

ATTACHMENT A
ORANGE COUNTY DETAILED COMMENTS ON
CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION
TENTATIVE ORDER No. R9-2015-0001
NPDES NO. CAS0109266

This document, **Attachment A**, contains the detailed legal and technical comments of the County of Orange and the Orange County Flood Control District (collectively, the “**County**”) on Tentative Order No. R9-2015-0001 dated September 18, 2014 (“**Tentative Order**”). These comments are divided into three sections (*General, Findings, and Permit Provisions*) and address issues relating to specific parts of the Tentative Order. At times, the issues and concerns raised will pertain to more than one section of the Tentative Order. **Attachment B** contains the recommended language changes to the Tentative Order and also includes some minor edits in order to provide additional clarification where necessary.

The County of Orange, as the Principal Permittee, and the 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 collectively refer to themselves as “San Diego Region Permittees” or “Permittees.” The Tentative Order refers to the County and incorporated cities of South Orange County as the “Copermittees.” As such, the comments below use the term “Copermittees” to be consistent with the terminology of the Tentative Order.

GENERAL

1. THE DRAFT ORDER DOES NOT RECOGNIZE THE REPORT OF WASTE DISCHARGE OR THE SIGNIFICANT WATER QUALITY OUTCOMES THAT HAVE BEEN ACHIEVED IN ORANGE COUNTY AND, THEREFORE, LACKS SUBSTANTIAL EVIDENCE TO SUPPORT NEW OR MODIFIED PROGRAM REQUIREMENTS.

The Copermittees submitted a Report of Waste Discharge (ROWD) to the San Diego Regional Water Quality Control Board (“Regional Board”) on May 20, 2014. Pursuant to federal law, the Copermittees’ ROWD is an application to discharge pollutants from a point source to waters of the United States and be covered by a fifth term municipal separate storm sewer system (MS4) National Pollutant Discharge Elimination System (NPDES) Permit.¹ The ROWD evaluates the fourth term MS4 Permit activities and discusses the accomplishments of the Orange County Stormwater Program. Based on the ROWD’s assessment and findings, the application identifies the activities that are proposed for the fifth term Permit and including additional pollutant control initiatives. The ROWD is also the technical basis or substantial evidence for what regulations and activities will be required in the fifth term Permit.

The Copermittees’ application for a fifth term Permit is predicated on the assessment of the “State of the Environment” (ROWD, Section 2). This assessment describes the results of the

¹ 40 CFR § 122.21.

long-term monitoring and special studies that are used to examine the condition of the surface water environment in Orange County with an emphasis on recreation and aquatic ecosystem health. The analyses focus on bacteria, nutrients, toxicity and improvements in water quality, as well as recommendations for the fifth term Permit intended to ensure further improvements in surface water quality.

However, despite the comprehensive evaluation of the Orange County Stormwater Program presented in the ROWD, there is no discussion in the Draft Order regarding the “State of the Environment.” In fact, the Draft Order Findings and Fact Sheet do not reference the Copermittees’ application or cite specific areas in the ROWD to provide a basis for or justify particular fifth term stormwater program modifications. Although Finding 38 states that the Fact Sheet “contains background information, regulatory and legal citations, references and additional explanatory information and data in support of the requirements of this Order,” many of the requirements within the Tentative Order lack technical justification. The comments provided herein identify many of the areas where new or modified provisions of the Tentative Order lack factual or technical support in the Findings and/or Fact Sheet. Examples of this include, but are not limited to, the following:

- Basis for including Orange County in the regional municipal stormwater permit;
- Basis for requiring uncontaminated pumped ground water, foundation drains, water from crawl space pumps, and footing drains to obtain coverage under the San Diego Region groundwater extraction permits;
- Basis for requiring conventional BMPs onsite in addition to alternative compliance;
- Basis for biofiltration BMPs required to be sized at 1.5 times the design capture volume;
- Basis for biofiltration BMPs not being an effective LID and treatment measure per the requirement to size them at 1.5 times the design capture volume and also require conventional BMPs when they are used;
- Basis for offsite regional BMPs required to be sized at 1.1 times the design capture volume;
- Basis for verification of coverage under all related permits for construction sites; and
- Basis for establishing Water Quality Based Effluent Limits (WQBELs) expressed as numeric effluent limitations, in lieu of WQBELs expressed as BMPs, for the TMDL provisions.

The Findings (Discharge Characteristics and Runoff Management) only contain generic statements about water quality and excludes the key findings from the ROWD. Although the Findings within Section B of the Draft Order may have been the general factual basis for the Copermittees’ first and second term permits, they are not appropriate for an advanced fifth term stormwater program.

The absence of any recognition of the significant water quality outcomes that have been achieved in Orange County (*e.g.*, coastal water quality) creates a false case, in many

instances, for regulatory change. Without support from specific findings and other evidence, the requirements of the Draft Order, in many instances lack substantial evidence and are, arbitrary and capricious, and therefore, cannot be lawfully adopted.²

Action: The Draft Order needs to include the key findings from the Report of Waste Discharge (including the State of the Environment) and use this information as the basis for the Draft Order's requirements. The Findings and/or Fact Sheet should be modified to include the technical justification for the requirements listed above.

2. THE NUMBERING IN THE TENTATIVE ORDER SHOULD EXPLICITLY IDENTIFY THE MAJOR SECTIONS TO HELP GUIDE THE READER.

The County is recommending that the Regional Board explicitly identify the numbering system within the Tentative Order subsections in order to assist and orient the reader. For example, within the Provisions (Section II of the Tentative Order):

- The sub-sections within Provision A should be listed as:
 - A.1 Discharge Prohibitions instead of 1. Discharge Prohibitions
 - A.2 Receiving Water Limitations instead of 2. Receiving Water Limitations
- The sub-sections within Provision B should be listed as:
 - B.1 Watershed Management Areas instead of 1. Watershed Management Areas
 - B.2 Priority Water Quality Conditions instead of 2. Priority Water Quality Conditions

Given the styles and formatting currently used within the Tentative Order, these edits were not made within Attachment B.

Action: Incorporate a definitive numbering system.

FINDINGS

3. FINDING 2 (PAGE 1 OF 130) – A REGIONAL PERMIT CANNOT BE ISSUED TO ORANGE COUNTY BECAUSE THERE IS NO SYSTEM-WIDE, JURISDICTION-WIDE, WATERSHED OR OTHER BASIS.

The Tentative Order is intended to cover Copermittees in three large metropolitan counties – Orange, Riverside and San Diego. In May 2012, Orange and Riverside Counties (“**Counties**”) sent letters to Staff Counsel for the Regional Board requesting the legal authority to issue a regional permit to the three counties.³ The Counties contended that, in accordance with federal regulations, there was no system-wide, jurisdiction-wide or watershed basis to issue a regional permit. The Counties also asserted that the lack of a Report of Waste Discharge (ROWD) process for either county prior to the initial adoption of

² *City of Rancho Cucamonga v. Regional Water Quality Control Bd.*, 135 Cal. App. 4th 1377, 1384–1385 (2006); Code Civ. Proc. § 1094.5(b).

³ Letter from Ryan M. F. Baron, Office of County Counsel, County of Orange, to Catherine Hagan, Office of Chief Counsel, State Water Resources Control Board, San Diego Region (May 10, 2012); Letter from David H. K. Huff, Office of County Counsel, County of Riverside, to Catherine Hagan, Office of Chief Counsel, State Water Resources Control Board, San Diego Region (May 21, 2012).

the Tentative Order prevented the issuance of a regional permit on the grounds that there was a conflict with both federal and state law. On September 7, 2012, Staff Counsel responded to the Counties stating that there was a jurisdiction-wide and watershed basis to impose a regional permit on the Counties, and cited legal authority and examples in the Bay Area and an Alaskan borough where regional permits had been issued.⁴

For the following reasons, the County continues to believe that the Regional Board lacks authority to issue a regional permit to Orange County:

1. Orange County's MS4 system does not interconnect with Riverside and San Diego Counties,
2. There is no jurisdictional basis to issue a regional permit to Orange County,
3. Orange County's MS4 does not drain into a shared watershed,
4. Orange County's MS4 is not adjacent to Riverside or San Diego's MS4, and
5. The quantity and nature of pollutants differ between the three counties.

Therefore, the Regional Board cannot under federal and state regulations impose a Regional Permit without the Copermittees expressly consenting to the Board's jurisdiction. The Copermittees therefore enroll in the region-wide permit under protest.

a. There Is No System-wide, Jurisdiction-Wide, Watershed or Other Basis by Which to Legally Impose a Regional Permit on Orange County.

Finding 2 in the Tentative Order states that the legal and regulatory authority for implementing a regional MS4 permit stems from Section 402(p)(3)(B) and 40 CFR 122.26(a)(1)(v). The Tentative Order also cites EPA's Final Rule regarding stormwater discharge permit application procedures that there is flexibility to establish system-wide or region-wide permits.⁵ During Focused Meeting Workshops conducted on June 27, 2012 and July 11, 2012, Regional Board staff stated that the reason for a regional permit was to consolidate all three permits into one to lessen the amount of permit writing time for three separate permits and reduce internal costs for writing and issuing permits. The justification at Finding 2 is largely the same although it adds that the "regional nature of this Order will ensure consistency of regulation within watersheds and is expected to result in overall costs savings for the Copermittees and San Diego Water Board."⁶

When EPA established regulations for MS4 permit issuance, the Response to Comments contemplated one permit being issued to a single system. And although it allowed

⁴ Letter from Jessica Jahr, California Regional Water Quality Control Board, San Diego Region, to Ryan M. F. Baron, Office of County Counsel, County of Orange, and David H. K. Huff, Office of County Counsel, County of Riverside (Sept. 7, 2012) ("Staff Counsel Letter").

⁵ 55 Fed. Reg. 47990, 48039-48042 ("EPA Final Rule").

⁶ Part I.2.

discretion to define “system,” it did so based on the following criteria – interconnectedness, political jurisdiction, and watershed-based.⁷

Interconnection. Although Orange County geographical boundaries abut San Diego and Riverside Counties, Orange County’s MS4 does not interconnect with the counties regulated under the regional permit. There is substantial undeveloped area between the developed jurisdictions of Orange County and Riverside Counties. The Santa Ana Mountains and the Cleveland National Forest separate Orange and Riverside Counties encompassing tens of thousands of acres of total land separating the two counties. Camp Pendleton military base separates Orange and San Diego Counties totaling over 122,000 acres with no adjacent cities or interconnected MS4s. Clean Water Act (CWA) regulations expressly state that a permit can be issued on a system-wide basis covering all discharges from MS4s within a large or medium municipal storm sewer system. One of the primary considerations in defining a “large or medium municipal separate storm sewer system” is one that has physical interconnections with other municipal separate storm sewers.⁸ In this case, there are no physical interconnections. A depiction of the County’s geographical separation have been entered into the record and is included in Appendix 1.

Jurisdiction. There is no jurisdiction-wide basis to issue a regional permit. 40 CFR 122.26(a)(3)(ii) states that one system-wide permit can cover all discharges from MS4s within a large or medium municipal storm sewer system located within the same jurisdiction. Orange, Riverside and San Diego Counties are separate counties with distinct political and geographical boundaries that do not drain into a common watershed and do not share physical interconnections. The three counties are not within the same political jurisdiction. While Region 9 can be considered one jurisdiction for Regional Water Board purposes, federal regulations state that there has to be one stormwater management regional authority in which to issue a permit, and the Regional Board is not such an authority.⁹ Regardless, such a permit can only be issued to a multi-jurisdictional entity upon a permit application and upon there being an interconnected MS4 or adjacent MS4. There is no tri-county stormwater management authority, there is no system-wide interconnection and Orange County is not adjacent to San Diego and Riverside Counties due to the large federal lands that separate the counties.

Watershed. Orange County does not drain into a shared watershed with Riverside and San Diego Counties. The Orange County Copermittees drain into various watersheds that drain into the Pacific Ocean. The Riverside County Copermittees drain into the Santa Margarita watershed. San Diego County drains into various watersheds. Orange County’s MS4 does not drain into or share one common watershed with either county, and therefore cannot be regulated on this basis. During the prior adoption hearing for the regional permit, it was asserted by Regional Board staff that one permit can be

⁷ 33 USC 1342(p)(3)(B)(i); 40 CFR 122.26(a)(1)(v).

⁸ 40 CFR 122.26(b)(4) (defining large systems); 40 CFR 122.26(b)(7) (defining medium systems).

⁹ 40 CFR § 122.26(a)(3)(iii)(C).

issued based on adjacency. That is, two or more separate MS4s can be issued one permit for discharges into watersheds adjacent to one another, such that they abut one another. The EPA and Army Corps of Engineers' definition of "adjacent," however, does not include mere proximity, but that one waterbody has a significant effect on the other waterbody. "Adjacent" is a waterbody adjacent to navigable waters or waters of the U.S. because the waterbodies are "inseparably bound up."¹⁰ "Adjacent waters" are wetlands, ponds, lakes and similar water bodies that provide similar functions which have a significant nexus to traditional navigable waters, interstate waters and the territorial seas. These include waters and wetlands that are adjacent to traditional navigable waters, interstate waters, and the territorial seas as well as waters and wetlands adjacent to other jurisdictional waters such as tributaries and impoundments."¹¹ In its Proposed Rule, EPA sought comment on clarifying the concept of adjacency as those waters that are "neighboring." "Neighboring" is proposed as possessing "a shallow subsurface or confined surface hydrologic connection to a jurisdictional water," that can exchange water, along with chemicals and organisms within that water, and subsequently have a significant effect, particularly in combination with other adjacent waters in the watershed, on the chemical, physical, or biological integrity of a downstream traditional navigable water, interstate water, and the territorial seas."¹²

Quantity and Nature of Pollutants. Orange, Riverside and San Diego Counties are comprised of different climates, soil types, waterbodies and other notable differences. Based on differing permit requirements for the three counties, such as TMDLs, and data filed in annual reports and past ROWDs, the quantity and nature of pollutants are different between the three counties, and do not serve as a basis or determination by which to lump all three counties into a one-size fits all permit (e.g., hydromodification).

Other Support. In the Staff Counsel Letter, Regional Board staff cited examples in the Bay Area and in Alaska where regional permits have been issued. In the Bay Area, various cities and counties under that permit interconnect in some fashion and drain into the San Francisco Bay. The Bay Area is also represented by a joint powers organization or regional watershed management program comprised of 8 municipal stormwater programs that voluntarily agreed to end their existing permits early and enroll in a regional permit. In the case of the Alaska example, a "regional" permit was issued to the Fairbanks North Star Borough, City of Fairbanks, City of the North Pole, the Alaska Department of Transportation and the University of Alaska Fairbanks. Further examination of that permit and the stormwater program maps demonstrate, though,

¹⁰ 79 Fed. Reg. 22188, 22191 ("Proposed Rule"). *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985).

¹¹ 79 Fed. Reg. 22188, 22195 and 22207 ("Connectivity is a foundational concept in hydrology and freshwater ecology. Connectivity is the degree to which components of a system are joined, or connected, by various transport mechanisms and is determined by the characteristics of both the physical landscape and the biota of the specific system.").

¹² *Id.* at 22210.

that the region regulated is a borough, the Alaskan equivalent of a county. All of the regulated Copermittees are physically interconnected through its storm drain system and most drain into one watershed. Therefore, neither the Bay Area nor the Fairbanks Borough permits provide sufficient examples of a regional permit comparable to the one being issued to Orange County.

As previously stated, Regional Board staff indicated in the June 27, 2012 and July 11, 2012 workshops that the rationale for implementing a region-wide permit was minimize costs to the Regional Board in preparing permits. Federal regulations, however, do not authorize and the EPA Final Rule does not contemplate regional permit issuance based on overall reduced cost savings. Moreover, cost savings have not been demonstrated in the Tentative Order.¹³ Although it may be convenient to ensure consistency of regulation, the EPA Final Rule contemplates such consistency within a watershed and not throughout a geographical area the size of the three counties. And although the EPA Final Rule does use the term “regional” in the Response to Comments, a careful examination of the term shows that EPA was analyzing whether individual permits should be issued to individual cities, a county and its incorporated cities, a set of Copermittees with interconnected sewer systems and other infrastructure, one state entity or a regional stormwater management authority. The largest area by which one permit could be issued under the Final Rule was a state entity that operated a state highway network or one county and its incorporated cities. There is no factual or technical basis in the Tentative Order that meets this criteria or establishes other bases to regulate Orange County under one unified permit. There is also no statistical basis by which to issue a regional permit as Orange County is comprised of over three million people and is the sixth largest county by population in the U.S. In fact, the U.S. Bureau of Census designates Orange County in a different Metropolitan Statistical Area than San Diego County, and is designated in a Combined Statistical Area with Los Angeles, Ventura and San Bernardino Counties.

b. There Is No Technical Basis to Regulate Orange County Due to the Lack of a Report of Waste Discharge Application.

The ROWD is a federally required application that is the technical basis to draft a new permit for a permittee. The information contained in the ROWD is used to determine prospective provisions of the new permit, including but not limited to monitoring, program strengths and other tools that are assessed in the new permit. In other words, the ROWD is the technical basis or substantial evidence for determining what will be required in the new permit. The initial draft of the Regional Permit did not contain a ROWD requirement for Orange County. The Order was subsequently revised to include a ROWD requirement to determine whether modification to the Order upon enrollment by Orange County is necessary, but the Regional Permit was still adopted by the Regional Board with terms and conditions that would also apply to Orange County that were not based on any federally required application or report.

In short, the Regional Permit was adopted by the Regional Board with provisions that regulate Orange County Copermittees, along with specific numeric and other

¹³ 55 Fed. Reg. 47990-01.

requirements that only apply to Orange County that were not based on an application process or other documented technical basis. There is no substantial evidence or basis under the Clean Water Act (“CWA”) by which to impose certain regulations on the County. Thus, the lack of a ROWD requirement prior to initial adoption of the regional permit is in conflict with the CWA, the Porter Cologne Water Quality Control Act (“Porter Cologne”) and the California Administrative Procedure Act.

Action: The County should be issued an individual permit. Incorporate the specific modifications to the Tentative Order, which are provided in Attachment B. The sections include:

- Finding 2 (page 1)
- Finding 28 (page 8)

4. FINDING 7 (PAGE 3 OF 130) - THE IN-STREAM TREATMENT CONTROL SYSTEMS FINDING WILL PRECLUDE THE USE OF REGIONAL BMPs.

In-stream controls must not adversely impact beneficial uses or result in sustained degradation of water quality of the receiving waters. Copermittees and project applicants should have the flexibility to identify creative solutions that meet the alternative compliance goals of mitigating the volume of stormwater not retained onsite or increased potential erosion of downstream receiving waters.

This finding should not prevent the implementation of stream restoration or stream rehabilitation projects and constructed wetlands, or prevent maintenance or reconstruction of existing stream restoration or rehabilitation projects, constructed wetlands, and regional BMPs.

Action: Finding 7 should be modified to allow for the implementation of stream restoration or stream rehabilitation projects and constructed wetlands, or maintenance or reconstruction of existing stream restoration or rehabilitation projects, constructed wetlands, and regional BMPs.

5. FINDING 8 (PAGE 3 OF 130) – IT SHOULD NOT BE PRESUMED THAT DISCHARGES FROM MS4s ALWAYS CONTAIN WASTE OR POLLUTANTS.

Discharges may contain waste or pollutants, but it should not be presumed that they necessarily always contain waste or pollutants.

Under current law, the Regional Board’s issuance of the Permit is a quasi-judicial decision.¹⁴ As a quasi-judicial decision, the Regional Board’s action must be supported by legally adequate findings, and those findings must be supported by evidence in the record.¹⁵

Pursuant to the Supreme Court’s decision in *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, findings are intended to “facilitate orderly analysis and minimize the likelihood that the agency will randomly leap from evidence to conclusions.”¹⁶ Here, there is no cited evidence that stormwater itself is a pollutant or that in

¹⁴ *City of Rancho Cucamonga v. Regional Water Quality Control Board*, 135 Cal.App.4th 1377, 1385 (2006).

¹⁵ *Topanga Association for a Scenic Community v. County of Los Angeles*, 11 Cal.3d 506 (1974).

¹⁶ *Id.*, at 514 (emphasis added).

every instance it contains pollutants or waste as those terms are defined by the CWA and Porter Cologne respectively. Absent evidence demonstrating that this is the case, in all cases, the Regional Board cannot make this finding.

Moreover, as a matter of law, the Regional Board lacks the authority to regulate pure stormwater as a pollutant. The CWA and its implementing regulations define the term “pollutant” to mean:

dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials (except those regulated under the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 et seq.)), heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.¹⁷

Federal regulations further define the term “stormwater” to mean “storm water runoff, snow melt runoff, and surface runoff and drainage.”¹⁸ Notably, the definition of the term “pollutant” does not include “stormwater.” Moreover, the text of the CWA requires the discharge of *pollutants* to be reduced to the Maximum Extent Practicable (MEP).¹⁹ There is no prohibition on or comparable authority to regulate the discharge of pure stormwater.

This rationale was recently adopted by the Eastern District of Virginia, when it held that the EPA has no authority under the Clean Water Act to regulate non-pollutants.²⁰ Specifically, the Court stated:

“Pollutant is statutorily defined. (33 U.S.C. § 1362(6).) The Court sees no ambiguity in the wording of this statute. EPA is charged with establishing TMDLs for the appropriate pollutants; that does not give them the authority to regulate nonpollutants. The parties agree that sediment is a pollutant under 33 U.S.C. § 1362(6), and stormwater is not. Then how does EPA claim jurisdiction over setting TMDLs for stormwater?”²¹

Likewise, Porter Cologne defines the term “waste” to mean:

“sewage and any and all other waste substances, liquid, solid, gaseous, or radioactive, associated with human habitation, or of human or animal origin, or from any producing, manufacturing, or processing operation, including waste placed within containers of whatever nature prior to, and for purposes of, disposal.”²²

¹⁷ 33 U.S.C. § 1362(6); 40 C.F.R. § 122.2.

¹⁸ 40 C.F.R. § 122.26(b)(13).

¹⁹ 33 U.S.C. § 1342(p).

²⁰ Virginia Dept. of Transportation v. EPA, No. 1:12-CV-775, slip op., 2013 WL 53741 (E.D. Va. Jan. 3, 2013).

²¹ *Id.*, at 5.

²² Water Code § 13050(d).

While the definition is certainly different and potentially broader than the definition of “pollutant” under the CWA, the definition of “waste” does not include stormwater or any other discharge that is not created by human activity. As a matter of law, the Regional Board is therefore without authority to regulate all discharges of stormwater as pollutants or waste.

Action: Incorporate the specific modifications to the Tentative Order, which are provided in Attachment B. The sections include:

- Finding 8 (page 3)
- Finding 16 (page 5)
- Finding 17 (page 5)

6. FINDING 11 (PAGE 4 OF 130) – NATURAL WATERS CANNOT LEGALLY BE CLASSIFIED AS PART OF THE MS4, AND CANNOT BE CLASSIFIED AS BOTH A MS4 AND RECEIVING WATER.

Rivers, streams, creeks and other natural waterbodies cannot be legally classified as a MS4. The definition of a “municipal separate storm sewer” means “a conveyance or system of conveyances including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains” “owned and operated” by a municipality.²³

In California, natural waterbodies are not “owned” by the municipality through which they flow. Such water bodies are generally administered by the State of California in the public trust for the right of the people to use such waters for certain purposes.²⁴ The Legislature, acting within the confines of the common law public trust doctrine, is the ultimate administrator of the trust and may often be the final arbiter of permissible uses of trust lands.

“receiving water” cannot also be an MS4, as is plain from the CWA regulations. An MS4 is itself defined as discharging to waters of the United States.²⁵ An MS4 cannot, in essence, discharge to itself. Moreover, an “outfall” from an MS4 (the point at which the discharge enters a receiving water) does not, pursuant to 40 C.F.R §122.26 (b)(9), include conveyances connecting “segments of the same stream or other waters of the United States and are used to convey waters of the United States.”

In EPA’s Preamble to the initial version of the MS4 regulations, the agency expressly determined that “streams, wetlands and other water bodies that are waters of the United States are not storm sewers for the purposes of this rule” and that “stream channelization, and stream bed stabilization, which occur in waters of the United States” were not subject to National Pollutant Discharge Elimination System (“NPDES”) permits under Section 402 of

²³ 40 CFR 122.26(b)(8).

²⁴ *Marks v. Whitney* 6 Cal. 3d 251, 259, 260 (1971).

²⁵ 40 C.F.R. §122.26(b)(8).

the CWA.²⁶ In further support of the point that a MS4 is an artificial, not natural, watercourse, the types of “conveyances” identified in the regulation (“roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains”) all refer to anthropogenic structures, not natural streams.²⁷

In *South Florida Water Management District v. Miccosukee Tribe of Indians*, the U.S. Supreme Court opined on the issue of whether a NPDES permit was needed when water from a channelized canal was pumped across a levee into a reservoir. The Court held that if the two waterbodies were meaningfully distinct, no permit was needed.²⁸ Likewise, the Court held in *L.A. County Flood Control District v. NRDC* that the flow of water from an improved portion of a navigable flood control channel into an unimproved portion of the same waterway is not a “discharge of a pollutant” under the CWA.²⁹ Based on these two holdings, there is no discharge of pollutants under the CWA if a waterbody like a flood control channel is both classified as a MS4 and receiving water.

This issue is currently being considered by U.S. EPA in its Proposed Rule. EPA has indicated in ex parte meetings that it did not seek comment and did not intend that MS4s be characterized as waters of the U.S. Therefore, the Regional Board should refrain from issuing this finding until the Proposed Rule is final and EPA has lawfully established this classification. Otherwise, such a finding is made purely under state law.

Action: Finding 11 should be deleted. Incorporate the specific modifications to the Tentative Order, which are provided in Attachment B. The sections include:

- *Finding 11 (page 4)*

7. FINDING 12 (PAGE 4 OF 130) – COPERMITTEES DO NOT ACCEPT FREE AND OPEN ACCESS TO MS4S, AND ARE NOT RESPONSIBLE FOR ALL DISCHARGES NOT PROHIBITED.

The Tentative Order states that MS4s provide free and open access and convey discharges to waters of the U.S., and that MS4 operators then accept all responsibility for such discharges not prohibited or otherwise controlled. This is simply not the case and is legally unsupportable. An MS4 is designed to accept stormwater for flood control purposes and prevent damage to life and property. Although it is true that the Copermittees have an obligation to effectively prohibit non-stormwater discharges, namely illicit connections and unlawful dumping, it is also true that the discharger into the MS4 is ultimately responsible for a condition of pollution or violation of a water quality standard. And, in accordance with California state law, MS4s downstream of upstream flows must accept those flows and

²⁶ 53 Fed. Reg. 49416, 49442 (Dec. 7, 1988).

²⁷ 40 CFR § 122.26(b)(8).

²⁸ 541 U.S. 95, 109-112 (2004) (remanding the case to the Florida District Court to determine the hydrological connection between the two waterbodies).

²⁹ *L.A. County Flood Control District v. National Resources Defense Council*, 133 S.Ct. 710 (Jan. 8, 2013).

cannot attempt to block or divert such flows.³⁰ Finding 12 attempts to shift all legal responsibility to the MS4s, which is unsupported by federal and state law.

Action: Incorporate the specific modifications to the Tentative Order, which are provided in Attachment B. The sections include:

- Finding 12 (page 4)

8. FINDING 15 (PAGE 5 OF 130) – THE TENTATIVE ORDER MUST RECOGNIZE THAT THE DISCHARGE OF ALL POLLUTANTS FROM THE MS4 IS SUBJECT TO THE MEP STANDARD.

Section 402(p)(3)(B)(ii) requires the Copermittees to effectively prohibit non-stormwater discharges into the MS4, namely pollutants generated from illicit connections and unlawful dumping.

The Tentative Order at Finding 15, however, states that “non-stormwater discharges from the MS4s are not considered stormwater discharges and therefore are not subject to the MEP standard....”. This finding is not supported by federal law. Although federal law regulates “non-stormwater discharges” into the MS4, Section 402(p)(3)(B)(iii) expressly states that the “discharge of pollutants” shall be reduced to MEP. In drafting this section of the CWA, Congress expressly intended all discharges from MS4s to be subject to MEP as it used the term “pollutant” and did not differentiate between stormwater and nonstormwater, as the Tentative Order attempts to do. Therefore, the duty of the Copermittees to reduce the discharge of pollutants from the MS4 to MEP applies to both stormwater and nonstormwater pollutants.

Furthermore, the focus of the CWA and federal regulations is on a management program that includes a comprehensive planning process to reduce the discharge of pollutants to MEP.³¹ One of the elements of the management program is the illicit discharge prevention program.³² The control and limitation of illicit discharges into the MS4 is intended to achieve the overall MEP standard for discharges from the MS4. This is confirmed by the preamble to EPA regulations that discuss the required elements of the management program. According to EPA:

[Copermittees are required] to develop management programs for four types of pollutant sources which discharge to large and medium municipal storm sewer systems. Discharges from large and medium municipal storm sewer systems are usually expected to be composed primarily of: (1) Runoff from commercial and residential areas; (2) storm water runoff from industrial areas; (3) runoff from construction sites; and (4) *non-storm water discharges*. Part 2 of the permit application has been designed to allow [Copermittees] the opportunity to propose *MEP control measures for each of these components of the discharge*. 55 Fed Reg at 48052 (emphasis

³⁰ *Keyes v. Romley*, 64 Cal.2d 396 (1966); *Locklin v. City of Lafayette*, 7 Cal. 4th 327 (1994).

³¹ 40 CFR 122.26(d)(2)(iv).

³² 40 CFR 122.26(d)(2)(iv)(B)(1).

added). *See also* 55 Fed Reg at 48045 (stating “Part 2 of the proposed permit application [which includes the illicit discharge prevention requirement] is designed to . . . provide municipalities with the opportunity of proposing a comprehensive program of structural and non-structural control measures that will *control the discharge of pollutants, to the maximum extent practicable, from municipal storm sewers.*”) (Emphasis added).

EPA’s position is consistent with existing State Water Resources Control Board policy which states that discharges into the MS4 are to be controlled through an iterative, BMP based approach that is *less* stringent than the MEP standard.³³ The State Board held:

An NPDES permit is properly issued for “discharge of a pollutant” to waters of the United States. (Clean Water Act § 402(a).) The Clean Water Act defines “discharge of a pollutant” as an “addition” of a pollutant to waters of the United States from a point source. (Clean Water Act section 502(12).) Section 402(p)(3)(B) authorizes the issuance of permits for discharges “from municipal storm sewers.”

We find that the permit language is overly broad because it applies the MEP standard not only to discharges “from” MS4s, but also to discharges “into” MS4s. . . [T]he specific language in this prohibition too broadly restricts all discharges “into” an MS4, and does not allow flexibility to use regional solutions, where they could be applied in a manner that fully protects receiving waters. It is important to emphasize that dischargers into MS4s continue to be required to implement a full range of BMPs, including source control. In particular, dischargers subject to industrial and construction permits must comply with all conditions in those permits prior to discharging storm water into MS4s.³⁴

The State Board's decision in the BIA Order makes clear that the CWA does not include a blanket prohibition on discharges of non-stormwater into the MS4. To the extent the Tentative Order would hold the dischargers liable in the event that any discharge into the MS4 occurs, the Tentative Order exceeds the requirements of the CWA and violates existing State Board policy.

It is also technically infeasible in some cases to differentiate between non-stormwater or stormwater pollutants discharged from the MS4. Thus, just as the discharge of non-stormwater into the MS4 is subject to the effective prohibition standard, the discharge of pollutants in non-stormwater from the MS4 is subject to the MEP standard. There are several instances where the specific provisions in the Tentative Order need to be modified in order to reflect this approach.

Action: *Incorporate the specific modifications to the Tentative Order, which are provided in Attachment B. The sections include:*

- *Finding 15 (page 5)*

³³ Specifically in State Board in Order No. WQ-2001-15, *In the Matter of the Petitions of Building Industry Assoc. of San Diego County and Western States Petroleum Assoc.* (2001) (“BIA Order”).

³⁴ *Id.*, at 9-10.

- *Provisions, A. Prohibitions and Limitations (page 15)*
- *Provisions, E. Jurisdictional Runoff Management Programs (page 78)*
- *Provisions, E.1.a. Legal Authority Establishment and Enforcement (page 78)*
- *Provisions, E.2.a. Illicit Discharge Detection and Elimination (page 80)*

9. FINDING 31 (PAGE 10 OF 130) – THE REQUIREMENTS IN THE TENTATIVE ORDER ARE MORE STRINGENT THAN FEDERAL LAW, REQUIRING AN ECONOMIC ANALYSIS. IN ADDITION, THE CURRENT ECONOMIC ANALYSIS IS INSUFFICIENT.

Finding 31 states that pollutant restrictions are not more stringent than federal law, yet an economic analysis is still conducted pursuant to Water Code § 13241. Despite the finding that the Tentative Order does not exceed federal law requirements, there are a number of requirements that are more stringent.

There has not been a full consideration of the section 13241 factors, which would include an analysis of the economic impacts that would result from compliance with the existing stormwater permit compared to the costs of complying with the proposed stormwater permit (*i.e.*, the costs of complying with the new requirements). Instead, the Order’s analysis begins by stating, and without any quantification, that it would more expensive to not fully implement programs. Section 13241 is not satisfied by this inverse analysis.

Additionally, the Tentative Order states that Copermittees have a significant amount of flexibility to choose how to implement BMPs and that “least expensive measures” can be chosen.³⁵ This statement, however, conflicts with the Order’s definition of MEP at C-6 which expressly acknowledges Chief Counsel’s 1993 MEP memo that only the Regional and State Boards determine whether BMPs meet MEP, and that selection of the least expensive BMPs will likely not result in meeting the MEP standard.

The Fact Sheet also fails to cite any recent cost benefit numbers but relies on inapplicable cost data such as a 1999 EPA study on household costs.

The analysis of costs contained in the Fact Sheet is deficient in two additional ways. First, the approach to compliance costs is fundamentally deficient because it tells the public nothing at all about the relationship between the cost of any particular control and the pollution control benefits to be achieved by implementing that control. Under this “generalized” approach, extremely costly requirements that bear little or even no relationship (or even a negative relationship) to the pollution control benefits to be achieved could be “justified” as long as the “overall” program costs are within what the Regional Board deems to be an acceptable range. This is not a proper way to determine whether a control reduces the discharge of pollutants from the MS4 to the MEP. A more individualized assessment of cost is required. Otherwise, dischargers may be required to implement very costly controls that have no relationship to pollution control benefits, a result inconsistent with MEP.

This analytical flaw in the Fact Sheet is compounded by the approach taken to assess the benefits of the Tentative Order. Here again, the assessment approach misses the mark

³⁵ Fact Sheet, Page F-17.

because it tells the public nothing about the pollution control benefits to be achieved by implementation of the controls in the Tentative Order. All the Fact Sheet says, in essence, is that people like clean water and in theory may be willing to pay for it, that urban storm water may contribute to beach closures and that such beach closures have an economic impact. This analysis sheds no light on the relationship between a BMP's costs and the pollution control benefits to be achieved by implementing that BMP.

Second, the Fact Sheet contains faulty assumptions and relies upon outdated or inapplicable data. The California State University, Sacramento (CSUS) Cost Survey assessed program costs for Phase I cities. Nothing in the Fact Sheet links any of the actual conditions of the Phase I permits of the Phase I cities studied by CSUS with any of the requirements of the Tentative Order. Therefore, the study tells the public nothing about the costs to implement the Tentative Order. The data included in the Fact Sheet is also from seven years to more than a decade old. In short, the Fact Sheet uses old data from Phase I programs that have no linkage to any conditions of the Tentative Order. The full costs of implementing the entire program required by the Tentative Order must be assessed.

Lastly, stormwater agencies cannot readily establish or raise fees to help pay for the BMPs necessary to comply with either the California Toxics Rule (CTR) criteria or proposed Site Specific Objectives (SSOs) due to the requirements of Proposition 218, Proposition 26 and the Mitigation Fee Act. For instance, Proposition 218 requires that property-related fees be put to a vote, so cities cannot assess fees without the consent of a majority (two-thirds) of the property owners. Therefore, the costs associated with the implementation and maintenance of the BMPs are more likely to be covered through the stormwater agency General Funds.

Action: Incorporate the specific modifications to the Tentative Order, which are provided in Attachment B. The sections include:

- *Finding 31 (page 10)*

10. FINDING 32 (PAGE 11 OF 130) – THE REGIONAL BOARD HAS NO LEGAL ABILITY TO DETERMINE WHETHER A PARTICULAR MANDATE IS UNFUNDED.

The Tentative Order finds that none of the requirements therein constitute an unfunded local mandate. This finding, however, should be stricken as the Regional Board has no legal ability to determine whether a particular mandate is unfunded. The Commission on State Mandates is the only State agency that has the jurisdiction and ability to make that determination.

The Fact Sheet's discussion of unfunded state mandates is not consistent with applicable legal authority or the Tentative Order, as discussed below.

Article XIII B, Section 6(a) of the California Constitution ("Section 6") provides that whenever "any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service" Section 6 applies to storm water permits issued by the State Board and the Regional Boards.³⁶ Thus, Section 6 applies to the Tentative Order.

³⁶ *County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898, 920.

Section 6 was added to the California Constitution by voter approval in 1979, as part of a larger effort that had as its goal both limiting state and local spending and restricting the ability of local entities to raise revenue. Section 6 must be viewed as a “safety valve” designed to protect local governments from being placed in the untenable position of being required by the state, on the one hand, to implement certain state mandated programs while also, on the other hand, being prohibited from raising the money needed to pay for those state mandated programs.³⁷ Recognizing that such a situation was neither a fair nor a wise approach to governing, the voters enacted Section 6 to prevent state government from shifting financial responsibility for carrying out governmental functions to local agencies without the state paying for them.

To implement Section 6, the Legislature created the Commission on State Mandates (“Commission”). The Commission has sole and exclusive jurisdiction to determine whether a state law or order of a state agency is an unfunded state mandate.³⁸ In accordance with Section 6, Government Code section 17500 et seq., and case law, the Commission on State Mandates has determined that an unfunded state mandate exists when: (a) the state imposes a new program or higher level of service that is; (b) mandated by state law, not federal law; and (c) when the local government lacks adequate fee authority to pay for the new program or higher level of service.

Whether and how individual stormwater permit conditions constitute unfunded state mandates is currently the subject of pending litigation. In 2009 and 2010, the Commission on State Mandates determined that parts of the Los Angeles Phase I Permit and major components of the San Diego Phase I Permit constituted unfunded state mandates. The State challenged these two decisions in court, and, in the San Diego matter, the court confirmed that only the Commission on State Mandates could make the ultimate determination of whether a permit condition constituted an unfunded state mandate. Specifically, the court in the San Diego case held that the “Commission has exclusive authority to determine whether the Regional Board has imposed a state mandate.” The court in the San Diego case further concluded that the Commission on State Mandates should reconsider its decision to assess whether each of the individual permit conditions were required to achieve the MEP standard. Specifically, the court held that “the Commission must determine whether any of the permit conditions exceed the ‘maximum extent practicable’ standard.” (Emphasis added.) Therefore, contrary to the discussion in the Fact Sheet, each permit condition (control) must be assessed to determine whether it is consistent with MEP.

This issue is currently being addressed by the California Supreme Court in *Department of Finance v. Commission on State Mandates*.³⁹

³⁷ *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 735; *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

³⁸ Government Code §§ 17551 and 17552; *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334.

³⁹ (2013) 220 Cal.App.3d 740.

Action: Finding 32 should be deleted. Incorporate the specific modifications to the Tentative Order, which are provided in Attachment B. The sections include:

- Finding 32 (page 11)

PERMIT PROVISIONS

GENERAL

11. THE TENTATIVE ORDER INCLUDES LANGUAGE THAT PROVIDES AN OVERLY BROAD INTERPRETATION OF THE STORMWATER REGULATIONS BY REQUIRING MS4s TO “ENHANCE” AND/OR “RESTORE” BENEFICIAL USES OR HABITAT.

The Tentative Order recognizes that the overarching objective of the CWA is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters” and that, in order to carry out this objective, the CWA utilizes a number permitting programs and regulatory tools to regulate the discharge of pollutants and other materials to Waters of the United States (Waters of the U.S.).

However, CWA section 402(p), that section which governs that permitting for municipal and industrial stormwater discharges, is only one regulatory tool within the CWA. Moreover, it requires the MS4s to focus on the quality and impact of their non-stormwater and stormwater discharges, not on the active enhancement and/or restoration of beneficial uses or habitat.

While the Fact Sheet recognizes that the development and implementation of a WQIP will identify the highest priority water quality conditions and that “addressing these threats and/or adverse impacts should restore the physical, chemical, and biological integrity of receiving waters, and result in the restoration and protection of the beneficial uses of the receiving waters in the Watershed Management Area,”⁴⁰ the Tentative Order should not explicitly require the enhancement or restoration of beneficial uses as the CWA only requires that the Copermitees protect beneficial uses and prevent nuisance.⁴¹

This is important from a prioritization and resource allocation perspective because while the Copermitees must control the discharge of pollutants in order to, ultimately, protect the beneficial uses of the receiving waters, they are not required to actively “enhance” or “restore” the beneficial uses and habitat of the receiving waters. It must be recognized that the actions and resources necessary to “protect” the beneficial uses may, in fact, be different than those that would be required to “enhance” or “restore” the beneficial uses of a particular receiving water.

Action: Incorporate the specific modifications to the Tentative Order, which are provided in Attachment B. The sections include:

- Provisions, B. Water Quality Improvement Plans (page 20)
- Provisions, E.5.e. Retrofitting and Rehabilitating Areas of Existing Development (page 115)

⁴⁰ Fact Sheet, Page F-45.

⁴¹ 40 CFR 131.120(1); CWC 13263(a) and 13050.

12. THE TENTATIVE ORDER INCLUDES LANGUAGE THAT PROVIDES AN OVERLY BROAD USE OF THE TERM “PROHIBIT.”

Although some changes were made in the Tentative Order language, the Tentative Order should be reviewed for the correct use of the terminology “effectively prohibit” since it appears that there are a couple of cases where this language was not modified.

The term “prohibit” is broader than CWA requirements and should be changed to “effectively prohibit.” 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 (Emphasis added)

The Tentative Order shall ensure the County “effectively prohibit non-stormwater discharges” but the Regional Board 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,” which recognizes the constraints of owning and operating a stormwater drainage system that includes hundreds of miles of open channels. The finding/provision should note that non-stormwater discharges are effectively prohibited.⁴²

In addition, discharges that are not significant sources of pollutants are exempted from the prohibition. In a practical sense, the use of word “effective” also provides flexibility to assess the impacts of relatively benign discharges such as air condition condensate, individual car washing, and non-emergency fire-fighting flows or non-anthropogenic sources before instituting a prohibition.

Action: Incorporate the specific modifications to the Tentative Order, which are provided in Attachment B. The sections include:

- *Provisions, E.1.a. Legal Authority Establishment and Enforcement (page 78)*

PROVISION A – PROHIBITIONS AND LIMITATIONS

13. PROVISION A (ENTIRE PROVISION; BEGINS PAGE 15 OF 130) – A CLEAR LINKAGE BETWEEN THE COMPLIANCE PROVISIONS AND PROHIBITIONS, RECEIVING WATER LIMITATIONS, AND EFFLUENT LIMITATIONS MUST BE ESTABLISHED.

Provision A.2.a states that “[d]ischarges from MS4s must not cause or contribute to the violation of water quality standards in any receiving water.” Numerous comments submitted in the 2013 Permit adoption process demonstrated that complying with the receiving water limitations provision is not achievable everywhere, all the time, given the extensive urbanization of Orange County and the variable nature of pollutants. The Tentative Order, however, does not contain any linkage between the compliance provisions of the Permit and the prohibitions, receiving water limitations and effluent limitations. Provision A then can be construed as a standalone provision that holds the Copermittees strictly liable for any exceedance of a water quality standard determined by water quality

⁴² CWA § 402(p)(3)(B)(ii).

monitoring results on an outfall-by-outfall basis.⁴³ Thus, the Copermittees are immediately out of compliance upon enrollment in the Permit.

Historically, this was not the case. MS4 permittees could maintain compliance by implementing the iterative process by diligently and rigorously implementing and increasing best management practices (“BMPs”) in response to an exceedance.⁴⁴ This approach is not only consistent with prior State Board and Regional Board policy but in accordance with federal law that MS4s be governed by the MEP standard and are not required to adhere to strict numeric standards.⁴⁵ This policy allowed MS4s the ability to adjust their programs and utilize the iterative process to meet water quality standards.

The County requests that the Regional Board establish a compliance pathway that allows the County to comply with all numeric limitations consistent with a prior Tentative Order it issued.⁴⁶ This is not only consistent with federal law and prior state policy, but allows the Copermittees the true flexibility to design programs and use program funds effectively by prioritizing those funds for pollutants of concern. The iterative process allows Copermittees to implement innovative programs and projects with assurance that those diligent efforts in doing so are helping achieve compliance.⁴⁷

In addition, compliance with Provisions A.1, A.2 and A.3 should be linked to Provision A.4, Provision B, and Attachment E so that it is clear that the compliance mechanism for A.4 is the WQIP (Provision B) and/or the TMDL (Attachment E), as applicable.

Action: Incorporate the specific modifications to the Tentative Order, which are provided in Attachment B. The sections include:

- Provisions, A. Prohibitions and Limitations (page 15)
- Provisions, A.1. Discharge Prohibitions (page 15)
- Provisions, A.2. Receiving Water Limitations (page 16)

⁴³ *Natural Resources Defense Council, Inc. v. County of Los Angeles et al* (9th Cir. 2011), 673 F.3d 880, 883, rev’d on other grounds by *Los Angeles County Flood Control District v. Natural Resources Defense Council, Inc.* (2013) 133 S.Ct. 710.

⁴⁴ State Water Resources Control Board, WQ 2001-15 at 7 (Nov. 15, 2001). The State Water Board indicated that the precedential receiving water limitations language in WQ 1999-05 does not require strict compliance with water quality standards.

⁴⁵ *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159, 1165; *Divers Environmental Conservation Organization v. State Water Quality Resources Control Board* (2006) 145 Cal. App. 4th 246, 256; *Bldg. Indus. Ass’n v. State Water Quality Resources Control Board* (2004) 124 Cal. App. 4th 866, 889-90; Betsy Jennings, State Board Memorandum, *Definition of Maximum Extent Practicable* (1993).

⁴⁶ Draft Tentative Order, R9-2013-0001, § II.B.3.c (March 29, 2013).

⁴⁷ A permit that does not contain a compliance pathway is impossible to comply with and is not in accordance with federal and state law. *Atlantic States Legal Fdn., Inc. v Eastman Kodak Co.* (2nd Cir, 1994) 12 F.3d 353, 357; *Hughey v. JMS Development Corp.* (11th Cir. 1996) 78 F.3d 1523, 1530.

14. PROVISION A (ENTIRE PROVISION; BEGINS PAGE 13 OF 130) – THE DISCHARGE PROHIBITIONS MUST ESTABLISH A LINKAGE WITH THE APPROVED COMPLIANCE SCHEDULES FOR TMDLS THAT HAVE BEEN INCORPORATED INTO THE BASIN PLAN.

The Discharge Prohibitions do not establish a sufficient linkage with approved compliance schedules for TMDLs that have been incorporated into the Basin Plan. TMDLs adopted within the region include a schedule to provide MS4 Copermittees the time necessary to develop and implement a plan to achieve water quality standards in impaired waters. The compliance schedules for adopted TMDLs have been incorporated into Attachment E and language is recommended in the Receiving Water Limitations provisions (A.2.c.) and the Effluent Limitations provisions (A.3.b.) pointing to the TMDL compliance schedules.

The Receiving Water Limitations language in the Tentative Order conflicts with TMDL compliance schedules. Language should be included to clarify that in instances where a TMDL is in effect, the Copermittees shall achieve compliance with these provisions as outlined in Attachment E (Specific provisions for TMDLs). Without this change, the Receiving Water Limitations language puts Copermittees in immediate and ongoing non-compliance with the permit, as opposed to incorporating TMDL implementation schedules.

In addition, the footnote to A.2.a.(4)(b) requires Copermittees to not cause or contribute to the more stringent of a water quality objective or a CTR criterion. Instances may exist where it has been determined that one or the other is more appropriate given site specific conditions or analysis (i.e., a TMDL has been established).

Action: Incorporate the specific modifications to the Tentative Order, which are provided in Attachment B. The sections include:

- Provisions, A.1. Discharge Prohibitions (page 15)
- Provisions, A.2.a. Receiving Water Limitations (page 16)
- Provisions, A.2.c. Receiving Water Limitations (page 17)
- Footnote #5 to Provision A.2.a(4)(b) (page 17)

15. PROVISION A (ENTIRE PROVISION; BEGINS PAGE 18 OF 130) – THE RECEIVING WATER LIMITATIONS LANGUAGE IS DISCRETIONARY AND SHOULD BE REVISED TO PROVIDE A CLEAR COMPLIANCE MECHANISM.

WQIPs provide flexibility with a BMP-based compliance approach for the Discharge Prohibitions and Receiving Water Limitations. The language in the Provision A.4 describes the WQIPs as a document trail rather than a compliance mechanism. In essence, the language suggests that Copermittees shall expend significant resources to develop and implement WQIPs, but taking the actions in the WQIPs has no effect on the Regional Board's compliance determination.

The Receiving Water Limitations language should be revised to expressly state that if exceedances of a water quality objective, water quality standard or any effluent limitation persist, or a discharge prohibition stated as an effluent limitation is not complied with, notwithstanding implementation of control measures, BMPs or compliance with the other water quality control program requirements of the Order, the Copermittee shall take actions to further reduce its discharges of such pollutants over time by complying with the iterative

process, and that diligent implementation of the iterative process (i.e., WQIP) constitutes compliance to MEP.

The iterative process is a fundamental aspect of MS4 programs, as envisioned by State Water Board Order 99-05 and later reconfirmed in Order WQ 2001-15 (BIA Order), and is the mechanism by which MS4 Copermittees should demonstrate compliance. The WQIPs now provide a mechanism to provide the detail and quantitative analyses used to identify pollutant sources and implement BMPs to address those sources.

Language in Provision A.4 should be consistent with the California Stormwater Quality Association (CASQA) proposed receiving water limitation language (see **Attachment B**).

Action: Incorporate the specific modifications to Provision A.4, which are provided in Attachment B.

PROVISION B – WATER QUALITY IMPROVEMENT PLANS

16. PROVISION B (ENTIRE PROVISION; BEGINS PAGE 20 OF 130) – THE WATER QUALITY IMPROVEMENT PLANS SHOULD BE THE FOUNDATION FOR A BMP-BASED COMPLIANCE APPROACH.

The Clean Water Act does not require MS4 permits to include watershed planning provisions.⁴⁸ Neither does Porter Cologne.⁴⁹ The Watershed Improvement Act of 2009 allows, but does not require, MS4 permittees to develop a watershed improvement plan. The County supports a voluntary watershed-based approach that has compliance linkage between the WQIPs in Provision II.b and the receiving water limitations in Provision II.A. This linkage would provide the Copermittees the opportunity to comply with the Permit while allowing for choice.⁵⁰ A watershed-based approach is ideal for the implementation of stormwater programs as it allows for the integration of all program elements, focuses efforts on the highest priorities for each watershed through the customization of actions and strategies, and allows for streamlined reporting. This approach also supports the implementation of TMDLs, which are developed and implemented at the watershed scale.

Although the language for the WQIP recognizes the need for the consideration of provisions A.1, A.2, and A.3 as a part of the assessments and identification of water quality priorities, consistent with the intent described in the Fact Sheet, the language within the Tentative Order should explicitly identify that compliance with those provisions is achieved through the development and implementation of the WQIPs and or TMDLs (Attachment E).

⁴⁸ 33 U.S.C. § 1342(p); 40 C.F.R. § 122.26.

⁴⁹ Water Code § 1610(e).

⁵⁰ Under the Tenth Amendment of the U.S. Constitution, a state or local government must retain the ultimate decision as to implement a federal regulatory program. The Regional Board has found that each and every requirement in the Permit is federally mandated under the CWA. Permit at F-29-30. The Copermittees disagree with this finding. In this case, involuntary WQIP and JURMP requirements in addition to the de facto effluent limitations established due to the lack of a compliance pathway do not allow for regulatory choice. *Printz v. United States* (1997) 521 U.S. 898, 925; *Environmental Defense Ctr., Inc. v EPA* (2003) (2003) 344 F.3d 832, 847; *City of Abilene v. EPA* (2003) 325 F.3d 657, 662.; *New York v. United States* (1997) 505 U.S. 144, 168, 176.

In particular, the Fact Sheet states:⁵¹

Provision B includes requirements for the Copermittees to develop and implement Water Quality Improvement Plans to ultimately comply with the prohibitions and limitations under Provision A. The Water Quality Improvement Plans will provide the Copermittees a comprehensive program that can achieve the requirements of the CWA. Implementation of the Water Quality Improvement Plans will also improve the quality of the receiving waters in the San Diego Region.....

The Water Quality Improvement Plan also incorporates a program to monitor and assess the progress of the Copermittees' jurisdictional runoff management programs toward improving the quality of discharges from the MS4s, as well as tracking improvements to the quality of receiving waters. A process to adapt and improve the effectiveness of the Water Quality Improvement Plans has also been incorporated into the requirements of Provision B to be consistent with the "iterative approach" required to achieve compliance with discharge prohibitions of Provisions A.1.a and A.1.c and receiving water limitations of Provision A.2.a, pursuant to the requirements of Provision A.4.

[Emphasis added]

In other words, the Water Quality Improvement Plan framework, as outlined within the Tentative Order, is established as the compliance mechanism for Provision A.4. In fact, this would complement the existing language in Provision A.4, which states (as modified below):

Each Copermittee must achieve compliance with Provisions A.1, A.2, and A.3 of this Order through timely implementation of control measures and other actions as specified in Provisions B and E of this Order, including any modifications. The Water Quality Improvement Plans required under Provision B must be designed and adapted to ultimately achieve compliance with Provisions A.1, A.2, and A.3.

In addition, the WQIP should identify the high priority water quality issues and conditions and provide direction for the development and implementation of the JRMPs. The goals for the WQIPs should be clearly identified and directly linked to the JURMPs (and the corresponding flexibility provided within the development of the JURMPs) (See also Provision E).

Lastly, although Regional Water Board staff have indicated that the WQIPs, once developed and approved, will functionally replace the CLRPs and BLRPs, the Tentative Order does not formally recognize this. The County recommends that a footnote be added to clarify that this is the case.

Action: Incorporate the specific modifications to the Tentative Order, which are provided in Attachment B. The sections include:

- *Provisions, B Water Quality Improvement Plans (page 20)*

17. PROVISION B (ENTIRE PROVISION; BEGINS PAGE 20 OF 130) – THE WQIP NUMERIC GOALS ARE USED TO SUPPORT THE WQIP IMPLEMENTATION AND MEASURE PROGRESS, THEY ARE NOT ENFORCEABLE COMPLIANCE STANDARDS.

⁵¹ Fact Sheet, Page F-42.

Similar to the footnotes in Provisions C.1.a and C.2.a, Provision B.2.e should explicitly state that the action levels, interim goals and final goals are not enforceable limitations.

Action: Incorporate the specific modifications to the Tentative Order, which are provided in Attachment B. The sections include:

- *Provisions, B.3.a.(1), Water Quality Improvement Goals and Schedules (page 26)*

PROVISION C – ACTION LEVELS

18. PROVISION C (ENTIRE PROVISION; BEGINS PAGE 36 OF 130) – THE TENTATIVE ORDER SHOULD ENABLE THE COPERMITTEES TO APPLY NALS/SALS THAT BASED ON THE PRIORITIES OF THE WQIP AND/OR THE IDDE PROGRAM.

Although the Tentative Order states that the Copermittees are to develop and incorporate numeric non-stormwater and numeric stormwater action levels into the Water Quality Improvement Plans (C.1 and C.2, respectively), the Tentative Order appears to contradict this approach by mandating that the Copermittees include all of the numeric actions levels as identified in tables C-1, C-2, C-3, C-4 and C-5.

The mandated action levels are problematic for the following reasons:

- 1) The NALs for the WQIPs will likely include different constituents and/or values than those values that would be used for the IDDE program.
- 2) The NALs and SALs will likely include different constituents and/or values between WQIPs depending upon the identified high priority water quality conditions.
- 3) In Provision B.3 the Copermittees are required to develop and use interim and final numeric goals to measure progress towards the protection of the receiving waters and beneficial uses. The choice of the numeric goals for the watershed may be biological, chemical, or physical based and may include multiple criteria and/or indicators. If the mandated values in Provision C have to be used as action levels within the WQIP, this takes away the flexibility that is should be afforded to the Copermittees. In addition, the NALs may not correspond to the highest priority water quality conditions or the metrics that should be used to measure progress. Thus, the NALs/SALS may direct resources away from the watershed priorities.
- 4) Source investigations must be focused on the highest priority outfalls, based on the data collected, that are most likely linked to illicit discharges.

It must also be noted that the State’s own Blue Ribbon Panel, which was convened specifically to examine the feasibility of incorporating numeric effluent limits in stormwater permits, ultimately concluded that numeric limits were generally infeasible across all three stormwater activities, with few exceptions. However, the Panel did agree that “upset values” or “action levels” could be established to assist Copermittees in identifying “bad actor” catchments which are clearly above the normal observed variability.

The Copermittees had previously developed and implemented an innovative Dry Weather Reconnaissance Program, based upon statistically derived benchmarks to identify illegal discharges and illicit connections during the typically dry summer months of May through

September using a suite of water quality analytes monitored in the field at designated random and targeted drains. A comparison of the probability of an exceedance using the statistical tolerance interval-based approach compared to the NAL-based approach shows that the NALs-based approach can misdirect resources since investigations are triggered at a much higher frequency for many constituents (Table 1.).

Table 1. Comparison of 2011-2012 NALs Data Collected in the San Diego Region with the Data from the Dry Weather Reconnaissance Monitoring Program for the 2009-2010 Reporting Period

Constituent	NAL Exceedances 2011-2012		Dry Weather Program Action Level Exceedances 2009-2010	
	Number	%	Number	%
pH	1	2	0	0
TDS	42	93	0	0
Dissolved Oxygen	2	4	0	0
Turbidity	3	7	3	1
Surfactants	3	7	14	5
Total Coliform	24	53	0	0
Fecal Coliform	19	42	0	0
Enterococcus	42	93	0	0
Unionized Ammonia	3	7	8	3
Total N / Nitrate	41	91	0	0
Total P / Ortho PO4	38	84	11	4
Cadmium	13	28	0	0
Copper	1	2	0	0
Nickel	7	15	0	0
Zinc	1	2	0	0
Total # of Site Visits	45		274	

The Dry Weather Reconnaissance Program was specifically designed to detect “abnormal” results that are indicative of illicit discharges, typically short term, transient, non-stormwater discharges. Consequently, the Copermittees perform many more site visits but initiate fewer investigations, as they are able to discern between discharges that are most likely to be illicit and those that are not. In contrast, the NAL-based program is designed to compare urban runoff from an outfall to a water quality objective that has been established

for a receiving water. As demonstrated in the ROWD, aquatic chemistry in many parts of south Orange County results trigger exceedances of the NALs the majority of the time, which does not allow the Copermittees to differentiate between typical site conditions and true illicit discharges.

The Copermittees have monitored water quality for several years and found that naturally derived pollutants in surface waters can often exceed water quality criteria both in undeveloped catchments as well as in developed watersheds. In recent years, efforts led by the County to characterize natural sources related to ambient geology have demonstrated that natural sources in specific areas are the primary contributor for many constituents of concern such as cadmium, nickel, total dissolved solids, chloride, and sulfate. The concentration ranges measured from the natural sources are shown in the table below.

Constituent	Concentration Range	Water Quality Criterion
Arsenic	<1 - 53 ppb	36 ppb ²
Cadmium	<1 - 200 ppb	7.3 ppb ²
Copper	1.2 - 23 ppb	18 ppb ²
Nickel	6.4 - 1300 ppb	169 ppb ²
Selenium	<1 - 220 ppb	5.0 ppb ²
Zinc	<1 - 1800 ppb	379 ppb ²
Chloride	470 - 2400 ppm	250 ppb ¹
Sulfate	1200 - 11000 ppm	250 ppb ¹
Total Dissolved Solids	3700 - 22000 ppm	500 ppb ¹
Total Nitrogen as N	<0.1 - 38 ppm	1.0 ppb ¹

1) Basin Plan Water Quality Objective

2) California Toxics Rule, Criterion Continuous Concentration at hardness of 400 mg/L

The County is currently collaborating with the University of Southern California (“USC”) to develop a modeling approach that could “fingerprint” water sources based on isotopic composition. This work will provide a much better understanding about natural and anthropogenic sources of water and contaminants to streams in south Orange County. It is key information since the Copermittees have found strong positive linear relationships between levels of metals associated with runoff and groundwater seepage from the Monterey and Capistrano marine sedimentary formations. Until this work is completed, the Copermittees will be unable to discriminate between instances of illicit discharges and conditions that are essentially artifacts of a constructed storm drain system and/or the local geology.

The conclusions from the implementation of the Orange County NAL-based program to date are:

- The NAL program replaced a previously existing and effective program (the Dry Weather Reconnaissance program);

- The Dry Weather Reconnaissance Program resulted in focused source investigations for key constituents indicative of illicit discharges;
- The NAL program has required increased resources and has resulted in everything being a priority (thus, nothing is a priority). In addition, the NAL-based triggers have, in many cases been the result of constituents attributable to natural sources within the watersheds;
- There have been many exceedances that have been due to non-IDDE factors such as local geology (especially for nickel and cadmium);
- It has been very difficult to determine the endpoints, the sources, of the various non-stormwater discharges since the discharges are so commingled; and
- There is a strong need for a regionally-based prioritization, so that there is not a mis-direction of limited resources.

Regional Board staff needs to evaluate the results of the Orange County program to date and consider the proposed revisions in order to assist with the prioritization of resources and water quality issues. As proposed, the NAL program lacks substantial evidence by which to justify If the Copermittees are required to continue to use the NAL-based program, they will lose the ability to prioritize the water quality issues and discriminate between true instances of IDDE and ambient urban conditions in a storm drain systems draining landscapes underlain by marine sedimentary formations containing phosphorous and a number of metals.

The Copermittees recommend the following in order to address these issues.

- Modify the NALs (Provision C.1) language to recognize that, for the purposes of the IDDE program, the Copermittees should be allowed to develop and/or use previously established NALs, especially if they are shown to be more effective at identifying “true” upset values and allow for a prioritization of resources.
- The mandated NALs should only be considered “default” values if the Copermittees do not develop their own NALs or use previously established values.

Action: Incorporate the specific modifications to the Tentative Order, which are provided in Attachment B. The sections include:

- *Provisions, B.3.a.(1), Water Quality Improvement Goals and Schedules (page 26)*
- *Provisions, C. Action Levels (page 36-43)*

PROVISION D – MONITORING AND ASSESSMENT PROGRAM REQUIREMENTS

19. PROVISION D (ENTIRE PROVISION; BEGINS PAGE 47 OF 130) – THE COPERMITTEES NEED TO HAVE THE FLEXIBILITY TO DEVELOP OR USE ANALYTICAL MONITORING REQUIREMENTS IN THE WATER QUALITY IMPROVEMENT PLANS BASED ON ASSESSMENTS OF CURRENT SOURCES THAT MAY CONTRIBUTE TO THE SECTION 303(D) WATER BODY IMPAIRMENTS.

The Regional Board should recognize the inherent difficulties associated with monitoring 303(d) constituents such as the legacy pesticides or the monitoring of aquatic toxicity. Many

existing developments were never subjected to the application of legacy pesticides such as DDT and, as such, these constituents are highly unlikely to be found in modern communities. The Regional Board should also recognize that laboratory toxicity tests provide a cumulative perspective of pollutant effects that may or may not be sampled as part of a monitoring program.

The Copermittees should be relieved of analytical monitoring requirements if supporting information can be provided to document the current pollutant concentrations or may provide historic information to support the absence of usage of these constituents in the MS4 drainage area. Additionally, the Copermittees should be allowed to develop an alternate approach for monitoring that allows the Copermittees to evaluate and identify the cause of toxicity currently affecting receiving waters and to iteratively adapt the monitoring program to address these chemical stressors in their MS4 outfall discharges through the WQIPs.

Action: Incorporate the specific modifications to the Tentative Order, which are provided in Attachment B. The sections include:

- *Provisions, D.2.a.(3)(e) Transitional Wet Weather MS4 Outfall Discharge Analytical Monitoring (page 65)*
- *Provisions, D.2.b.(2)(e) Non-Storm Water Persistent Flow MS4 Outfall Discharge Analytical Monitoring (page 69)*
- *Provisions, D.2.c.(5)(f) Wet Weather MS4 Outfall Discharge Analytical Monitoring (page 72)*
- *Provisions, D – Tables D-3 (page 51), D-6 (page 65), D-7 (page 70)*

PROVISION E – JURISDICTIONAL RUNOFF MANAGEMENT PROGRAMS

20. PROVISION E (ENTIRE PROVISION; BEGINS PAGE 79 OF 130) – THE JRMP PROVISIONS MUST BE MODIFIED SO AS NOT TO NEGATE THE VERY INTENT AND PURPOSE OF THE WATERSHED APPROACH AND THE FOCUS ON THE HIGHEST PRIORITIES WITHIN EACH WATERSHED MANAGEMENT AREA.

The Tentative Order states that the purpose of the WQIPs is to guide the Copermittees' jurisdictional runoff management programs towards achieving improved water quality by identifying the highest priority water quality conditions within a watershed and implementing strategies through the jurisdictional runoff management programs (Provision B).

Provision E goes on to state that the jurisdictional runoff management programs will be implemented in accordance with the strategies identified in the WQIPs. In addition, the Fact Sheet states:

“Where the Water Quality Improvement Plan is the ‘comprehensive planning process’ on a Watershed Management Area scale, requiring ‘intergovernmental coordination’, the jurisdictional runoff management program document is the ‘comprehensive planning process’ on a jurisdictional scale that should be coordinated with the other

Copermittees in the Watershed Management Area to achieve the goals of the Water Quality Improvement Plan.”⁵²

The Fact Sheet also states:

“Based on the economic considerations below, the San Diego Water Board has provided the Copermittees a significant amount of flexibility to choose how to implement the requirements of the Order. This Order also allows the Copermittees to customize their plans, programs, and monitoring requirements. In the end, it is up to the Copermittees to determine the effective BMPs and measures necessary to comply with this Order. The Copermittees can choose to implement the least expensive measures that are effective in meeting the requirements of this Order.”⁵³

Although the Fact Sheet states that “Implementation of the components of each Copermittee’s jurisdictional runoff management program must be consistent with the water quality improvement strategies identified within the Water Quality Improvement Plan,”⁵⁴ the Tentative Order requires the Copermittees to incorporate all of the requirements identified within Provision E regardless of the high priority water quality conditions that have been identified within the WQIP. If the Copermittees are required to implement all of the requirements in Provision E instead of prioritizing and implementing those requirements that directly address the highest priority water quality conditions and support watershed strategies, then the program is not prioritized and focused and does not allow Copermittee discretion to tailor its WQIP. The approach in Provision E then negates the prioritized and strategic approach outlined in Provision B.

The Tentative Order should provide a clear linkage between Provision B and Provision E and state that the WQIP should guide the customization of the JRMP to meet the highest water quality priorities and strategies in a given watershed.

(See also the corresponding comments under Provision E.2, E.3, E.4, E.5, and E.7)

Action: Incorporate the specific modifications to the Tentative Order, which are provided in Attachment B. The sections include:

- Provisions, E. Jurisdictional Runoff Management Programs (page 79)

PROVISION E.1 - LEGAL AUTHORITY ESTABLISHMENT AND ENFORCEMENT

21. PROVISION E.1 (PAGE 79 OF 130) – THE COPERMITTEES ARE ONLY RESPONSIBLE FOR ADMINISTERING AND ENFORCING THE CODES AND ORDINANCES APPLICABLE TO THEIR JURISDICTIONS.

Provision E.1.a(2) requires the Copermittees to establish the legal authority to control the contribution of pollutants in discharges of runoff associated with industrial and construction activity within their jurisdictions. Since the Copermittees can only administer and enforce their local codes and ordinances, it is unnecessary to include the language

⁵² Fact Sheet, Page F-71.

⁵³ Fact Sheet, Page F-17.

⁵⁴ Fact Sheet, Page F-71.

regarding the Statewide Industrial and Construction General Permits. The sites subject to the Statewide Permits (which are administered and enforced by the State and Regional Boards) are already inspected by state staff and are included within the Copermittee inventories, inspection and enforcement programs.

In addition, language that acknowledges that local codes and ordinances will include the legal authorities identified within the Tentative Order to the extent permitted by the Constitution should be included.

Action: Incorporate the specific modifications to the Tentative Order, which are provided in Attachment B. The sections include:

- Provisions, E.1.a.(2) Legal Authority Establishment and Enforcement (page 79)
- Provisions, E.1.a.(10) Legal Authority Establishment and Enforcement (page 80)

22. PROVISION E (ENTIRE PROVISION; BEGINS PAGE 79 OF 130) – THE REQUIREMENT FOR THIRD PARTY BMP EFFECTIVENESS DOCUMENTATION IS DUPLICATIVE.

The Tentative Order includes a provision that requires the Copermittees to demonstrate that they have the legal authority to require documentation on the effectiveness of BMPs.

As it is currently written, this provision broadly applies to any aspect of the stormwater program where BMPs have been implemented – the result is that this provision sets up a process for the establishment of multiple third party monitoring programs and expenditure of significant public funds to monitor the effectiveness of BMPs. If the Regional Board’s desire is to document the effectiveness of certain types of BMPs, it would be more effective and scientifically defensible to establish special studies by entities qualified to conduct such sampling instead of requiring potentially hundreds of third parties to conduct a monitoring program for every BMP that is implemented.

This provision is redundant with other requirements in the Tentative Order in that it ignores the fact that the New Development/Significant Redevelopment section of the Drainage Area Management Plan (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.

This provision also ignores the fact that the Copermittees have already established legal authority for their development standards, so that project proponents have to incorporate and implement the required BMPs.

Action: Incorporate the specific modifications to the Tentative Order, which are provided in Attachment B. The sections include:

- Provisions, E.1.a.(8) Legal Authority Establishment and Enforcement (page 80)

PROVISION E.2 - ILLICIT DISCHARGE DETECTION AND ELIMINATION

23. PROVISION E.2 (PAGE 81 OF 130) – THE ILLICIT DISCHARGE DETECTION AND ELIMINATION PROGRAM PROVISIONS MUST BE MODIFIED SO AS NOT TO NEGATE THE VERY INTENT AND PURPOSE OF THE WATERSHED APPROACH AND THE FOCUS ON THE HIGHEST PRIORITIES WITHIN EACH WATERSHED MANAGEMENT AREA.

(See the corresponding comments under Provision E – Jurisdictional Runoff Management Programs)

Action: Incorporate the specific modifications to the Tentative Order, which are provided in Attachment B. The sections include:

- Provisions, E.2 Illicit Discharge Detection and Elimination (page 81)

24. PROVISION E.2 (PAGE 81 OF 130) – THE COPERMITTEES SHOULD BE ALLOWED THE FLEXIBILITY TO PRIORITIZE THEIR IDDE PROGRAM TO FOCUS ON THOSE NON-STORMWATER DISCHARGES THAT ARE LIKELY TO BE A SOURCE OF POLLUTANTS.

Provision E.2.a identifies several categories of discharges that are to be considered “non-stormwater discharges” (do not need to be addressed as an illicit discharge). The categories include the following:

- E.2.a.(1) and E.2.a.(2) - Those discharges which have coverage under a separate NPDES Permit;
- E.2.a.(3) - Those discharges which are recognized within the federal regulations as acceptable unless they are identified as a source of pollutants to the receiving waters;
- E.2.a.(4) - Those discharges that are addressed by a set of requirements/BMPs; and
- E.2.a.(5) - Firefighting related discharges that are addressed by a set of requirements/BMPs.

In comparison, 40 C.F.R § 122.26(d)(2)(iv)(B)(1) states that, as a part of an illicit discharge program, the Copermittees shall incorporate a series of items including the following:

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; this program description shall address all types of illicit discharges, however 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: [Emphasis added and items re-ordered based on Tentative Order (TO) structure]

- landscape irrigation, [not included in TO]
- irrigation water, [not included in TO]
- lawn watering, [not included in TO]
- street wash water [not included in TO]
- *uncontaminated pumped ground water, [E.2.a.(1)]*
- *foundation drains, [E.2.a.(3)]; [E.2.a.(1)]*
- *water from crawl space pumps, [E.2.a.(1)]*
- *footing drains, [E.2.a.(3)]; [E.2.a.(1)]*
- water line flushing, [E.2.a.(2)]
- diverted stream flows, [E.2.a.(3)]

- rising ground waters, [E.2.a.(3)]
- springs, [E.2.a.(3)]
- uncontaminated ground water infiltration (as defined at 40 CFR 35.2005(20)) to separate storm sewers, [E.2.a.(3)]
- flows from riparian habitats and wetlands, [E.2.a.(3)]
- discharges from potable water sources, [E.2.a.(3)]
- air conditioning condensation, [E.2.a.(4)]
- individual residential car washing, [E.2.a.(4)]
- dechlorinated swimming pool discharges, and [E.2.a.(4)]

(program descriptions shall address discharges or flows from firefighting [E.2.a.(5)] only where such discharges or flows are identified as significant sources of pollutants to waters of the United States);

Although the discharges listed within the Federal Regulations are generally considered to be conditionally exempt from the illicit discharge program (unless they are found to be sources of pollutants), the Regional Board has determined that the following categories of non-stormwater discharges

- uncontaminated pumped ground water [E.2.a.(1)]
- foundation drains [E.2.a.(3)]; [E.2.a.(1)]
- water from crawl space pumps [E.2.a.(1)]
- footing drains [E.2.a.(3)]; [E.2.a.(1)]

will be considered to be illicit discharges unless the discharge has coverage under the following two NPDES Permits (NPDES Permit No. CAG919001 (Order No. R9-2007-0034 and NPDES Permit No. CAG919002 (Order No. R9-2008-002)

The County would submit, however, that it is unnecessary to move these discharges (uncontaminated pumped groundwater, foundation drains, water from crawl space pumps, and footing drains) from the E.2.a.(3) category to the E.2.a.(1) category and require them to obtain coverage under one of these two permits for the following reasons:

- There is no technical basis or demonstrated water quality concern that justifies the need for these discharges to obtain coverage under these permits;
- The two permits are clearly defined for groundwater extraction activities where there is groundwater containing or potentially containing petroleum hydrocarbons, solvents, or other pollutants (in fact, one of the categories of discharges required to obtain coverage is 'uncontaminated pumped groundwater');
- One of the permits is clearly defined for temporary discharges, not permanent discharges; and
- The categories of discharges are non-stormwater discharges that are generally not expected to be a source of pollutants to receiving waters.

Action: Incorporate the specific modifications to the Tentative Order, which are provided in Attachment B. The sections include:

- Provisions, E.2 Illicit Discharge Detection and Elimination (page 81)
- Provisions, E.2a.(1) Illicit Discharge Detection and Elimination (page 81)
- Provisions, E.2a.(3) Illicit Discharge Detection and Elimination (page 82)
- Provisions, E.2a.(4) Illicit Discharge Detection and Elimination (page 82)

25. PROVISION E.2.A.(5) (PAGE 83 OF 130) – THE FIRE FIGHTING BMP PROVISIONS SHOULD REFLECT THE LANGUAGE INCLUDED IN THE CURRENT ORANGE COUNTY PERMIT.

Provision E.2.a includes a requirement for the Copermittees to establish BMPs for both emergency and non-emergency firefighting activities. While the Copermittees already have established guidelines for non-emergency firefighting activities, it is unclear why the approach and language in the Tentative Order regarding the emergency firefighting activities has been modified from Order R9-2009-0002. In fact, the language in the Tentative Order is actually inconsistent with the Phase I Final Rule (55 FR 48037), which states:

“In the case of firefighting it is not the intention of these rules to prohibit in any circumstances the protection of life and public and private property through the use of water or other fire retardants that flow into separate storm sewers.” [Emphasis added]

Thus, there should not be a circumstance in which the Copermittees or the Regional Board would identify emergency firefighting discharges as illicit discharges or a significant source of pollutants to receiving waters. The language previously adopted by the Regional Board in Order R9-2009-0002 regarding emergency firefighting discharges is recommended.

Action: Incorporate the specific modifications to the Tentative Order, which are provided in Attachment B. The sections include:

- Provisions, E.2.a.(5) Non-Storm Water Discharges (page 83)

26. PROVISION E (ENTIRE PROVISION; BEGINS PAGE 81 OF 130) – THE TENTATIVE ORDER SHOULD NOT REQUIRE THE REDUCTION OR ELIMINATION OF ALL NON-STORMWATER DISCHARGES AS A PART OF THE IDDE PROGRAM .

Federal regulations include two provisions designed implement the “effective prohibition”⁵⁵ of Clean Water Act Section 402(p)(3)(B)(ii)

- The first provision requires Copermittees to perform a screening analysis, intended to provide sufficient information to develop priorities for a program to detect and remove illicit discharges.⁵⁶

⁵⁵ 55 Fed. Reg. 47989, 48037.

⁵⁶ 40 CFR § 122.26(d)(1)(iv)(D).

- The second provision requires Copermittees to develop a recommended site-specific management plan to detect and remove illicit discharges (or ensure they are covered by an NPDES permit) and to control improper disposal to MS4s.⁵⁷

Therefore, Provision E.2.a(7) misapplies the federal regulations that require the Copermittees to identify the non-stormwater discharge as an illicit discharge prior to having an obligation to effectively prohibit it. There is not a presumption to reduce or eliminate it otherwise.

Action: Incorporate the specific modifications to the Tentative Order, which are provided in Attachment B. The sections include:

- Provisions, A.1. Discharge Prohibitions (page 20)
- Provisions, E.1. Legal Authority Establishment and Enforcement (page 79)
- Provisions, E.2. Illicit Discharge Detection and Elimination (page 81)

PROVISION E.3 – DEVELOPMENT PLANNING

The Tentative Order’s land development requirements are some of the most challenging requirements in the Tentative Order. Indeed, a number of the land development requirements, particularly hydromodification controls, potentially pose federal constitutional issues as well as conflict with the CWA, the State Administrative Procedure Act, California Environmental Quality Act (CEQA), the Mitigation Fee Act and federal court decisions.

The following discussion examines the overarching legal concerns with the land development requirements, and is followed by specific technical analyses for individual requirements.

a. Land Development Requirements Expose the Copermittees to Significant Litigation Risk And Will Be Largely Unenforceable.

Many of the land development requirements, such as hydromodification, pose constitutional issues either exposing municipalities to litigation and/or will result in municipalities being unable and unwilling to implement such requirements. Specifically, but not limited to, Orange County is most concerned with the provisions: 1) ultimately requiring Copermittees to compel development projects that have no impact on hydromodification to implement on-site or alternative compliance hydromodification mitigation measures, 2) using pre-development (naturally occurring) runoff reference condition as applied to sites that are, in fact, developed, and 3) *STREAM*, channel and habitat restoration.

The Copermittees are concerned that implementing these requirements has the potential to subject the Copermittees to liability under the Takings Clauses of the U.S. and California Constitutions and violate the Mitigation Fee Act because of the questionable nexus between a project’s impacts on hydromodification and the hydromodification management measures in the Tentative Order. When imposing a condition on a development permit, a local government is required to establish that the condition bears a reasonable relationship to the impacts of the project. This rule applies evenly to legislatively enacted requirements and

⁵⁷ 40 CFR §§ 122.26(d)(1)(iv)(D) and 122.26(d)(2)(B).

impact fees or exactions.⁵⁸ Moreover, fees imposed on a discretionary ad-hoc basis are subject to heightened scrutiny under a two-part test. First, local governments must show that there is a substantial relationship between the burden created by the impact of development and any fee or exaction.⁵⁹ Second, a project's impacts must bear a rough proportionality to any development fee or exaction.⁶⁰ Under California law and a recent U.S. Supreme Court opinion, the *Nollan/Dolan* heightened scrutiny test also applies to in-lieu fees.⁶¹

The Legislature has memorialized these requirements in the Mitigation Fee Act, which establishes procedures that local governments must follow to impose impact fees.⁶² Irrespective of whether the hydromodification management requirements are implemented by legislative act or on an ad-hoc basis, the Copermittees attempt to enforce them as proposed in the Tentative Order will likely result in claims alleging unconstitutional takings of private property and violations of the Mitigation Fee Act. This is because a developer could argue that limiting hydromodification impacts of already developed property to its naturally occurring state, or requiring hydromodification mitigation measures for impacts not imposed by the project, would not have a legally sufficient nexus to the impact of the development project.

Additionally, CEQA does not allow a local government discretionary approval to require over-mitigation of a project. The CEQA Guidelines provide that “a lead agency for a project has the authority to require feasible changes in any or all activities involved in the project in order to substantially lessen or avoid significant effects on the environment, consistent with applicable constitutional requirements such as the ‘nexus’ and ‘rough proportionality’ standards established by case law.”⁶³ Thus, Copermittees would most assuredly be exposed to CEQA challenges, which are the most prevalent lawsuits against projects.

In all likelihood, municipalities will not risk constitutional challenges and the high litigation costs of such challenges, but will instead exempt projects from certain requirements or limit their applicability based on documented technical and legal reasons. Such actions then would only be addressed through a Regional Board audit years after a project has been approved and developed. Therefore, predevelopment runoff reference conditions and stream, channel and habitat restoration requirements should be eliminated in their entirety.

b. Stream, Channel and Habitat Restoration Cannot Be Required Due to Conflicts with Federal and State Laws.

⁵⁸ *Building Ass'n Industry v. City of Patterson*, 171 Cal. App. 4th 886, 898 (2009).

⁵⁹ *Nollan v. Calif. Coastal Comm'n*, 483 U.S. 825, 837 (1987).

⁶⁰ *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

⁶¹ *Ehrlich v. City of Culver City*, 12 Cal. 4th 854, 876 (1996).

⁶² Gov't Code §§ 66000-66025.

⁶³ Cal. Code Regs. Tit. 14, § 15041 (citing *Nollan/Dolan*).

The Tentative Order requires stream, channel and habitat restoration and/or retrofitting depending on certain land development projects. The prior analysis above discussed the litigation risk to which municipalities will be exposed. The following discussion focuses on the direct conflicts with federal and state laws that also prohibit such requirements.

The objective of the CWA is to restore and maintain the chemical, physical and biological integrity of the Nation's waters.⁶⁴ In carrying out this objective, Section 402(p) requires municipalities to reduce the discharge of pollutants from the MS4 to the MEP standard. The Tentative Order, however, goes well beyond the Congressional intent of the CWA to only address pollutants by requiring both Copermitees and the property owners to restore and/or retrofit streams, channels and habitat, with no technical evidence as to how this will reduce the discharge of pollutants to MEP or under what legal authority these requirements can be imposed.

Not only do such requirements go beyond MEP, but go beyond the scope of the CWA's focus on pollutant reduction. First, there is no evidence in the Order for how restoration requirements reduce pollutants from leaving the MS4. Second, in a recent decision in the Eastern District of Virginia, a federal court has held that the EPA has no authority under the Clean Water Act to regulate non-pollutants.⁶⁵ Restoration as described in the Tentative Order does not regulate pollutants directly, but requires costly over-mitigation by project proponents to do more than address pollutants by restoring streams, channels and habitat to a subjective, predevelopment standard. Essentially, the Tentative Order uses restoration as a surrogate for pollutants, and tries to unlawfully regulate the flow of water, not pollutants themselves.

Under state law, the Orange County Flood Control District has been delegated authority by the Legislature to construct flood control channels and infrastructure to protect life and property. Under this authority, the Orange County Flood Control District has exclusive authority to control the flow of water in these channels. Although the State and Regional Boards may have some ability to impose conditions that impact volumetric flows (which is now called into question by the VDOT case), this authority does not extend to NPDES permits.⁶⁶ Returning channels to natural conditions impinges on municipal flood control authority as removing concrete and performing other restoration efforts would alter the flow of water in those channels.

Engineered channels serve the public health and safety through flood control protection. A significant portion of Orange County lies in a flood plain whereby property owners are required to carry flood insurance. Concrete channels are used to better control the flow of water and minimize flooding and reduce insurance premiums. State courts have long recognized that residents living near flood control improvements have a right to rely on the

⁶⁴ CWA § 101(a).

⁶⁵ *Virginia Dept. of Transportation v. EPA*, No. 1:12-CV-775, slip op. (E.D. Va. Jan. 3, 2013) (“VDOT”).

⁶⁶ *S.D. Warren Co. v. Me. Bd. of Env'tl. Prot.*, 547 U.S. 370 (2006); *PUD No.1 v. Washington Dep't of Ecology*, 511 U.S. 700 (1994).

current standards of a particular channel to protect against flooding.⁶⁷ Restoring a stream or channel to a natural state would not ensure against flooding as engineering is used to ensure that stormwater is controlled to certain patterns. Many developments are built up to flood control channels, and thus, restoration would expose residents to threats of flood, potential property damage and loss of life and expose municipalities to claims of inverse condemnation and other torts based on relied upon flood control protections by the public. Restoration in some cases would also require use of eminent domain authority, which the State cannot require municipalities to exercise.

27. PROVISION E.3 (PAGE 94 OF 130) – THE DEVELOPMENT PLANNING PROVISIONS MUST BE MODIFIED SO AS NOT TO NEGATE THE VERY INTENT AND PURPOSE OF THE WATERSHED APPROACH AND THE FOCUS ON THE HIGHEST PRIORITIES WITHIN EACH WATERSHED MANAGEMENT AREA.

See the corresponding comments under Provision E – Jurisdictional Runoff Management Programs.

Action: Incorporate the specific modifications to the Tentative Order, which are provided in Attachment B. The sections include:

- Provisions, E.3. Development Planning (page 94)

28. PROVISION E.3 (PAGE 98 OF 130) – PORTIONS OF REDEVELOPMENT PROJECTS THAT ALREADY HAVE WATER QUALITY TREATMENT BMPs SHOULD NOT BE SUBJECT TO THE NEW PDP REQUIREMENTS.

Some redevelopment projects already have portions of the project that were subject to previous permit PDP requirements. These portions of redevelopment that were subject to prior PDP requirements should not be subject to the new PDP requirements as these projects already have water quality treatment. Such an approach is consistent with the Los Angeles and Ventura MS4 permits.

Action: Incorporate the specific modifications to the Tentative Order, which are provided in Attachment B. The sections include:

- Provisions, E.3.b.(2) Special Considerations for Redevelopment Projects (page 98)

29. PROVISION E.3 (PAGE 98 OF 130) – THE REGIONAL PERMIT SHOULD INCLUDE A PRIORITY DEVELOPMENT PROJECT EXEMPTION FOR FLOOD CONTROL AND STREAM RESTORATION PROJECTS.

Exemptions should be added for flood control and stream restoration projects as these projects do not meet the intent of requiring treatment for land development projects as they are not a source of pollutants, and can actually be defined as mitigation projects.

Action: Incorporate the specific modifications to the Tentative Order, which are provided in Attachment B. The sections include:

- Provisions, E.3.b.(3) Priority Development Project Exemptions (page 98)

⁶⁷ *Arreola v. County of Monterey*, 99 Cal.App.4th 722 (2002).

30. PROVISION E.3 (PAGE 98 OF 130) – THE REGIONAL PERMIT SHOULD INCLUDE A PRIORITY DEVELOPMENT PROJECT EXEMPTION FOR EMERGENCY PUBLIC SAFETY PROJECTS WHERE A DELAY DUE TO A STANDARD STORMWATER MITIGATION PLAN (SSMP) WOULD COMPROMISE PUBLIC SAFETY, PUBLIC HEALTH AND/OR THE ENVIRONMENT.

An exemption should be added for emergency public safety projects where a delay due to a Standard Stormwater Mitigation Plan (SSMP) would compromise public safety, public health and/or the environment. In reality, emergency projects will be implemented immediately where public safety, public health and/or the environment is threatened. There will be no time for the development, processing and plan check and revisions of a SSMP prior to these projects. Emergency projects are provided exempt status in many other MS4 permits including the OC Santa Ana Region Permit (Order No. R8-2009-0030 – Section XII.B.2.j) and the Los Angeles County MS4 Permit (Order R4-2012-0175 – Section VI.D.7.b.ii.c.(i)).

Action: Incorporate the specific modifications to the Tentative Order, which are provided in Attachment B. The sections include:

- Provisions, E.3.b.(3) Priority Development Project Exemptions (page 98)

31. PROVISION E.3.C (PAGE 98 OF 130) – FLEXIBILITY SHOULD BE PROVIDED TO THE STRUCTURAL BMP PERFORMANCE STANDARDS IF WATERSHED-SPECIFIC PERFORMANCE STANDARDS ARE DEVELOPED IN THE WATER QUALITY IMPROVEMENT PLANS.

Utilizing the watershed approach, it is conceivable that the Water Quality Improvement Plans will identify an alternate performance standard than do the provisions in E.3.c. . To fully realize the watershed approach, the Copermittees should be given the opportunity to develop alternative BMP performance standards consistent with the goals and objectives developed in the Water Quality Improvement Plans.

Action: Incorporate the specific modifications to the Tentative Order, which are provided in Attachment B. The sections include:

- Provisions, E.3.c Priority Development Project Structural BMP Performance Requirements (page 98)

32. PROVISION E.3 (PAGE 98 OF 130) – TERMINOLOGY IS INCONSISTENT ESPECIALLY WITH THE USE OF LOW IMPACT DEVELOPMENT BMPS AND SHOULD BE MODIFIED.

Provision E.3.c. specifies the requirements for structural BMPs. Furthermore, Provision E.3.c.(1) introduces the concepts for onsite structural BMPs and LID BMPs. The County recommends that the Tentative Order be modified to provide more consistency in terminology. The County views LID as a strategy of BMPs that is used to mimic preproject water balance. (See Provision E.3.a(3)). There is also no single definition for LID BMPs that has gained widespread recognition. Although Attachment C includes a definition for LID BMPs, this definition is not widely accepted. LID is rather a concept (the Attachment C definition does adequately capture this concept) made up of various non-structural and structural BMPs. While the onsite BMP requirements should be defined (e.g., retention of the 85% storm) the Tentative Order could be greatly simplified by avoiding multiple terms and uses. The County has provided suggested edits throughout the Development Planning provision to provide better consistency.

33. PROVISION E.3.C (PAGE 100 OF 130) – IF PROJECTS USE ALTERNATIVE COMPLIANCE CONVENTIONAL BMPs SHOULD NOT BE ALSO REQUIRED ONSITE.

Section E.3.c.(1)(c) requires that if projects use alternative compliance, conventional BMPs must also be implemented onsite. Although the Fact Sheet identifies that the intent of this provision is to reduce the pollutants onsite to the MEP there is not adequate technical justification for effectively requiring additional mitigation. This provision requires additional mitigation for projects, and in effect, requires double mitigation that goes well beyond the MEP standard. Providing mitigation offsite for the PDP requirements offsite in itself is adequate to meet the MEP standard.

Action: Incorporate the specific modifications to the Tentative Order, which are provided in Attachment B. The sections include:

- Provisions, E.3.c.(1) Storm Water Pollutant Control BMP Requirements (page 100)

34. PROVISION E (ENTIRE PROVISION; BEGINS PAGE 94 OF 130) – THE HYDROMODIFICATION MANAGEMENT REQUIREMENTS SHOULD BE BASED ON A WATERSHED MANAGEMENT APPROACH, BE CONSISTENT WITH THE WQIPs, AND CONSIDER THE CURRENT COPERMITTEE HMPs.

Hydromodification management should be based on the conditions of receiving waters and on the impacts and potential impacts from development projects. The basis to make hydromodification management decisions needs to be an understanding of the watershed and the receiving waters within a watershed. Understanding a watershed is achieved through watershed analysis and analysis of the susceptibility of the receiving waters to hydromodification impacts. This approach of watershed analysis is identified in the Southern California Coastal Water Research Project (“SCCWRP”) Technical Report 667 – *Hydromodification Assessment and Management in California (Appendix A-2)*. The SCCWRP report identifies that watershed analysis is the first step and most critical step in the development of watershed hydromodification management. The SCCWRP report concluded that hydromodification management is not a one size fits all approach, but needs to consider watershed analysis. This was also concluded by the authors of the SCCWRP report at the Hydromodification Management Meeting in August of 2012 and by State Board staff at the California Stormwater Quality Association (CASQA) General Meeting on January 10, 2012. The Tentative Order hydromodification requirements are, however, a one size fits all approach as the requirements do not allow consideration of watershed analysis or receiving water information.

The County believes the best way to implement the vision of the SCCWRP Report for development of effective hydromodification management is to develop clear hydromodification management objectives that are watershed specific and developed through a stakeholder process. The intent of the WQIPs is to improve water quality in the WMAs based on the highest priorities for water quality in the watershed. Unless more is known about the watersheds and their receiving waters, however, including their susceptibility to hydromodification, the appropriate standards and performance criteria cannot be identified. The WQIPs can build on the current Hydromodification Management Plans (HMPs) that have been developed and can use additional watershed and receiving waters information to develop appropriate watershed specific hydromodification standards

and where they should apply in a specific watershed. Instead of hydromodification requirements that do not consider specific watershed analysis and conditions of receiving waters and that were developed unilaterally by Regional Board staff, the County suggests that watershed specific requirements be developed as part of the WQIPs as part of a watershed stakeholder process.

Matching pre-development (naturally occurring) flow rates and duration is identified as the performance standard for hydromodification management. The purpose of the CWA does is not to restore waters to pre-Columbian (pre-development) conditions. Rather, the objective must be taken in context of section 402(p) and reflect the stormwater compliance standard to reduce pollutants to the maximum extent practicable. The hydromodification standard should reflect the developed urban environment. To do otherwise would negate the engineering efforts done to date to protect life and property from floods and create an impractical solution for municipalities. Furthermore, the current hydromodification standard as provided for in numerous municipal permits in California is to match post development with “pre-project” conditions. The current pre-development standard goes well beyond federal law with no technical justification and can only be adopted under state authority.

Hydromodification effects may also be caused from other sources that are not in the Copermittees’ jurisdiction. Initial implementation of the pre-development (naturally occurring) hydromodification performance standard has identified that BMPs to comply with the standard are of significant size even for smaller projects. Implementing the hydromodification requirements can disturb a significant area of land, which has its own environmental impacts, including changing the natural hydrology. This is antithetical to the LID concept. This can also cause a decrease in open space, which is in conflict the Orange County General Plan requiring certain thresholds of open space for developments. For smaller redevelopment projects and other infill projects, it may not be technically or economically feasible to build these projects, and will be a lost opportunity to improve water quality through implementation of LID requirements.

In addition, identifying “naturally occurring” conditions for redevelopment sites is difficult and entirely subjective, as in most cases there are no historical records of the natural condition of the site, raising whether there is a technical question as to how far back a Copermittee goes historically in determining the proper predevelopment timeframe. In cases where natural conditions of a site are not known, the best approach is to use an undeveloped natural site in proximity to the re-development site as a reference site. The vegetative cover, soil type and slope will most affect the hydrology of a site and so approximating these conditions for a redevelopment site using a natural reference site where these parameters can be measured is a way to approximate the natural conditions of a redevelopment site. Locating a natural reference site in proximity to a redevelopment site is difficult, however, as the entire sub-watershed or watershed may be developed. Additionally the conditions of the natural reference site may be much different than the “naturally occurring” conditions of the redevelopment site as vegetative cover, soil type and slope may have been very different. Without historical records, there is no way of knowing the actual “naturally occurring” conditions of a redevelopment site. The subjectivity of the pre-development approach not only puts municipalities in a position to violate the U.S. and California Constitutions on unlawful takings, but it also conflicts with the Mitigation Fee

Act, CEQA and the State Administrative Procedure Act in that the Tentative Order does not contain an adequate record justifying the reasonableness of this standard.

The County is therefore suggesting an approach to hydromodification management that is not a one size fits all approach, is consistent with the watershed approach and the intent of the WQIPs, considers the current Copermittee HMPs, and provides an opportunity to develop watershed specific requirements as part of a watershed stakeholder process that have the best chance of improving water quality.

Action: Incorporate the specific modifications to the Tentative Order, which are provided in Attachment B. The sections include:

- *Provisions, E.3.c.(2) Hydromodification Management BMP Requirements (page 100)*

35. PROVISION E.3.C (PAGE 99 OF 130) – BIOFILTRATION BMPs SHOULD BE SIZED FOR THE DESIGN CAPTURE VOLUME AND IF USED FOR ALTERNATIVE COMPLIANCE CONVENTIONAL BMPs SHOULD NOT ALSO BE REQUIRED.

Section E.3.c.(3)(b)(i)[c] requires that if biofiltration is used as an alternative compliance method, the biofiltration BMP is required to be sized to 1.5 times the design capture volume. This is an increase from the prior Orange County permit. The Fact Sheet provides no technical justification for the 1.5 factor.

Studies based on work conducted within Orange County by Geosyntec Consultants provide information contrary to the unsupported inclusion of a 1.5 factor. The following documents are submitted for the record at Appendix A-3 & Appendix A-4.

Storage and Reuse Systems for Stormwater Management – Preliminary Cost and Performance Estimates for Residential Use in Irvine, CA, Eric Strecker (2009 presentation to Santa Ana Regional Board). Assessed the costs and modeled the performance of harvest and use retention BMPs and compared average annual total suspended solids (TSS) load removed and annual TSS concentrations with BMPs. In both scenarios presented, biofiltration provided superior TSS results to harvest and use.

*The Water Report Issue #65: Stormwater Retention on Site, An Analysis of Feasibility and Desirability.*⁶⁸ The paper identified significant limitations with all retention BMPs and states, “There needs to be a more technical vetting of “retain on site” and stormwater harvest and use before these approaches are made mandatory.” The authors also caution that a “one size fits all” approach requiring retention may not be desirable and “in many cases would lead to undesirable results.”

Based on the above information, the requirement to oversize biofiltration BMPs should be deleted from the Tentative Order. Biofiltration should be considered equivalent to other retention BMPs and should remain a full part of the LID toolbox without penalization.

Section E.3.c.(3)(b)(i)(d) requires that PDPs that use biofiltration as an alternative compliance option must also implement conventional BMPs. This provision requires additional mitigation for projects and in effect requires double mitigation when it is not needed. Biofiltration BMPs are more effective than conventional BMPs, and requiring both does not make technical sense. Furthermore the Fact Sheet provides no technical

⁶⁸ Eric Strecker and Aaron Poresky (2009).

justification for requiring conventional treatment in addition to biofiltration and this is not the standard in the current Orange County and Riverside permits or any other permits in California.

Action: Incorporate the specific modifications to the Tentative Order, which are provided in Attachment B. The sections include:

- Provisions, E.3.c.(1) Storm Water Pollutant Control BMP Requirements (page 99)

36. PROVISION E.3.C (PAGE 102 OF 130) – THE REGIONAL PERMIT INADVERTENTLY CREATES A TIMING GAP IN COVERAGE FOR EXEMPTIONS TO HYDROMODIFICATION REQUIREMENTS.

A strict reading of the revised permit section E.3.c.(2)(e) suggests that there could be a lapse of the exemptions for engineered channels and the large river even if the WMA Analysis supports keeping the exemptions because once the BMP design manual is submitted with WQIP the interim exemptions appear to expire and it could be some time before the Regional Board approves the WQIP and the WMA Analysis supporting keeping the interim exemptions. We suggest that clarification be provided that notes that the interim timeframe exemptions are in place until the Board approves the BMP Design Manual.

Action: Incorporate the specific modifications to the Tentative Order, which are provided in Attachment B. The sections include:

- Provisions, Development Planning E.3.c.(2)(e) - (page 102)

37. PROVISION E.3.C (PAGE 104 OF 130) – THE COPERMITTEES SHOULD BE ALLOWED THE FLEXIBILITY PROVIDED UNDER EPA POLICY TO DEVELOP A TRADING AND WATER QUALITY CREDIT SYSTEM.

The Copermittees appreciate the flexibility of the Tentative Order to implement a water quality credit system as an alternative compliance schedule. Trading systems create cost-effective, market-based mechanisms for pollutant reduction, and have been successful in other water quality and air quality contexts. The Copermittees note that any water quality trading system should be implemented in accordance with EPA's 2003 Final Water Quality Trading Policy, which allows for flexibility in generating and trading credits and offsets. The Tentative Order appears to limit a trading system to no net impacts caused by projects meeting the onsite structural BMP performance requirements of Provisions E.3.c(1) and E.3.c(2).

The Copermittees request that this language be stricken and that Copermittees be allowed the flexibility provided under the EPA 2003 Policy. Trading systems differ from program to program and are highly robust and complex credit mechanisms. Therefore, no net impact limitations should be addressed on a case-by-case basis subject to Executive Office approval, and should not immediately be limited by permit language, as certain projects may offer other significant environmental benefits.

Action: Incorporate the specific modifications to the Tentative Order, which are provided in Attachment B. The sections include:

- Provisions, Development Planning E.3.c.(3)(d) - (page 104)

PROVISION E.4 – CONSTRUCTION MANAGEMENT

38. PROVISION E.4 (PAGE 104 OF 130) – THE CONSTRUCTION MANAGEMENT PROGRAM PROVISIONS MUST BE MODIFIED SO AS NOT TO NEGATE THE VERY INTENT AND PURPOSE OF THE WATERSHED APPROACH AND THE FOCUS ON THE HIGHEST PRIORITIES WITHIN EACH WATERSHED MANAGEMENT AREA.

See the corresponding comments under Provision E – Jurisdictional Runoff Management Programs.

Action: Incorporate the specific modifications to the Tentative Order, which are provided in Attachment B. The sections include:

- Provisions, E.4. Construction Management (page 104)

PROVISION E.5 – EXISTING DEVELOPMENT MANAGEMENT

39. PROVISION E.5 (PAGE 108 OF 130) – THE EXISTING DEVELOPMENT PROGRAM PROVISIONS MUST BE MODIFIED SO AS NOT TO NEGATE THE VERY INTENT AND PURPOSE OF THE WATERSHED APPROACH AND THE FOCUS ON THE HIGHEST PRIORITIES WITHIN EACH WATERSHED MANAGEMENT AREA.

(See the corresponding comments under Provision E – Jurisdictional Runoff Management Programs)

Action: Incorporate the specific modifications to the Tentative Order, which are provided in Attachment B. The sections include:

- Provisions, E.5. Existing Development Management (page 108)
- Provisions, E.5.b Existing Development BMP Implementation and Maintenance (page 110)

40. PROVISION E.5.E (PAGE 116 OF 130) – REMOVE THE REQUIREMENT TO EVALUATE RETROFIT OF STREAM CHANNELS FROM THE TENTATIVE ORDER.

It is not the responsibility of the Copermittees to restore receiving waters, but rather reduce the discharge of pollutants in stormwater and non-stormwater to the maximum extent practicable.

Action: Incorporate the specific modifications to the Tentative Order, which are provided in Attachment B. The sections include:

- Provisions, E.5.e.(2) Stream, Channel and/or Habitat Rehabilitation in Areas of Existing Development (page 115)

PROVISION E.6 – ENFORCEMENT RESPONSE PLANS

41. PROVISION E.6 (PAGE 116 OF 130) – THE COPERMITTEES SHOULD BE ALLOWED TO UTILIZE EXISTING GUIDELINES AND PROCEDURES FOR ENFORCEMENT.

As a part of the development and implementation of a robust Illegal Discharge/Illicit Connection (ID/IC) Program, the Copermittees have developed an *Investigative Guidance Document* and *Enforcement Consistency Guide* (“Guide”). The Tentative Order should be modified to allow the Copermittees to continue to use and implement established, equivalent guidelines and procedures for enforcement.

Action: Incorporate the specific modifications to the Tentative Order, which are provided in Attachment B. The sections include:

- *Provisions, E.6 Enforcement Response Plans (page 116)*

42. PROVISION E.6.D (PAGE 118 OF 130) – THE TERM AND DEFINITION FOR “ESCALATED ENFORCEMENT” SHOULD BE REDEFINED.

Although Provision E.6.d requires each Copermittee to include “Escalated Enforcement” in the required Enforcement Response Plan, the definition of what is intended by “Escalated Enforcement” is different within the Tentative Order than the Fact Sheet and may not be enforceable.

The Tentative Order defines “Escalated Enforcement” as “any enforcement scenario where a violation or other non-compliance is determined to cause or contribute to the highest water quality conditions identified in the Water Quality Improvement Plan.” This definition seems to indicate that a Copermittee may enforce differently in a particular situation if it involves a high priority pollutant of concern. Not only does the County take exception to the notion that they would enforce differently solely based on the constituent involved, the legality of such an enforcement action is questionable. In fact, when selecting enforcement options, the Copermittee must ensure that violations of a similar nature are subjected to similar-types of enforcement remedies in order to avoid any claim of selective enforcement of the Ordinance.

However, the Fact Sheet seems to indicate that “Escalated Enforcement” would instead require the Copermittee to “take progressively stricter response to enforce its legal authority and achieve compliance....” The County supports this approach, especially since this is consistent with other ID/IC programs in California and the established guidance that has been developed and implemented by the Copermittees. In fact, the established guidance recognizes that a more severe enforcement option may be selected when a violator has either a history of noncompliance or has failed to take good faith actions to eliminate continuing violations or to meet a previously imposed compliance schedule. Ultimately, enforcement is in the prosecutorial discretion of the Copermittee.

The Tentative Order should be modified as indicated below so that it reflects a standard progressive response approach.

Action: Incorporate the specific modifications to the Tentative Order, which are provided in Attachment B. The sections include:

- *Provisions, E.6.d Escalated Enforcement (page 118)*
- *Attachment C*

PROVISION E.7 – PUBLIC EDUCATION AND PARTICIPATION

43. PROVISION E.7 (PAGE 118 OF 130) – THE PUBLIC EDUCATION PROGRAM PROVISIONS MUST BE MODIFIED SO AS NOT TO NEGATE THE VERY INTENT AND PURPOSE OF THE WATERSHED APPROACH AND THE FOCUS ON THE HIGHEST PRIORITIES WITHIN EACH WATERSHED MANAGEMENT AREA.

See the corresponding comments under Provision E – Jurisdictional Runoff Management Programs.

Action: Incorporate the specific modifications to the Tentative Order, which are provided in Attachment B. The sections include:

- *Provisions, E.7 Public Education and Participation (page 118)*
- *Provisions, E.7.a Public Education (page 119)*

PROVISION F – REPORTING

44. PROVISION F (ENTIRE PROVISION; BEGINS PAGE 121 OF 130) – THE PROCESS FOR THE DEVELOPMENT AND UPDATES OF THE VARIOUS PLANS NEEDS TO BE ALIGNED AND ALLOW FOR THE TIME NECESSARY TO COMPLETE THE WORK AND TO SUBMIT THE ROWD.

Provision F includes requirements for the documents and reports that Copermittees must prepare and provide to the Regional Board. This provision incorporates significantly expanded requirements for public participation and involvement in the development and implementation of the WQIPs and JRMPs.

However, the timeframe outlined in this section links each step of the development of the WQIP and JRMP to the commencement of coverage under the Order instead of to the development step that precedes it. The three steps outlined for the development of the WQIP need to be sequential so that the Copermittees have adequate time to complete each step and build the program based on comments received. In addition, the timeframe needs to explicitly incorporate adequate time for the Copermittees to review and respond to comments received on the current action before moving on to the next step of development. For example, it is unclear how the Copermittees would establish their water quality improvement strategies (step 2 of development) at the same time as the establishment of the priority water quality conditions and numeric goals (step 1 of development).

It should also be noted that this approach appears to establish a heavy workload for the public, the Copermittees and the Regional Board. A more streamlined approach for the development of the WQIPs should be considered that would provide the Copermittees with the necessary time to develop the final WQIP without extending the overall timeframe. For example, instead of requiring a formal public notice and solicitation of comments by the Regional Board for all three (3) steps of each WQIP, the Copermittees could work with stakeholders to solicit comments for the first two steps of the development of the WQIP and only require formal public noticing for the final approval of the WQIP. Although this is one approach to streamline the development of the WQIP, an alternative approach would be to modify the timelines as indicated below.

It should be noted that the preparation of a regional WQIP will require a CEQA determination by the Copermittee acting as lead agency. This should be recognized in setting the timeline as noted within the table below.

A comparison of the current and recommended approach is provided in the table below.

Steps and Timelines	Existing Approach in Tentative Order	Total Time from Effective Date of Order	Recommended Approach (w/ edits provided in Tentative Order)	Total Time from Effective Date of Order
Establish Priority Water Quality	Within 6 months of commencement of	6 months	Within 6 months of	6 months

Steps and Timelines	Existing Approach in Tentative Order	Total Time from Effective Date of Order	Recommended Approach (w/ edits provided in Tentative Order)	Total Time from Effective Date of Order
Conditions and Numeric Goals	coverage		commencement of coverage	
Request Public Comments	60 days from posting	8 months	30 days from posting	7 months
Revise Priority Water Quality Conditions and Numeric Goals	Not specified	? months	30 days from receiving comments	8 months
Establish Water Quality Improvement Strategies and Schedules	Within 9 months of commencement of coverage	9 months	Within 3 months of finalizing Priority Water Quality Conditions and Numeric Goals	11 months
Request Public Comments	60 days from posting	11 months	30 days with stakeholders	12 months
Revise Water Quality Improvement Strategies and Schedules	Not specified	? months	30 days from receiving comments	13 months
Develop WQIP	Within 18 months of commencement of coverage	18 months	Within 18 months of commencement of coverage	18 months (this allows 5 months for the development of the document)
Request Public Comments	30 days from posting	19 months	30 days from posting	19 months
If no hearing, Regional Board notify Copermittees that the WQIP is accepted	Within 6 months of the public request for comments	25 months	Within 6 months of the public request for comments	25 months
Finalize WQIP	Not specified	? months	60 days from receiving comments (this assumes	? months

Steps and Timelines	Existing Approach in Tentative Order	Total Time from Effective Date of Order	Recommended Approach (w/ edits provided in Tentative Order)	Total Time from Effective Date of Order
			that it is concurrent with the Regional Board notification above)	
<i>Review for CEQA Requirements</i>	<i>It should be noted that the preparation of a regional WQIP may trigger local requirements under CEQA. This should be recognized in setting the timeline. This would likely take 30-60 days.</i>			
Posting on Regional Clearinghouse	Within 30 days of acceptance by Regional Board	26 months	Within 30 days of acceptance by Regional Board	26 months

Action: Incorporate the specific modifications to the Tentative Order, which are provided in Attachment B. The sections include:

- *Provisions, F.1.a.(2)(f) Reporting (page 122)*
- *Provisions, F.1.a.(3)(d) Reporting (page 123)*
- *Provisions, F.2.a.(5) Updates (page 125)*

ATTACHMENT C – ACRONYMS, ABBREVIATIONS AND DEFINITIONS

45. ATTACHMENT C (ENTIRE ATTACHMENT; BEGINS PAGE C-1) – ATTACHMENT C SHOULD CLARIFY THE MEANING OR INTENT OF SPECIFIC TERMS USED WITHIN THE ORDER.

In addition to the acronyms and abbreviations, Attachment C includes definitions that may provide an explanation or description of the meaning or intent of specific terms or phrases that are used within the Order. The County recommends the addition and/or modification of the following definitions in order to assist in describing the meaning or intent of these terms and to avoid unnecessary confusion.

Action: Incorporate the specific modifications to the Tentative Order, which are provided in Attachment B. The terms include:

- This term did not have a definition - *Channel Rehabilitation and Improvement*
- This definition should provide additional clarification - *Illicit Connection*
- This term did not have a definition - *Progressive Enforcement*
- This definition should provide additional clarification - *Redevelopment*
- This definition should remain consistent with the Federal regulations – *Storm Water*

- This definition should remain consistent with the State regulations – *Waters of the State*
- This term should clarify that a wet weather period should be preceded by a minimum dry weather period, unless defined differently in another regulatory mechanism – *Wet Weather*

ATTACHMENT E – SPECIFIC PROVISIONS FOR TOTAL MAXIMUM DAILY LOADS

46. ATTACHMENT E (ENTIRE ATTACHMENT; BEGINS PAGE E-1) – PERMIT PROVISIONS MUST BE CONSISTENT WITH THE CORRESPONDING BASIN PLAN AMENDMENTS.

The Regional Board has adopted two Basin Plan Amendments (“BPAs”) to establish Total Maximum Daily Loads (“TMDLs”) where the Copermittees are identified as Responsible Parties and assigned wasteload allocations (“WLAs”): (1) Indicator Bacteria in Baby Beach in Dana Point Harbor⁶⁹ and (2) Indicator Bacteria, Project I - Twenty Beaches and Creeks in the San Diego Region (Including Tecolote Creek)⁷⁰ (Beaches and Creeks Bacteria TMDL).

There are several fundamental and substantive discrepancies, however, between the adopted TMDL BPAs and the provisions of the Tentative Order. These inconsistencies negate the Basin Planning process that occurred to establish the TMDLs and clearly contradict the Board’s intent for how the TMDLs would be incorporated into the MS4 Permit. As the TMDLs have been incorporated into the Basin Plan, the TMDLs constitute the “program of implementation needed for achieving water quality objectives”⁷¹ and the provisions in the MS4 Permit must, therefore, be consistent with the Basin Plan.

For example:

- Both the Baby Beach and Beaches and Creeks TMDLs clearly establish mass-based wasteload allocations. These wasteload allocations are entirely absent from the Tentative Order (see additional comments below for further discussion). Instead, the Tentative Order establishes water quality based effluent limits (WQBELs) based upon an effluent concentration (set equal to the numeric targets).
- For the Beaches and Creeks TMDL, the Tentative Order is not consistent with the compliance schedule approach provided for the comprehensive load reduction plans (CLRPs) established in the BPA. The CLRPs that will be submitted by Copermittees will propose interim compliance dates, as allowed by the BPA, to meet the 50% reduction milestone for dry and wet weather. The CLRPs submitted by Copermittees may not all propose the same interim compliance dates and the Tentative Order should acknowledge the flexibility allowed by the TMDL⁷². In fact, this scheduling

⁶⁹ Resolution R9-2008-0027.

⁷⁰ Resolution R9-2010-0001.

⁷¹ Water Code § 13050(j).

⁷² Page 68 of Attachment A of the Basin Plan Amendment.

flexibility was a primary “incentive” for Copermittees to develop CLRPs instead of Bacteria Load Reduction Plans (BLRPs).

- For the Baby Beach TMDL, the BPA includes two paths for the implementation of the TMDL – one where the beach has been delisted from the 303(d) list and one where the beach remains impaired⁷³. Where a beach has been delisted, the BPA requires that Responsible Copermittees monitor and continue implementation of existing implementation actions “to ensure REC-1 water quality objectives are maintained” (i.e., the beach is not placed back on the 303(d) list). Only if the beach is placed back on the 303(d), the NPDES permit is to be revised to include “requirements consistent with these TMDLs.” As Baby Beach is not on the most recent 303(d) list for REC-1 bacteria objectives, the requirements for Responsible Copermittees must be limited to monitoring and implementation of existing implementation actions. The Tentative Order does not recognize the approach for delisted beaches or recognize that Baby Beach is delisted.
- For the Beaches and Creeks TMDL, the BPA clearly establishes that no additional actions are required for beaches that are delisted⁷⁴. This language is not included in the Tentative Order.
- Monitoring requirements in the Tentative Order must be consistent with the requirements of the BPAs. Both the Baby Beach TMDL and the Beaches and Creeks TMDL provide certain flexibility in monitoring, via the BLRPs and CLRPs, respectively, and this flexibility is not captured in the Tentative Order.
- Both the Baby Beach TMDL and the Beaches and Creeks TMDL clearly acknowledges that exceedances in the receiving water may not be from the MS4 and contains specific compliance language to address such a situation. This language is not provided in the Tentative Order.

These examples are not exhaustive of the inconsistencies between the BPAs and the Tentative Order (additional inconsistencies are identified and modified language is proposed in **Attachment B**).

During the workshops on the Tentative Order, Regional Board members raised the question of feasibility of attaining the TMDLs. The Basin Plan Amendments included many considerations and requirements that cumulatively result in a more feasible program of implementation. If many of the requirements of the BPAs are modified or not included in the MS4 permit, such as the mass-based WLAs, flexible monitoring programs, no further action for delisted beaches, and reconsideration of the TMDLs through reopeners, the Tentative Order establishes requirements that are not only inconsistent with the BPAs, but that make attainment of the TMDLs infeasible.

Action: Modify the requirements in Attachment E to establish provisions that are consistent with the adopted Basin Plan Amendments. Specific modifications to address these inconsistencies are

⁷³ Basin Plan Amendment, Page A-12.

⁷⁴ Basin Plan Amendment, Pages A2, A12, A66.

provided in Attachment B. Certain key inconsistencies are noted in the subsequent comments below. Additional inconsistencies are also captured in the modifications detailed in Attachment B.

47. ATTACHMENT E (ENTIRE ATTACHMENT; BEGINS PAGE E-1) – THE TENTATIVE ORDER’S NUMERIC WQBELS VIOLATE THE REQUIREMENTS OF LAW BECAUSE THEY ARE INFEASIBLE.

Due to the nature of urban runoff and the extensive urbanization of Orange County, the Tentative Order’s numeric WQBELS are economically and technically infeasible.⁷⁵ The Copermittees transport stormwater for flood control purposes, and do not generate pollutants. The Copermittees are legally and practically unable to control all aspects of the urban landscape and prevent illicit substances, such as copper, from entering the environment. The state and federal government has direct oversight over consumer goods and services and can better regulate these pollutants than can local government which has little jurisdiction over consumer issues due to Commerce Clause in the U.S. Constitution and other limitations. Furthermore, the are insufficient technologies to control and treat all the pollutants that threaten receiving waters, and it is economically infeasible to expend billions of dollars in local government general funds on research and development, particularly when the Permit does not contain a compliance pathway.⁷⁶

Federal law does not require the Copermittees to meet numeric standards.⁷⁷ Moreover, meeting numeric standards in all places at all times is technically and economically infeasible and therefore beyond MEP. Any numeric WQBELS that are adopted in the Permit are done under authority of state law.⁷⁸

The State Board has consistently rejected the incorporation of numeric WQBELS as evidenced by its adoption of the Caltrans MS4 Permit, affirming that “it is not feasible at this

⁷⁵ A WQBEL is an enforceable translation in an MS4 permit for attaining compliance with a TMDL WLA, which serves to protect beneficial uses of a receiving water. 40 C.F.R. § 130.2.

⁷⁶ For example, in the final technical report prepared by the Regional Board, entitled “Revised Total Maximum Daily Loads for Indicator Bacteria Project I – Twenty Beaches and Creeks in the San Diego Region (Including Tecolote Creek)” (including beaches in Orange County), the Board concluded that the cost of implementing the particular TMDL in issue may be as high as \$973 million, with annual maintenance running as great as \$68 million annually. (See TMDL Report, http://www.swrcb.ca.gov/sandiego/water_issues/programs/tmdls/bacbacte.shtml, at p. 144 [“The cost estimates for treating 10 percent of the watershed with structural BMPs ranged from \$50,000 to \$973 million, depending on BMP selection, with yearly maintenance costs estimated from \$10,000 to \$68 million.”]; see also Total Maximum Daily Load for Bacteria in the Los Angeles River Watershed, http://www.waterboards.ca.gov/losangeles/board_decisions/basin_plan_amendments/technical_documents/bpa_80_R10-007_td.shtml, at p. 81[estimating the cost to implement the bacteria TMDL for the LA River at “\$5.4 billion.”].

⁷⁷ *Defenders of Wildlife v. Browner* (9th Cir. 1999) 191 F.3d 1159, 1167.

⁷⁸ *Long Beach Unified School District v. State of California* (1990) 225 Cal.App.3d 155, 173; *National Resources Defense Council, Inc. v. U.S. E.P.A.* (9th Cir. 1992) 966 F.2d 1292, 1308.

time to set enforceable numeric effluent criteria for municipal BMPs and in particular urban discharges.”⁷⁹

The Caltrans MS4 permit’s fact sheet also supports the use of BMP-based WQBELs as a means of meeting TMDLs and other quality standards. The Caltrans MS4 permit is also subject to TMDLs adopted by the Regional Board and USEPA. If this aspect of the Tentative Order is not corrected, Orange County MS4 Copermittees will be compelled to comply strictly with numeric WQBELs and receiving water limitations while Caltrans need only implement WQBEL BMPs to achieve compliance with the same TMDLs. This inconsistency lacks any justification.

48. ATTACHMENT E (ENTIRE ATTACHMENT; BEGINS PAGE E-1) – THE TENTATIVE ORDER’S WQBELs WERE IMPROPERLY FORMULATED.

The Tentative Order fails to provide adequate justification for incorporating numeric WQBELs in the Tentative Order for each of the incorporated TMDLs to which they apply. Further, the Tentative Order fails to establish that an adequate requisite Reasonable Potential Analysis (“RPA”) has been conducted.

The Tentative Order fails to establish if discharges from any individual Copermittee’s MS4 have the reasonable potential to cause or contribute to an excursion above any State water quality standard including State narrative criteria for water quality.

There are two generally accepted approaches to conducting an RPA. According to USEPA guidance, “A permit writer can conduct a reasonable potential analysis using effluent and receiving water data and modeling techniques . . . or using a non-quantitative approach.”⁸⁰

Neither the administrative record nor the Tentative Order’s fact sheet contains any evidence of that an RPA has been performed in accordance with the two foregoing approaches. Regarding the first approach, such an analysis would in any case have been impossible to perform given that no outfall (effluent) monitoring has been required for any prior Orange County MS4 permit. No modeling appears to have been conducted either.

Beyond this, federal regulations not only require that an RPA be performed to determine if an excursion above a water quality standard occurred, but also that the storm water discharge must be measured against an “allowable” ambient concentration.⁸¹

A WQBEL is a means of attaining a TMDL WLA, a translation of a WLA into prescribed actions or limits which has in the past been typically expressed as a BMP. Before a WQBEL can be developed, however, a need for it must be established. As the Permit Writers’ Manual indicates:

The permit writer should always provide justification for the decision to require WQBELs in the permit fact sheet or statement of basis and must do so where

⁷⁹ Fact Sheet for NPDES Permit and Waste Discharges Requirements for State of California Department of Transportation, NPDES Permit No. CAS000003, Order No. 2012-0011-DWQ, page 9 (Sept. 7, 2012).

⁸⁰ NPDES Permit Writers’ Manual, September 2010, page 6-23.

⁸¹ 40 C.F.R. § 122.44(d)(iii).

required by federal and state regulations. *A thorough rationale is particularly important when the decision to include WQBELs is not based on an analysis of effluent data for the pollutant of concern.*⁸²

No such rationale is provided in the Fact Sheet, which in the absence of effluent data derived from outfall monitoring, would have been absolutely necessary to justify the need for a numeric WQBEL.

49. ATTACHMENT E (ENTIRE ATTACHMENT; BEGINS PAGE E-1) – WQBELs FOR BOTH BABY BEACH BACTERIA TMDL AND BEACHES AND CREEKS TMDLS INAPPROPRIATELY INCLUDE TMDL NUMERIC TARGETS.

Federal regulations require that NPDES permits contain effluent limits consistent with the assumptions and requirements of all available WLAs.⁸³ As currently established in the Tentative Order, the WQBELs are not consistent with the WLAs and are therefore not consistent with federal regulations. Therefore, any adjustment of the TMDL in the Permit is taken under state authority.

The Tentative Order establishes WQBELs based upon the numeric targets (set equal to water quality objectives) in addition to the mass-based WLAs established by the TMDL. To justify this approach, the Fact Sheet states:

*Because numeric targets for TMDLs typically include a component that will be protective of water quality standards, a TMDL will likely include one or more numeric receiving water limitations and/or effluent limitations as part of the assumptions or requirements of the TMDL. Any numeric receiving water limitations and/or effluent limitations developed as part of the assumptions or requirements of a TMDL must be incorporated and included as part of a WQBELs for the MS4s.*⁸⁴

However, federal regulations require that the WLAs, not the numeric targets, are incorporated into the Tentative Order. Further, federal regulations do not require that any receiving water limitation or effluent limitation developed as part of the TMDL must be incorporated. Rather, federal regulations require that the WQBELs are consistent with the assumptions and requirements of the WLAs. Federal regulations expressly state: When developing water quality based effluent limits under this paragraph the permitting authority shall ensure that: (B) Effluent limits developed to protect a narrative water quality criterion, a numeric water quality criterion, or both, *are consistent with the assumptions and requirements of any available wasteload allocation for the discharge prepared by the State and approved by EPA pursuant to 40 CFR 130.7.*⁸⁵

⁸² *Id.*

⁸³ 40 CFR § 122.44(d)(1)(vii)(B).

⁸⁴ Fact Sheet, pg. F-38 (emphasis added).

⁸⁵ 40 CFR § 122.44(d)(1)(vii)(B).

While in most cases the numeric targets are a component of the allocations, there are numerous additional assumptions and requirements of the WLAs that are also a component of the WLAs. Wasteload allocations take into account various considerations, including the multiple sources of a pollutant, flow rates, critical conditions and margin of safety. By only incorporating the numeric target component of the WLAs, the Regional Permit fails to include all other assumptions and requirements of the WLAs as required by federal regulations. Only incorporating the numeric targets negates the entire TMDL analysis and Basin Planning process. Otherwise, TMDLs would be as simple as assigning numeric effluent limitations to MS4 discharges equal to the numeric objectives in the Basin Plan, which is explicitly contrary to the TMDLs that have been established in the Basin Plan.

In fact, simply defining the WQBELs as the numeric targets of the TMDL is contrary to the purpose of the Basin Plan itself, which not only requires the establishment of water quality objectives, but also the program of implementation needed to achieve the water quality objectives.⁸⁶ A TMDL, once incorporated into the Basin Plan, is exactly that – a program of implementation needed for achieving water quality objectives.

The following language from the Basin Plan Amendment is controlling:

Beaches and Creeks Bacteria TMDL BPA

TMDLs must be established at levels necessary to attain and maintain the applicable narrative and numerical water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge between effluent limitations and water quality.⁸⁷

Baby Beach Bacteria TMDL BPA:

The loading capacities are defined as the maximum amount of fecal coliform, total coliform and Enterococcus that the waterbody can receive and still attain water quality objectives necessary for the protection of designated beneficial uses. Each TMDL must accommodate all known sources of a pollutant, whether from natural background, nonpoint sources, or point sources, and must include a margin of safety (MOS) to preclude pollutant loading from exceeding the actual assimilative capacities of the waterbodies. The TMDL calculations also account for seasonal variations and critical conditions and were developed in a manner consistent with guidelines published by USEPA⁸⁸

In both TMDLs, the WLAs clearly take into consideration factors other than the numeric targets, such as flow rates, as the WLAs are expressed as mass-based limits. If it was the Regional Board's intent to establish a concentration-based TMDL, then the WLAs would be

⁸⁶ See Water Code section 13050(j) and as stated in the Beaches and Creeks Bacteria TMDL (Resolution, Pg.2): "A "Water Quality Control Plan" or "Basin Plan" consists of a designation or establishment for the waters within a specified area of all of the following: (1) Beneficial uses to be protected, (2) Water quality objectives and (3) A program of implementation needed for achieving water quality objectives."

⁸⁷ Resolution, Page 2.

⁸⁸ Resolution, Page 4.

expressed as a concentration. By establishing mass-based WLAs, however, the TMDL purposefully and explicitly establishes WLAs that incorporate many other factors than just the concentrations of the numeric targets. Therefore, establishing WQBELs that fail to incorporate the mass-based WLAs is inconsistent with the assumptions and requirements of the WLAs as well as inconsistent with the intent of the Basin Plan itself.

Action: Modify the requirements in Attachment E to include:

- *Fact Sheet, (page F-38)*
- *Attachment E*

Baby Beach Bacteria TMDL

In addition to the universal issues identified above, there are additional concerns with the WQBELs specific to the Baby Beach Bacteria TMDL.

Of particular concern are the WQBELs established for wet weather for total coliform (TC) and fecal coliform (FC). The BPA establishes WLAs for those indicators based upon existing conditions as the loading capacity was determined to be greater than the current discharges and clearly states that no further reductions are necessary. The BPA states:

“According to Tables 7-26 and 7-27, no wet weather wasteload reductions are required for total and fecal coliform indicator bacteria. This means that according to the wet weather models for Baby Beach, REC-1 water quality objectives for total and fecal coliform indicator bacteria are not expected to be exceeded due to discharges from the MS4s. The only wet weather wasteload reductions required for MS4s discharging into the receiving waters along the shoreline at Baby Beach is for *Enterococcus* indicator bacteria.”⁸⁹

These existing conditions WLAs were based upon a *load assessment, not a concentration assessment* (e.g., the numeric targets). The final compliance date for these WLAs was set equal to the effective date of the TMDL, given that the WLAs were set to existing conditions and no further reductions were required. Therefore, not only are the WLAs in the Tentative Order not incorporated properly as mass-based WQBELs, but the Copermitees are not provided any time to attain these new and inappropriately established concentration-based WQBELs as the effective date, and therefore final compliance date, was 2009.

Beaches and Creeks Bacteria TMDL

In addition to the universal issues identified above, there are additional concerns with the WQBELs specific to the Beaches and Creeks Bacteria TMDL.

Attachment E specifies WQBELs for dry weather flows as both receiving water and effluent limitations, in terms of zero allowable exceedances of the single sample maximum and the 30-day geometric mean. However, the dry weather component of the TMDL only considered the 30-day geometric mean and did not consider the single sample maximum within its calculation. Incorporating single sample effluent limitations into the Tentative Order goes beyond the TMDL requirements.

⁸⁹ Basin Plan Amendment, Page A-23.

In addition, if the TMDL had included single sample limits, there would have been a corresponding allowable exceedance frequency, just as for wet weather. The 22% allowable exceedance rate for wet weather was based on a reference beach within the Los Angeles Region, and although not used in the technical approach for the San Diego Beaches and Creeks TMDL, the reference beach also exhibits exceedances during dry weather, which is incorporated into beach TMDLs in the Los Angeles region.

Action: Modify the Tentative Order to be consistent with the assumptions and requirements of the WLAs by incorporating the WLAs into the Permit. See Attachment B for the specific modifications.

50. ATTACHMENT E (ENTIRE ATTACHMENT; BEGINS PAGE E-1) – WQBELS SHOULD ONLY BE DEFINED AS EFFLUENT LIMITATIONS.

There is a significant legal distinction between the Receiving Water Limitations established in Provision A (Discharge Prohibitions) and the Receiving Water Limitations established as part of the WQBELS in Attachment E (TMDL provisions). As currently (and inappropriately) defined, WQBELS include receiving water limitations based on the numeric targets (set equal to WQOs) in addition to WLAs.

Ensuring that MS4 discharges do not cause or contribute to exceedances of WQOs is already and more appropriately addressed in Provision A.2. When an exceedance occurs under Provision A (Discharge Prohibitions), there is the potential for an enforcement action at the discretion of the Regional Board (e.g., issuing a Notice of Violation). Where an exceedance occurs for a WQBEL, however, the Copermittees may be subject to Mandatory Minimum Penalties (MMPs) where the Regional Board does not have discretion.

As set forth above, the WQBELS are inappropriately defined to include TMDL numeric targets, and not just the WLAs. Ensuring that discharges do not cause or contribute to exceedances of WQOs is already addressed via Provision A.2. Therefore, the inclusion of receiving water limitations in the definition of the WQBELS is inconsistent with the assumptions and requirements of the WLAs and unnecessarily exposes Copermittees to MMPs without any requisite change to the protection of water quality.

Throughout the Beaches and Creeks Bacteria TMDL, the BPA consistently refers to attaining the numeric targets (e.g., the water quality objectives) via receiving water limitations. Therefore, establishing the mass-based WLAs as the WQBELS and the numeric targets as receiving water limitations is consistent with federal regulations for the incorporation of WLAs and the BPA for establishing the receiving water limitations.

The WQBELS should be defined only as the mass-based effluent limitations, consistent with the WLAs in the BPAs. Although the Copermittees prefer that the receiving water limitations are simply addressed with a cross-reference back to Provision A.2, if the Regional Board prefers to keep the receiving water limitations as part of the TMDL provisions, they must be distinct from and excluded from the definition of the WQBELS.

Action: Modify the Tentative Order to be consistent with the assumptions and requirements of the WLAs by defining the WQBELS as equal to the WLAs. Receiving water limitations should be excluded from the definition of WQBELS as they are not part of the WLAs.

51. ATTACHMENT E (ENTIRE ATTACHMENT; BEGINS PAGE E-1) – COMPLIANCE DETERMINATION FOR FINAL WQBELS SHOULD BE BASED ON THE IMPLEMENTATION OF BMPs AND NOT NUMERIC EFFLUENT LIMITATIONS.

For interim water quality-based effluent limitations and receiving water limitations, A BMP-based path to compliance is provided via the implementation of an approved Water Quality Improvement Plan.⁹⁰ A voluntary WQIP acknowledges the inherent challenges unique to stormwater management and provides appropriate flexibility to implement the necessary BMPs. However, the same approach is not applied to the final WQBELS.

a. Regional Board has Discretion to Establish BMP-Based Compliance

State and federal law do not require the use of numeric effluent limitations for MS4 Copermittees, but rather encourage flexible implementation of best management practices through an iterative process. Specifically, the choice to include either management practices or numeric limitations in MS4 permits is within the Regional Board’s discretion acting under state law.

Over the last decade, EPA has issued a succession of policy memoranda and guidance documents regarding the incorporation of TMDLs into stormwater permits, including:

- 1) *Guidance for Developing TMDLs in California* (EPA Region 9). January 7, 2000
- 2) *Establishing Total Maximum Daily Load (TMDL) WLAs for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs* (Wayland and Hanlon). November 22, 2002
- 3) *TMDLs to Stormwater Permit Handbook* (Draft) (EPA). November 2008
- 4) *Untitled Letter* (Kevin Weiss). March 17, 2011

In each of these EPA documents, EPA allows for discretion on the part of the permitting authority in the use of numeric effluent limitations for stormwater or BMP-based effluent limitations.

Further, it is important to note that the EPA documents did not identify any differences in how interim and final WQBELS may be addressed by effluent limitations. In particular, the guidance did not limit BMP-based effluent limitation approaches to interim WQBELS. EPA guidance does emphasize that NPDES provisions implementing TMDLs be enforceable, objective and measurable.

The Tentative Order provides for enforceable, objective and measurable provisions via the Water Quality Improvement Programs (WQIPs). Establishing an additional compliance path for the final WQBELS would therefore be consistent with the approach already provided in the Tentative Order for interim WQBELS as well as guidance issued by EPA over the last.

b. Compliance Mechanism Matters

The Regional Board has the opportunity to exercise discretion in drafting and approving the compliance language in the Order; however, if the Regional Board continues to opt for

⁹⁰ Attachment E.5.e.(1)(f); Attachment E.6.e.(1)(f)

numeric effluent limitations for final WQBELs, the Regional Board will no longer have discretion for enforcement decisions during implementation of the Order as Copermittees may be subject to Mandatory Minimum Penalties (MMPs).

Take for example a watershed where a group of Copermittees implement a suite of BMPs designed to achieve the final WQBELs. The Copermittees work closely with Regional Board staff and non-governmental organizations in developing and implementing the plan. Implementation of the BMPs achieves a 90% reduction in bacteria loads and results in the delisting of the waterbody from the State’s 303(d) list, yet the reductions do not attain the WQBELs. Another Copermittee does little to nothing to address the TMDL and achieves no reductions in bacteria loads, the waterbody continues to be listed as impaired on the State’s 303(d) list, and the WQBELs are not attained.

If numeric effluent limitations continue as the compliance mechanism for final WQBELs, both Copermittees (the group that achieved the 90% reduction and the Copermittee that did little to nothing) would equally be out of compliance with the Order and equally subject to MMPs. If a BMP-based compliance option is provided for final WQBELs, the Regional Board would have the ability to exercise discretion. The Regional Board could continue to work with the group or Copermittees that are successfully implementing actions and evaluate appropriate additional actions. For the Copermittee that did little to nothing, the Regional Board would still be able to take appropriate enforcement action.

BMP-based compliance is not a request to decrease accountability or the efforts of the Copermittees or the commitment to water quality, it is a request for the Regional Board to utilize its discretion to establish Permit provisions that will support and reward actions taken by Copermittees that are achieving the intended purposes of the TMDLs.

c. Consistent with Regional Board Approach to Enforcement

A BMP-based compliance mechanism for final WQBELs is consistent with the Regional Board’s stated approach to enforcement (as noted in the BPA establishing the Indicator Bacteria TMDL for Baby Beach):

Regional Board typically implements enforcement through an escalating series of actions to:

- (1) assist cooperative dischargers in achieving compliance; (2) compel compliance for repeat violations and recalcitrant violators; and (3) provide a disincentive for noncompliance.⁹¹

The Regional Board can structure the final WQBEL compliance options to achieve this escalating approach to enforcement. A BMP-based compliance option can be provided via the implementation of the WQIPs where discrete milestones and actions are identified. For Copermittees that do not implement the WQIPs, this compliance mechanism would no longer be an option and Copermittees would be compelled to comply via the other mechanisms (essentially, no discharge or numeric effluent limitations). Such an approach achieves all three of the escalating compliance approaches identified by the Regional Board in the Baby Beach Bacteria TMDL, while numeric effluent limitations remove the Regional

⁹¹ Baby Beach Bacteria TMDL Basin Plan Amendment, Page A-20.

Board’s discretion and will require that the Board treat cooperative dischargers and recalcitrant violators equally.

d. Consistent with Basin Plan Amendments

Establishing a BMP-based compliance path is also consistent with the Basin Plan Amendments for both TMDLs.

Beaches and Creeks TMDL:⁹²

The San Diego Water Board will revise and re-issue the WDRs and NPDES requirements for Phase I MS4s to incorporate the following:

WQBELs consistent with the requirements and assumptions of the Municipal MS4 WLAs. WQBELs may be expressed as numeric effluent limitations, when feasible, and/or as a BMP program of expanded or better-tailored BMPs.

Baby Beach Bacteria TMDL (emphasis added):

WQBELs consistent with the requirements and assumptions of the bacteria WLAs described in Tables [Insert table numbers] and a schedule of compliance applicable to the MS4 discharges into the impaired shoreline segments described in Tables [Insert table numbers]. *At a minimum, WQBELs shall include a BMP program to attain the WLAs.*⁹³

If the WQBELs consist of BMP programs, then the reporting requirements shall consist of annual progress reports on BMP planning, implementation, and effectiveness in attaining the WQOs in impaired shoreline segments, and annual water quality monitoring reports.⁹⁴

The BLRPs are the municipal dischargers’ opportunity to propose methods for assessing compliance with WQBELs that implement TMDLs.⁹⁵

Additionally, the compliance schedule anticipates revisions to the TMDL after the final compliance date, potentially through the Natural Sources Exclusion Approach (NSEA).⁹⁶ It is inconsistent with the assumptions and requirements of the BPA to require strict compliance via numeric effluent limitations at Year 10 when the TMDL explicitly anticipates revisions occurring after that final date. The intent from the BPA is to have 10 years of implementation, evaluate progress and assess whether additional regulatory options (such as the NSEA) are necessary and/or warranted. This approach can only be accomplished if BMP-based compliance is provided as an option for the final WQBELs.

⁹² Basin Plan Amendment, Page A-41.

⁹³ Basin Plan Amendment, Page A-14.

⁹⁴ Basin Plan Amendment, Page A-15.

⁹⁵ Basin Plan Amendment, Page A-19.

⁹⁶ Basin Plan Amendment, Page A-24.

e. BMP-Based Compliance is Not a “Safe Harbor”

BMP-based compliance through the iterative process is not a safe harbor under the law. A safe harbor exists in the law where certain misconduct is deemed not to violate a given rule.⁹⁷ For instance, if a purchaser of property conducts a Phase 1 Environmental Assessment of that property prior to purchase, it generally insulates the purchaser from liability related to contamination found to be caused from a prior owner. In this case, BMP-based compliance pathways can be structured to provide accountability and enforceability so long as BMPs are diligently and rigorously being implemented with specific actions and timetables and where progress is being made. This form of BMP implementation is measurable and objective, and can thus be enforced. If BMP-based compliance was a true safe harbor, any BMP-based action would qualify as a safe harbor. This is not what is being recommended by the Copermittees

The concept of “safe harbor” was raised during the hearing for the recently adopted Los Angeles Region MS4 Permit. The Regional Board as well as Executive Officer of the Regional Board directly addressed the question if BMP-based compliance, via the implementation of a Watershed Management Program (equivalent to the WQIPs), constituted a “safe harbor.” Both the Board and Executive Officer determined that BMP-based compliance was not a “safe harbor” and the Watershed Management Programs provided objective and measureable elements whereby Copermittees would be required to implement actions and would have clear accountability.

Equating BMP-based compliance as a “safe harbor” is legally inaccurate, as it does not account for the way in which the law defines safe harbors. The Regional Board should frame the issue through accountability, objectivity and enforceability.

f. Numeric Effluent Limitations are Not Feasible

The Regional Board has discretion in how the WLAs are incorporated into the MS4 Permit. The concept of feasibility relates to *achieving* the numeric effluent limitations, not to *calculating* a numeric effluent limitation. As all TMDLs have numeric WLAs, it would be “feasible” for most all TMDLs, from the very first TMDL ever established, to utilize numeric effluent limitations if simply calculating a WQBEL was the intended definition. As Wayland and Hanlon (2002) (EPA’s policy memorandum regarding incorporation of TMDLs into stormwater Permits) noted EPA “expects that most WQBELs for NPDES-regulated municipal and small construction storm water discharges will be in the form of BMPs, and that numeric limits will be used only in rare instances.” Therefore, in EPA’s policy memoranda, the concept of feasibility is not related to the ability to simply calculate the WQBELs. The concept of “feasibility” really relates to whether or not *achieving* numeric effluent limitations are feasible for the stormwater permit.

The State Water Resources Control Board convened a Blue Ribbon Panel in 2006 to investigate this very question – are numeric effluent limitations feasible for stormwater permits? This panel of national experts ultimately concluded that numeric limits were

⁹⁷ “Safe Harbor,” Black’s Law Dictionary, (1996).

generally infeasible across all three stormwater activities (municipal, industrial, and construction), with a few exceptions.⁹⁸

Therefore, without providing the BMP-based compliance option for Copermitees, the Tentative Order directly contradicts the State Water Resources Control Board’s finding regarding the feasibility of achieving numeric effluent limitations for municipal stormwater discharges.

Action: Establish a BMP-based compliance path for final WQBELs by adding the following provisions as Attachment E.5.e(2)(f) and as Attachment E.6.e.(2)(e):

The Responsible Copermitees have submitted and are fully implementing a Water Quality Improvement Plan, accepted by the San Diego Water Board, which provides reasonable assurance that the final compliance requirements will be achieved by the final compliance dates. A Responsible Copermitee that does not implement its WQIP in accordance with the milestones and compliance schedules shall demonstrate compliance with the final WQBELs pursuant to Attachment E.5.e(2)(a - e)/Attachment E.6.e(2)(a-d).

52. ATTACHMENT E (ENTIRE ATTACHMENT; BEGINS PAGE E-1) – AN EXPLICIT RE-OPENER PROVISION IS NECESSARY.

In both the Baby Beach TMDL and the Beaches and Creeks TMDL, the BPAs have included an implementation schedule that defines a point at which the TMDL will be reconsidered to incorporate new information and potentially modify targets, allocations and/or implementation requirements. The intent of the approach is clear in both BPAs:

- **Beaches and Creeks TMDL:** There is an entire section of the Basin Plan Amendment that details modifications to the TMDL through a future Basin Plan Amendment. The BPA specifically notes (BPA pg. A49):

As the implementation of these TMDLs progress, the San Diego Water Board recognizes that revisions to the Basin Plan may be necessary in the future.

- **Baby Beach TMDL:** The intent to reassess this TMDL is built directly into several sections of the implementation plan as well as the compliance schedule (emphasis added):
 - The San Diego Water Board recognizes that there are potential problems associated with using indicator bacteria WQOs to indicate the presence of human pathogens in receiving waters free of sewage discharges. The indicator bacteria WQOs were developed, in part, based on epidemiological studies in waters with sewage inputs. The risk of contracting a water-borne illness from contact with urban runoff devoid of sewage, or human-source bacteria is not known. Some pathogens, such as giardia and cryptosporidium can be contracted from animal hosts. Likewise, domestic animals can pass on human pathogens through their feces. *These and other uncertainties need to be*

⁹⁸ *The Feasibility of Numeric Effluent Limits Applicable to Discharges of Stormwater Associated with Municipal, Industrial and Construction Activities, June 19, 2006.*

addressed through special studies and, as a result, revisions to the TMDLs may be appropriate.”⁹⁹

- “Ultimately, the San Diego Water Board supports the idea of measuring pathogens (the agents causing impairment of beneficial uses) or an acceptable alternative indicator, rather than indicator bacteria (surrogates for pathogens). However, as stated previously, indicator bacteria have been used to measure water quality historically because measurement of pathogens is both difficult and costly. The San Diego Water Board is supportive of any efforts by the scientific community to perform epidemiological studies and/or investigate the feasibility of measuring pathogens directly. *The San Diego Water Board further supports subsequent modification of WQOs as a result of such studies. Ultimately, TMDLs will be recalculated if WQOs are modified due to results from future studies.”¹⁰⁰*
- Excerpt from Baby Beach Bacteria TMDL Compliance Schedule. Revisions to the TMDL are anticipated to occur in Year 10+ (after the final compliance date).

Table 1. Excerpt from Baby Beach Bacteria TMDL Compliance Schedule.¹⁰¹ Revisions to the TMDL are anticipated to occur in Year 10+ (after the final compliance date).

Year (after OAL approval)	Required Wasteload Reduction	TMDL Compliance Action
10	100 percent <i>Enterococcus</i> reduction	<ul style="list-style-type: none"> • Water Quality Monitoring • Implement BMPs • Submit request for removal from 303(d) List • (if not requested and removed earlier)
10+	Same as above	<ul style="list-style-type: none"> • Water Quality Monitoring • Implement BMPs • <i>Submit request for TMDL revisions based on Natural Sources Exclusion Approach if supported by data (if not requested and recalculated earlier)</i> • Submit request for removal from

⁹⁹ Basin Plan Amendment, Page A-22.

¹⁰⁰ Basin Plan Amendment, Page A-23.

¹⁰¹ Basin Plan Amendment, Page A-24.

		303(d) List (if not requested and removed earlier)
--	--	----------------------------------------------------

Although the County is not advocating for technical revisions to the TMDL as part of the Tentative Order issuance (such revisions would appropriately occur through the Basin Plan Amendment process with any subsequent revisions incorporated into the Permit), there is a well-documented level of uncertainty in the BPAs with the existing TMDLs where revisions to the targets, allocations, and implementation plans and schedules may be warranted. Such uncertainty should be incorporated into the provisions via an explicit re-opener in Provision H (Modifications of Programs) of the Tentative Order.

The explicit re-opener provision for the Tentative Order would serve two purposes:

- Provide a trigger to reconsider the compliance mechanism (BMP-based compliance in lieu of numeric effluent limits) prior to any compliance dates; and
- Ensure that the WQBELs are reconsidered, consistent with the intent of the TMDLs to revisit and revise as necessary the targets, allocations, and implementation actions prior to final compliance being required. This aspect is especially critical as the Beaches and Creeks re-opener would occur during this permit term (request must be made by the Copermittees by 2016) and the Baby Beach TMDL has final WQBELs compliance dates within the permit term (2014 and 2019).

While the Copermittees recognize the authority of the Regional Board to re-open the Permit at any time, the explicit re-opener captures the Regional Board’s intent to revisit and revise as necessary the TMDL provisions, consistent with the assumption and requirements of the BPAs. Based upon the first year data summary for the on-going San Diego Regional Stream Reference Study,¹⁰² such revisions may likely be warranted. The first year data show that during dry weather, the reference systems demonstrated a 34.1% exceedance rate of the single sample maximum and a 71% exceedance rate of the 30 day geometric mean for enterococci. The TMDL currently allows for a 0% exceedance rate during dry weather. During storm events, the reference systems had a 71% - 100% exceedance rate of the single sample maximum for enterococci. The TMDL currently only allows for a 22% exceedance rate during storm events. Providing for an explicit reopener in the Permit will ensure that such compelling information, such as the results of the Reference Study, are considered prior to subjecting Copermittees to enforcement actions, such as Mandatory Minimum Penalties.

The explicit re-opener is consistent with the Regional Board’s stated approach to enforcement, an escalating enforcement approach that contemplates “cooperative dischargers” as well as “recalcitrant violators.” Lastly, such an approach was built into the recently adopted Los Angeles MS4 Permit.¹⁰³

¹⁰²Southern California Coastal Water Research Project (SCCWRP). *San Diego Regional Stream Reference Study, Monitoring Progress Report #3 and Year 1 Data Summary, October 2011 through November 2012* (Jan. 3, 2013).

¹⁰³ Order R4-2012-0175.

Action: Provide an explicit Permit re-opener to capture the Regional Board’s intent to revisit and revise as necessary the TMDL provisions prior to final compliance dates. The following additional language is provided as Provision H.6 and H.7:

H.6. *Modifications of the Order shall be initiated to incorporate provisions as a result of future amendments to the Basin Plan, such as new or revised water quality objectives or the adoption or reconsideration of a TMDL, including the program of implementation. As soon as practicable, but no later than 6 months of the effective date of a revised TMDL where the revisions warrant a change to the provisions of this Order, the Regional Water Board shall modify this Order consistent with the assumptions and requirements of the revised WLA(s), including the program of implementation.*

H.7. *Modification to the Order shall be considered 18 months prior to the compliance date for final WQBELs where the compliance mechanism is based upon numeric effluent limitations. The intent of the reconsideration is to include provisions or modifications to WQBELs in Attachment E of this Order prior to the final compliance deadlines, if practicable, that would allow an action-based, BMP compliance demonstration approach with regard to final WQBELs.*

53. ATTACHMENT E (ENTIRE ATTACHMENT; BEGINS PAGE E-1) – COMPLIANCE MECHANISM IS NECESSARY PRIOR TO APPROVAL OF THE WATER QUALITY IMPROVEMENT PLANS.

The Tentative Order currently provides for BMP-based compliance with interim WQBELs via the implementation of the WQIPs.¹⁰⁴ However, as the BMP-based compliance mechanism is contingent upon implementation of an approved WQIP, the Copermittees are not provided with a BMP-based compliance mechanism during the development of the WQIPs. Without any modifications to the Tentative Order, the Copermittees would be subject to numeric effluent limitations for during WQIP development, then provided BMP-based compliance for interim WQBELs during WQIP implementation. Prior to the approval of the WQIPs, Copermittees should be provided a similar BMP-based compliance mechanism while resources are devoted to plan development and the continuation with the implementation of the existing programs.

Recognizing that the shift to a watershed approach is an important and necessary shift in the management of stormwater, in the recently adopted Los Angeles MS4 Permit,¹⁰⁵ such compliance was provided during the plan development phase.

Action: Provide BMP-based compliance as a compliance option during the development of the WQIPs through incorporation of the following provisions:

- *Interim WQBELs Compliance (Attachment E.5.e(1) and Attachment E.6.e(1)):*

Upon the effective date of this Order, a Copermittee’s full compliance with all of the following requirements shall constitute a Copermittee’s compliance with provisions pertaining to interim WQBELs with compliance deadlines occurring prior to approval of a WQIP.

¹⁰⁴ Attachment E.5.e.(1)(f); Attachment E.6.e.(1)(f)

¹⁰⁵ R4-2012-0175.

- (1) *Meets all interim and final deadlines for development of a WQIP,*
 - (3) *Targets implementation of watershed control measures in its existing storm water management program, including watershed control measures to eliminate non-storm water discharges of pollutants through the MS4 to receiving waters, to address known contributions of pollutants from MS4 discharges that cause or contribute to the impairment(s) addressed by the TMDL(s), and*
 - (4) *Receives final approval of its WQIP from the Regional Board.*
- *If the Regional Board makes modifications to provide for a BMP-based compliance path for final WQBELs, the same revisions are requested to be added to Attachment E.5.e(2) and Attachment E.6.e(2).*

54. ATTACHMENT E (ENTIRE ATTACHMENT; BEGINS PAGE E-1) – CLARIFYING LANGUAGE IS NEEDED IN THE FACT SHEET REGARDING THE ITERATIVE APPROACH AND TMDLS.

The Fact Sheet includes language on pg. F-41 to describe an exception to the iterative approach and adaptive management process for receiving waters with adopted and approved TMDLs. The language notes that for TMDLs incorporated into the Order there is a specific date for compliance to be achieved. After this date, the iterative approach and adaptive management process required under Provision A.4 no longer provides the flexibility to achieve compliance. This language implies that prior to the compliance date for each TMDL, Provision A.4 does provide flexibility to achieve compliance. This point of linkage between Provision A and the TMDL Provisions in Attachment E is significant and it was raised in the County of Orange’s comment letter on the Tentative Order for the Regional Permit.

For clarity, the Fact Sheet should also include language that explicitly states that during the implementation of the TMDL, prior to the final compliance date, Provision A.4 provides flexibility to achieve compliance with the applicable Receiving Water Limitations. In addition, the Regional Permit also needs to provide clarity in the permit provisions in Provision A.4.

Further, the Fact Sheet includes the following language on pg. F-41:

Thus, after interim or final compliance dates for a contributing violation of WQBELs, if the discharges from the Copermittees’ MS4s are causing or contributing to a violation of WQBELs, exceedances of WQBELs must be strictly enforced by the San Diego Water Board.

It is unclear what “strictly enforced” means in this context as neither interim or final WQBELs are established strictly as numeric effluent limitations in the Regional Permit. This language is counter to the compliance options provided for both interim and final WQBELs in Attachment E.

55. ATTACHMENT E (ENTIRE ATTACHMENT; BEGINS PAGE E-1) – CLARIFYING LANGUAGE IS NEEDED IN THE FACT SHEET REGARDING INCORPORATION OF NEW TMDLS INTO WQIPs.

The Fact Sheet includes language on pg. F-111 that states the WQIPs can incorporate new TMDLs prior to the Order being re-opened to incorporate the requirements of the new TMDLs. This approach is included as a requirement in the Regional Permit at F.2.c.(2). The

Fact Sheet needs to clarify that while the WQIPs can incorporate fully approved, effective TMDLs, the Regional Permit must be re-opened to incorporate the TMDLs into the Permit. As TMDLs are not self-implementing, the Permit must be reopened to include new TMDL provisions and requirements (e.g., addition WQBELs).

Action: Specific modifications are included in Attachment A (see Fact Sheet, pg. F-111; Regional Permit, Provision F.2.c.(2)).