual Report should be submitted in conjunction with the Unified Annual Report and Performance Effectiveness Assessments	Comment noted. Please see response to Comment 183.
328	4	Construction	F	Section F.2.d.(1)(c)(i) (Page 48) states that the Permittees must require implementation of advanced treatment for sediment at construction sites that are determined to be an exceptional threat to water quality. The Fact Sheet provides no justification for this requirement. The newly released draft Statewide Construction General Stormwater Permit identifies the Active Treatment System (ATS) as an advanced sediment treatment technology. The ATS prevents or reduces the release of fine particles from construction sites by employing chemical coagulation, chemical flocculation, or electrocoagulation to aid in the reduction of turbidity caused by fine suspended sediment. The recently released (April 2009) Draft Construction General Stormwater Permit does not require use of ATS but identifies it as an available BMP. However, that permit acknowledges that the ATS is a newly emerging technology in California. The provisions requiring the use of ATS should be deleted from this permit, and the selection of BMPs for construction operations, especially an ATS, should be done under the aegis of the Statewide Construction General Stormwater Permit.	The requirements for active treatment systems in the Tentative Order are consistent with the requirements in the adopted MS4 permit for San Diego County. Although the draft General Construction Permit may have some basic requirements for active treatment systems, there is no assurance that those requirements will be in the final adopted version of the permit. The Copermittees have a greater knowledge and understanding of site conditions within their jurisdiction than the general permit. Therefore, the Copermittees are more appropriate to know when and how to implement ATS within their jurisdiction. Advanced treatment has been effectively implemented extensively in the other states and in the Central Valley Region of California. In addition, the Regional Board's inspectors have observed advanced treatment being effectively implemented at large sites greater than 100 acres and at small, less than 5 acre, in-fill sites. Advanced treatment is often necessary for Copermittees to ensure that discharges from construction sites are not causing or contributing to a violation of water quality standards. For example, the Basin Plan lists the water quality objective for turbidity as 20 NTU for all hydrologic areas and subareas except for the Coronado HA (10.10) and the Tijuana Valley (11.10). For certain construction sites with large slopes and exposed areas, the only technology that is likely to meet 20 NTU is advanced treatment combined with erosion and sediment controls. To ensure the MEP standard and water quality standards are met, the requirement for implementation of advanced treatment at high threat construction sites has been added to the Order, while still providing sufficient flexibility for each Copermittee's unique program.