

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD,
SAN DIEGO REGION

Response to Comments II

Section X.2 of the Fact Sheet / Technical Report for

Tentative Order No. R9-2008-0001

December 12, 2007

I. Introduction	1
II. Responses to Comments	3
A. General Comments	3
B. Comments on Findings	11
C. Comments on Specific Sections.....	16

I. Introduction

A. Background

This document summarizes and responds to written comments received between July 6, 2007 and August 23, 2007 on proposed revisions to Tentative Order No. R9-2008-0001 (formerly known as Tentative Order No. R9-2007-0002). This is the second response to comments document on the Tentative Order. Tentative Order No. R9-2008-0001 was initially distributed on February 9, 2007 by the California Regional Water Quality Control Board, San Diego Region (Regional Board). A public hearing on the Tentative Order was held on April 11, 2007 in the City of Mission Viejo before a panel of four Regional Board members. The Regional Board panel directed staff to provide written responses to significant comments received through April 25, 2007 and distribute a Tentative Order with applicable revisions that would be considered for adoption by the Board. The Revised Tentative Order was distributed for review and comment on July 6, 2007 with a Response to Comments Document (RTC 1) and a revised Fact Sheet / Technical Report.

At the April 11, 2007 meeting, the Regional Board panel directed staff to accept written comments on revisions made to the Tentative Order. Written comments were accepted on the July 6, 2007 Revised Tentative Order until August 23, 2007, and they are summarized in this document. It was previously expected that the Regional Board would review those written comments and consider adoption of the Revised Tentative Order at its September 12, 2007 meeting without reviewing written responses to those comments. Because of a lack of quorum for the item, consideration of the Tentative Order was postponed until sufficient numbers of Board members can hear the item.

This second Response to Comments (RTC 2) document and a Revised Tentative Order (dated December 12, 2007) are being distributed in order to facilitate public review and preparation for the consideration of the Tentative Order No. R9-2008-0001 by the Regional Board. At this time it is expected that the Regional Board will consider adoption of the final Revised Tentative Order in early 2008.

B. Contents of This Document

Twelve commenters provided approximately 119 comments during the second written comment period from July 6, 2007 to August 23, 2007 (Table 1). Several comments responded to revisions incorporated in the July 6, 2007 Revised Tentative Order. Most comments, however, addressed requirements that were not changed from the initial Tentative Order released for review in February 2007.

Most comments also repeated concerns that were previously addressed in RTC 1. New responses have not been drafted for repeat comments that lacked sufficient new information. Instead, readers are directed to the appropriate section in the RTC 1 document. Other comments reiterated previous concerns and provided additional supporting material. The new material, however, generally did not sufficiently refute the factors supporting the requirements within the July 6, 2007 Revised Tentative Order. In these cases, responses are provided in this document. In a few instances, consideration of new material resulted in further revisions to the Tentative Order and/or Fact Sheet.

In this document, the comments have been summarized and paraphrased. Many of the comments received were similar to other comments received. These comments have been grouped in order to minimize redundancy.

The overall organization of this document generally follows the organization of Tentative Order No. R9-2008-0001. Responses to "General Comments" are presented first, followed by responses to "Comments on Findings". The remainder of the document contains responses to "Comments on Specific Sections," presented in the same sequence as the sections in the Tentative Order. Changes to the Tentative Order and Fact Sheet, resulting from a comment, are noted in the response to that particular comment.

Table 1
Organizations providing written comments on the July 6, 2007 Revised
Tentative Order No. R9-2007-0002 (now identified as No. R9-2008-0001)

Building Industry Association of Orange County and Building Industry Legal Defense Fund	City of Mission Viejo
City of Aliso Viejo	Construction Industry Coalition on Water Quality
City of Dana Point	County of Orange
City of Laguna Hills	Natural Resources Defense Council and Defend the Bay
City of Laguna Niguel	Orange County Vector Control District
City of Lake Forest	Rancho Mission Viejo

II. Responses to Comments

A. General Comments

1. *The Tentative Order Exceeds Federal Law*

Commenters: County of Orange, City of Dana Point, City of Aliso Viejo, Building Industry Association of Orange County and Building Industry Legal Defense Fund

Comment: Several commenters reiterated concerns that various aspects of the Revised Tentative Order exceed the requirements outlined in the Clean Water Act¹ (CWA). Therefore, commenters continue, the Tentative Order is an unfunded mandate placed upon local governments by the State of California. Elements of the Revised Tentative Order specifically referenced by commenters include the Business Plan (Section F.3) and hydromodification (Section D.1.h). Commenters also cited general provisions, including requirements to control discharges into storm drains. Others declared that requirements that are “more explicit” (language used in Finding E.6) than federal regulations actually exceed federal regulations.

¹ Clean Water Act in this document refers to the Federal Water Pollution Control Act, as amended.

Response: These comments were all previously considered and addressed in developing the Tentative Order and responding to previous comments. However, in response to comments on unfunded mandates, Finding E.6 and related Fact Sheet sections have been revised. This language also revises Response No. 5 in RTC 1.²

Discussions of the other issues raised in this general comment can be found in RTC 1, Section X.1 of the Fact Sheet. No further changes have been made to the Revised Tentative Order in response to these comments. The municipal storm water business plan is discussed in RTC 1 Response No. 55 and Response No. 30 of this document. Requirements to control discharges into storm drains are discussed in RTC 1 Response No. 2 and Response No. 6 in this document. Requirements regarding hydromodification are discussed in RTC 1 Response No. 34 and Response No. 20 of this document.

2. The Tentative Order Dictates the Manner of Compliance

Commenters: City of Dana Point, City of Lake Forest, County of Orange

Comment: Commenters suggested that the Tentative Order improperly dictates the methods of compliance in contrast to California Water Code (CWC) Section 13360. For instance, commenters claim that municipalities should be able to meet the general standard for Maximum Extent Practicable (MEP) in any manner they choose and that restricting the placement of management measures within receiving waters is equivalent to dictating how compliance must be achieved.

Response: The issue of prescribing the manner of compliance, and the relationship to the MEP standard, was previously considered and addressed in developing the Tentative Order and in responding to previous comments. This general issue is discussed in Response No. 6 in RTC 1. No changes have been made in response to this comment.

3. Flexibility, Prescriptive Requirements, and the Role of the Drainage Area Management Plan (DAMP)

Commenters: County of Orange, City of Dana Point

Comment: Commenters repeated concerns that requirements within the Revised Tentative Order did not more closely match the activities described in the Copermittees' Drainage Area Management Plan (DAMP). They noted that the DAMP generally calls for more programmatic flexibility or fewer commitments than the Revised Tentative Order. They also suggested that specificity within the Tentative Order lessens their ability to manage municipal programs with an iterative approach.

² On July 6, 2007 the California Regional Water Quality Control Board, San Diego Region, distributed a document containing responses to comments received on the initial Tentative Order No. R9-2007-0002 that was released for review on February 9, 2007. That Response to Comments document became Section X of the Tentative Order's Fact Sheet / Technical Report and is referred to as RTC 1 in this document. A Revised Tentative Order was concurrently released on July 6, 2007.

Response: The DAMP was fully reviewed and considered during the development of the Tentative Order. Comments regarding these issues were previously addressed in Response No. 1 of RTC 1. No changes have been made in response to this comment.

4. Use of the Terms “Exceedance” and “Violation”

Commenters: City of Dana Point, County of Orange

Comment: One comment continued previous objections to the use of the term “violation” in the Revised Tentative Order when referring to instances when water quality objectives are exceeded. The commenter prefers the term “exceedance,” as has been used in previous Regional Board documents.

Response: This issue was considered when the Tentative Order was developed and also in response to previous comments. Response No. 16 of RTC 1 provides a discussion of the issue in the context of Finding C.7. No changes have been made in response to this comment.

5. Regulating Discharges from Third Parties

Commenters: City of Dana Point, City of Lake Forest, City of Aliso Viejo

Comment: Several comments raised concerns previously addressed about requirements to control discharges from various classes of third parties. Comments suggested that municipalities lack authority or control over other local and State agencies, including Phase 2 municipalities. Commenters are concerned that the tentative requirements do not adequately reflect the level of control they can exert.

Response: These issues have been fully considered previously. The Regional Board has followed federal guidance regarding third party discharges into the Copermittees’ MS4s. Responses No. 2 and No. 7 in RTC 1 provide discussions of these issues. No changes have been made in response to this comment.

6. Controlling Discharges Into the MS4

Commenters: Building Industry Association of Orange County and Building Industry Legal Defense Fund

Comment: One general comment asserts that municipalities should not be considered in violation of the NPDES Permit due to discharges into the municipal separate storm sewer system (MS4). The commenter contends that municipalities should be required to adopt means, measures, and controls, but not be held in violation for discharges beyond the control of Copermittees.

Response: The federal regulations and the tentative MS4 Permit requirements recognize the difference in options available to a Copermittee for addressing runoff sources within and outside its jurisdiction. The Copermittees will be in violation of the NPDES Permit if they fail to implement those requirements. As explained in Response No. 2 in RTC 1 and the Fact Sheet, municipalities are subject to the federal requirements for effectively prohibiting discharges of non-storm water into the MS4 and for implementing a program to reduce discharges of pollutants from the MS4 to the maximum extent practicable. They also cannot passively receive discharges from other third-party dischargers. No changes have been made in response to this comment.

7. Justify Differences from Other MS4 Permits

Commenters: County of Orange

Comment: One commenter suggested that the Regional Board is obligated to justify any deviations from other municipal storm water permits it has recently issued.

Response: The justification for each requirement is provided in the Fact Sheet. Certain requirements may deviate from those issued in the San Diego MS4 Permit (Order No. R9-2007-0001) or Riverside MS4 Permit (Order No. R9-2004-0001) because of variations in many factors among the subject areas. Examples of deviations include, but are not limited to, findings from program implementation and water quality monitoring, results from municipal program audits, identified threats to specific water bodies, land-use patterns, and stages of urban development. No changes have been made in response to this comment.

8. BMP Collaboration

Commenters: Building Industry Association of Orange County and Building Industry Legal Defense Fund

Comment: One commenter suggested that the Regional Board should specifically permit and encourage Copermittee collaboration on BMP implementation.

Response: The Revised Tentative Order does not prohibit collaboration on BMP implementation. Collaboration is encouraged in the watershed component and elsewhere. There are times when collaboration may be both effective and efficient, such as common educational programs. There may also be situations when BMP collaboration would be inappropriate, such as when a storm drain discharges runoff from a single Permittee. In other cases, collaboration is particularly useful in the development of a strategic effort to address particular situations, but the targeted responses may vary among Copermittees. No changes have been made in response to this comment.

9. Consideration of Balancing Factors (California Water Code Sections 13241 and 13262)

Commenters: Building Industry Association of Orange County and Building Industry Legal Defense Fund, City of Dana Point

Comment: The Building Industry Association repeated its concern that the Regional Board failed to appropriately consider the factors outlined in California Water Code (CWC) Section 13241³ and in the definition of the MEP standard.⁴ Specifically, while acknowledging that the Regional Board has broad discretion in determining requirements necessary to meet the MEP standard, which is a federal requirement, the commenter suggests that nothing in the federal law prevents the Regional Board from considering the factors outlined in CWC Section 13241 (e.g., local environmental characteristics and economics). Similarly, the City of Dana Point contended that the discussion of economics within the Fact Sheet underestimates the cost to manage storm water discharges because it is based on controlling bacteria.

Response: As has previously been stated, and supported in the Fact Sheet, the requirements of the Tentative Order do not exceed federal law. The California State Supreme Court has determined that the factors listed in CWC Section 13241 must only be considered during adoption of permits if the permit requirements exceed federal law. (*City of Burbank v. State Water Resources Control Board*. (2005) 35 Cal. 4th 613). Therefore, the Regional Board need not consider the factors listed in CWC Section 13241 in adopting the Tentative Order.

Technically, all NPDES requirements issued by the Regional Boards are promulgated in waste discharge requirements issued pursuant to CWC Sections 13260 and 13263. However, requirements issued for discharges of pollutants from point sources to waters of the United States, including requirements for discharges from MS4s, implement the provisions of the federal Clean Water Act and the federal NPDES regulations, as contemplated by Chapter 5.5 of the Porter-Cologne Water Quality Control Act (Section 13370, *et seq.*).

The references cited in the Fact Sheet discussion of economic considerations are focused largely, but not entirely, on estimates related to bacteria because that issue has received significant public attention in the last few years. The Fact Sheet also acknowledges that anticipated costs of program changes are difficult to estimate because of the variability inherent in jurisdictional-focused programs that target local issues of concern. No changes have been made in response to this comment.

³ CWC §13241 identifies factors to be considered by each Regional Board in establishing water quality objectives.

⁴ MEP is defined in Attachment C (Definitions) to Tentative Order No. R9-2008-0001.

10. Imposition of Clean Water Act Requirements is Unconstitutional

Commenters: City of Mission Viejo

Comment: The City of Mission Viejo reiterated its previous comment that forcing the municipalities to implement provisions of the federal Clean Water Act violates the Tenth Amendment of the U.S. Constitution because the federal government cannot coerce a local government to carry out federal mandates. To support its assertion, the City relies on a U.S. Supreme Court ruling (*Printz v. Unites States*, 521 U.S. 898, 925 [1977]). That case noted the Court's jurisprudence (rather than constitutional text) makes clear that the federal government may not compel the States to enact or administer a federal regulatory program.

Response: This argument is specious and remains without merit. As noted above in Response No. 8, the State of California has consented to implementing federal NPDES regulations. Furthermore, this general argument was rejected by U.S. EPA when it issued its Final Rule for Phase 2 Storm Water Regulations.⁵ No changes have been made in response to this comment.

⁵ Federal Register / Vol. 64, No. 235 / Wednesday, December 8, 1999 / Rules and Regulations. U.S. EPA. 40 CFR Parts 9, 122, 123, and 124. National Pollutant Discharge Elimination System; Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges.

11. Restricting Options for Regional Treatment Practices
Finding E.7: In-Stream Best Management Practices
Finding E.9: Facilities That Extract, Treat, and Discharge U.S. Waters
Finding D.3.c: Urban Streams as Both MS4s and Receiving Waters
Section B.5: Non-Storm Water Discharges
Section D.1.d.6: Treatment Control BMP Requirements

Commenters: County of Orange, City of Dana Point, City of Laguna Niguel, Building Industry Association of Orange County and Building Industry Legal Defense Fund

Comment: Municipalities and the building industry reiterate concerns that the revised Tentative Order restricts the use of regional, shared practices to remove pollutants from storm water discharges. Commenters contend that such practices can be more efficient or appealing than dispersed treatment controls. Specific issues associated with the use of regional controls include the placement of BMPs within waters of the U.S. (Finding E.7 and Section D.1.d.6), the dual nature of urban streams as both components of the MS4 and receiving waters (Finding D.3.c), and the use of facilities that extract, treat, and discharge water of the U.S. (Finding E.9 and Section B.5).

Response: No changes have been made to the Revised Tentative Order associated with requirements to implement treatment control measures prior to the point of discharge to receiving waters. These issues are discussed in Responses No. 3 and No. 11 of RTC 1. The use of regional or shared measures is not prohibited, provided that the treatment occurs before untreated runoff enters receiving waters. Supplemental, downstream treatment controls are also allowed subject to provisions on placing control measures within waters of the U.S. (Finding E.7) and on the effluent from the treatment systems that extract and discharge water of the U.S. (Section B.5 and Response No. 14 below). Finally, the Tentative Order does provide for the use of a treatment control mitigation fund (Section D.1.d.7.b) for projects in which a Copermittee determines implementation of appropriately-sized treatment controls is infeasible.

Comment: Commenters also contest the interpretation of U.S. EPA guidance on constructed treatment wetlands used by the Regional Board to partly justify its stance that waters of the U.S. cannot be used as treatment BMPs (Finding E.7). Commenters note that federal guidance provides assistance, rather than direction, to parties implementing the Clean Water Act. As such, they assert that the Regional Board retains discretion to allow treatment BMPs, including wetlands and others, to be placed within waters of the U.S.

Response: The Regional Board agrees that there is not a federal prohibition on placing pollution control practices within waters of the U.S. Finding E.7 was previously revised to provide clarification, and Response No. 11 of RTC 1 provided a detailed discussion with numerous examples to demonstrate the factors that must be considered when evaluating such proposals.

It is also relevant to distinguish practices used to meet waste discharge / NPDES requirements from practices used to improve conditions within a water body. The NPDES regulations clearly require the use of management practices to remove pollutants to the maximum extent practicable from MS4 storm water discharges before such discharges enter waters of the U.S. Therefore, the Tentative Order must require treatment BMPs (Section D.1.6) to be implemented prior to receiving waters. In cases where practices are proposed within waters to improve ambient water quality conditions, the Regional Board will evaluate such proposals and consider the guidance provided by the U.S. EPA on constructed treatment wetlands. This may occur under the Regional Board's responsibilities in the NPDES program or elsewhere, such as federal Clean Water Act Section 401 or CWC Section 13260. No changes have been made in response to this comment.

B. Comments on Findings

12. Finding C.2: Categories of Pollutants

Commenters: City of Dana Point

Comment: The City of Dana Point suggested that Finding C.2 acknowledge that sediment is not the only pollutant that may have a non-anthropogenic source.

Response: Finding C.2 has been revised to remove the reference to “anthropogenic activities” that had been applied to describe sediment as a common category of pollutants in urban runoff. Although there are natural sources of materials that may alter the quality of waters to a degree which could affect beneficial uses, the definition of pollution⁶ (see Attachment C – Definitions of the Tentative Order) is predicated upon waste as the source of pollutants. Therefore, by definition, the categories of pollutants described in the Finding are related to anthropogenic sources of waste.

13. Finding D.3.c: Urban Streams as Both MS4s and Receiving Waters

Commenters: City of Dana Point, County of Orange, City of Mission Viejo

Comment: Several comments addressed the Regional Board’s previous response to comments concerning Finding D.3.c, which states circumstances under which urban streams are considered both parts of the MS4 and receiving waters. Generally, the commenters continued to disagree with the Finding. One comment asserted that MS4s should not be treated similarly to waters with beneficial uses. Another suggested that only streams which have been channelized or otherwise altered by man should be considered part of the MS4. And, one comment recommended removing this Finding and instead addressing the status of urban streams on a case-by-case basis. Finally, one commenter objected to the Regional Board’s previous response (Response No. 3 in RTC 1) because it referenced *Rapanos vs. United States*⁷ although that case was specifically limited to Section 404 of the Clean Water Act.

⁶ Pollution is defined in CWC §13050(l): “(1) Pollution means an alteration of the quality of the waters of the State by waste to a degree which unreasonably affects either of the following: (a) The waters for beneficial uses. (b) Facilities which serve these beneficial uses. (2) Pollution may also include contamination.”

⁷ *Rapanos v. United States and Carabell v. United States* [126 S.Ct. 2208 (2006)]

Response: The issues raised in the comments have previously been considered during development of the Tentative Order and Response No. 3 in RTC 1. Reference to the *Rapanos* case was made specifically because many commenters wrongly asserted that the case removed many urban streams from jurisdiction under Clean Water Act Section 402 and the MS4 NPDES program. Although the *Rapanos* ruling did not pertain to Section 402, the discussions in the Opinions⁸ were cited because they articulated how ephemeral and intermittent streams can be waters of the U.S. subject to regulation under CWA Section 404 and also be considered point sources of pollution discharges regulated under CWA Section 402. As noted in Response No. 3 in RTC 1, urban streams are part of the Copermittees' MS4s where the Copermittees channel urban runoff to the urban stream. The State Water Resources Control Board (State Water Board) supports this approach.⁹ No changes have been made in response to this comment.

14. Finding E.9: Facilities That Extract, Treat, and Discharge Water (FETDs), Section B.5, and Monitoring; and Reporting Section II.C.4

Commenters: City of Dana Point, County of Orange, City of Mission Viejo, City of Laguna Niguel, City of Aliso Viejo, Building Industry Association of Orange County and Building Industry Legal Defense Fund

Several commenters responded to the changes proposed in the Revised Tentative Order regarding FETDs (Finding E.9, Section B.5, and Monitoring Program Section II.C.4). Comments addressed both the merits of addressing FETD discharges in the MS4 Permit and the actual tentative requirements.

Comment: *MS4 NPDES Permitting of FETDs.*

One comment suggested FETD discharges are not subject to NPDES permitting because no pollutants are being added to the water by the FETD process. Another comment stated that the MS4 NPDES permit is a more appropriate regulatory tool than individual NPDES permits. A third comment implied that use of the MS4 Permit is appropriate, but suggested that because FETDs are part of the MS4, specific requirements are unnecessary since the Receiving Water Limitation language in Section A already lays out a process for mitigating effects caused by FETD discharges.

⁸ Section V of the Opinion of Justice Scalia and Section A (p.14) of the Concurring Opinion of Justice Kennedy. 547 U. S. ____ (2006)

⁹ In reviewing a Petition on Order No. R9-2001-01, the State Water Board stated "We also agree with the Regional Water Board's concern, stated in its response, that there may be instances where MS4s use 'waters of the United States' as part of their sewer system [...]" State Water Resources Control Board Order WQ 2001-15. In the Matter of the Petitions of Building Industry Association of San Diego County and Western States Petroleum Association for Review of Waste Discharge Requirements Order No. 2001-01 for Urban Runoff from San Diego County. SWRCB/OCC Files A-1362, A-1362(a).

Response: The effluent from FETDs is a point source discharge to waters of the U.S. that is subject to NPDES requirements. There are no exemptions in federal regulations for surface water treatment facilities. Exemptions exist for irrigated agricultural return flows and oil and gas exploration facilities. The Regional Board anticipates establishing requirements for FETD discharges through the development of general or individual NPDES requirements. The discharge is considered non-storm water because the source of water is a surface water body, which, incidentally, may contain water from both precipitation and dry-weather urban runoff.

Although an NPDES permit is not necessarily required when transferring water from one navigable water into another,¹⁰ the use of FETDs is clearly distinguishable from water transfers used to allocate the supply of water resources. The discharge from a FETD is a discharge from a waste treatment system, whereas traditional water transfers simply convey between two waters of the U.S., without any type of processes to change the physical, chemical, or biological integrity of the source water. Because FETDs do not merely convey water from one water body to another, their effluent is subject to NPDES requirements.

The effluent is considered separately than the effluent from traditional municipal storm water post-construction treatment BMPs because traditional BMPs are required to remove pollutants before the runoff is discharged to receiving waters. The Regional Board agrees with the iterative approach outlined in Section A of the Tentative Order (Prohibitions and Receiving Water Limitations) would apply to discharges from FETDs that cause or contribute to a condition of pollution or nuisance. Therefore, Section B.5 has been revised to delete the tentative requirement that discharges from FETDs must not cause or contribute to a condition of pollution or nuisance.

Furthermore, it is worthwhile to note that the iterative process within Section A is applicable to all Copermittees discharging pollutants that cause or contribute to a violation of water quality standards in a particular receiving water. Therefore, if the discharge from a FETD causes or contributes to a violation of water quality standards, then each Copermittee contributing to the problem will be expected to comply with the iterative approach described in Section A.3.

Comment: *FETD Requirements are too strict.*

Several comments asserted that the proposed requirements for discharges from FETDs are too strict. Commenters are concerned that this creates a disincentive to construct FETDs, which they perceive as water quality improvement projects.

¹⁰ In South Florida Water Management District v. Miccosukee Tribe of Indians 541 U.S. 95 (2004), the U.S. Supreme Court ruled that NPDES permits are required if transferring water between two meaningful distinct water bodies. In response, the U.S. EPA issued a proposed rule: U.S. EPA's *NPDES Water Transfers Proposed Rule* at Federal Register / Vol. 71, No. 109 / Wednesday, June 7, 2006 / Proposed Rules p.32887, available on-line at http://cfpub.epa.gov/npdes/regresult.cfm?program_id=0&type=3&sort=name&view=all.

Response: The FETD requirements are reasonable. They establish a process which ensures that pollutants in FETD discharges will be identified so that management measures can be developed to ensure discharges will meet water quality standards. They are based upon requirements issued by the Regional Board to FETDs in south Orange County. Previous requirements have been established pursuant to California Water Code Section 13267 and Section 401 of the federal Clean Water Act. The requirements include an adaptive monitoring program to identify whether the discharge is causing a condition of nuisance, contamination or pollution, then identifying the pollutant of concern in order to develop a targeted management approach. This iterative approach is necessary because of uncertainties in the source water, treatment processes, and discharge characteristics. This approach would be reviewed at the time individual or general NPDES requirements are developed.

As noted in the Revised Fact Sheet discussion, FETDs have been proposed to reduce concentrations of indicator fecal bacteria. In doing so, they have the potential of removing some other pollutants (e.g., via media filtration), but they do not necessarily reduce other pollutants to levels that meet water quality objectives. For instance, the concentrations of metals, pesticides, or other dissolved pollutants in discharges of treated effluent may exceed California Toxics Rule or Ocean Plan criteria. As a result, they may be expected to cause conditions of pollution, contamination, or nuisance. Dischargers who cause such conditions must be subject to requirements for abating the effects of their discharges. Rather than prohibiting the discharges, the Revised Tentative Order allows for an adaptive management approach to eliminating the pollution.

Comment: *Requirements should consider loads, not concentrations.*

One comment suggested that loads of pollutants, rather than concentrations, should be evaluated when considering the discharges of FETDs, since monitoring is likely to show reductions in pollutant loads.

Response: Concentrations of pollutants are the appropriate metric because numeric water quality objectives are based upon concentrations. In cases where Total Maximum Daily Loads (TMDLs) have been developed for targeted pollutants, load reductions may be appropriate metrics. No TMDLs have been established in south Orange County.¹¹

¹¹ A TMDL is a quantitative assessment of water quality problems, contributing sources, and load reductions or control actions needed to restore and protect bodies of water. The TMDL approach does not replace existing water pollution control programs. It provides a framework for evaluating pollution control efforts and for coordination between federal, state and local efforts to meet water quality standards. The San Diego Regional Board is tentatively scheduled to consider adoption of TMDLs for bacteria-impaired beaches and creeks on November 14, 2007. Once adopted by the Regional Board, the TMDL must then be approved by the State Water Board, the Office of Administrative Law, and the U.S. EPA.

Comment: *Allow for case-specific requirements.*

Several commenters requested that requirements for discharges from FETDs be subject to case-by-case evaluations, rather than standard requirements. For example, one group of comments suggested that monitoring be conducted only for the constituent targeted by the facility. Another set of comments asserted that operators of FETDs should not be responsible for monitoring and treating pollutants from upstream sources. Another comment requested that a “grandfather” clause be added to exempt existing projects from the requirements.

Response: Section C.4.b already provides for deviations of the monitoring requirements upon written authorization of the Regional Board Executive Officer. It is expected that operators of existing FETDs will request revised monitoring requirements commensurate with the extensive monitoring already conducted for existing facilities. Operators of new facilities must conduct water quality monitoring to determine whether discharges will affect beneficial uses of the receiving waters. Based on results of progressive monitoring, sources of toxicity will be identified. In this way, Copermittees in the watershed can develop source identification programs and/or the facility’s treatment process may be modified.

C. Comments on Specific Sections

15. Section C: Legal Authority

Commenters: Building Industry Association of Orange County and Building Industry Legal Defense Fund, City of Dana Point

Comment: Representatives of building industry associations requested that each requirement within Section C (Legal Authority) be qualified by the phrase “to the MEP.”

Response: Adding MEP to each phrase is inappropriate because of the range of expectations outlined in the federal regulations. For example, discharges of non-storm flows (except for ones specifically exempted in Section B.2) must be effectively prohibited, not merely reduced to the MEP. The current language is appropriate and no changes have been made.

Comment: The City of Dana Point is concerned that the language within Sections C.1 and C.2 is too vague to be meaningful.

Response: The language within Section C is nearly identical to the current MS4 Permit (Order No. R9-2002-01), which was used by the Copermittees to update their water quality ordinances. It has provided meaningful direction. No changes are proposed to this section.

16. Section D.1: General Comments

Commenters: Construction Industry Coalition on Water Quality, Building Industry Association of Orange County and Building Industry Legal Defense Fund, Rancho Mission Viejo

Comment: Several commenters recommended that the Tentative Order provide flexibility for BMP design and implementation given site-specific and regional factors, including regional planning and development scale.

Response: These comments have been addressed in detail in Response No. 22 of RTC 1. No changes have been made in response to this comment.

17. Section D.1.c.6: Infiltration and Groundwater Protection, and Finding C.11: Groundwater Protection

Commenters: Building Industry Association of Orange County and Building Industry Legal Defense Fund, Rancho Mission Viejo

Comment: Two commenters recommended that the Tentative Order be revised to define “significant pollutant loads” as used in Section D.1.c.6 and require pretreatment as a management technique for reducing the risk of groundwater contamination when infiltrating diverted dry weather flows.

Response: The use of the term “significant pollutant load” in the Tentative Order is appropriate and allows sufficient flexibility for technical design and site-specific factors, such as soil type and depth to groundwater. As discussed in Response No. 24 of RTC 1, pretreatment has been added as a potential management technique in Finding C.11.

18. Section D.1.d.2: Priority Project Categories for SUSMPs

Commenter: Construction Industry Coalition on Water Quality

Comment: One commenter gave examples of specific project types that do not increase imperviousness and then requested that they not be considered priority projects with regards to SUSMP requirements. Examples included pothole repair, square patching and installation or refurbishment of underground utilities.

Response: As currently written, the Tentative Order does not necessarily consider the example projects as priority projects. Some redevelopment projects, however, will be categorized as priority projects and will be subject to SUSMP requirements. The definition of such redevelopment projects in the Tentative Order is consistent with the existing requirements and with Regional Board Order No. R9-2001-01, the previous San Diego County MS4 Permit that has withstood review by the State Water Board and the Courts.

19. Section D.1.d.8: SUSMPs and Low Impact Development (LID)

Commenters: National Resources Defense Council (NRDC), Defend the Bay

Comment: In a combined letter, NRDC and Defend the Bay commented that the Tentative Order falls short of the MEP standard by failing to include clear and adequate LID requirements. The commenters specifically recommended that the Tentative Order define all projects as priority projects, adopt a three-percent maximum allowable effective impervious area, require LID as the primary pollution prevention management technique, recognize that LID is more effective and cost-efficient than treatment control BMPs, and shorten the timeframe for LID guideline development to three months.

Response: Section D.1.c.2 of the Tentative Order requires that all development projects, not just those that are identified as priority projects, implement site design BMPs. Site design BMPs are effectively equivalent to and include many LID techniques. Tentative Order offers flexibility to the Copermittees without sacrificing the end-goal of preventing storm water pollution to the MEP.

This tentative requirement is similar to existing requirements in Order No. R9-2002-01. Section D.8 of the Tentative Order presents an option to develop an LID substitution program allowing LID techniques to be used to replace treatment control BMPs, demonstrating the Regional Board's support of LID's ability to prevent pollution. As noted in Response No. 30 of RTC 1, depending on the success of this element of the Tentative Order, LID language may be clarified in future permits. Comments regarding site design BMPs and the LID Substitution Program are addressed at greater length in Fact Sheet Sections D.1.d.6 and D.1.d.8. No changes have been made in response to this comment.

20. Section D.1.d: Standard Urban Storm Water Mitigation Plans (SUSMPs)

Section D.1.h: Hydromodification

Commenters: Building Industry Association of Orange County and Building Industry Legal Defense Fund, Rancho Mission Viejo, Construction Industry Coalition on Water Quality, City of Dana Point, City of Lake Forest, City of Laguna Niguel

Comment: Two commenters requested that the Regional Board delete all specific hydromodification requirements and should instead let cities develop their own requirements.

Response: This issue was considered during development of the Tentative Order. Section D.1.h of the Fact Sheet discusses the need to expand and clarify current requirements for hydromodification controls. Each Copermittee may develop its own procedures and criteria for hydromodification based on the minimum requirements in the Tentative Order. Further discussion is provided in Response No. 34 of RTC 1. No changes have been made in response to this comment.

Comment: One commenter proposed allowing regional approaches to SUSMP and hydromodification requirements. Another commenter requested that off-site controls be allowed for infill, redevelopment projects. Additionally, the commenter proposed combining the peak, volume and duration reductions achieved by all BMPs cumulatively and without limitations for the purpose of determining compliance with numeric treatment control and hydrologic control requirements in the Tentative Order.

Response: A discussion of regional BMPs relative to treatment control and hydromodification BMPs is provided in Responses No. 22 and No. 34 of RTC 1. The Regional Board agrees with the commenter that the cumulative effect of BMPs can be considered in order to determine compliance with the Tentative Order (see footnote no. 6 in Section D.1.d.6). This point underscores the importance of long-term maintenance of site design, source control, treatment control and hydromodification BMPs. No changes have been made in response to this comment.

Hydromodification Control Waivers (D.1.h.3.c)

Comment: Three commenters made suggestions regarding the hydromodification control waivers (Section D.1.h.3.c). One commenter requested that the Tentative Order more clearly allow off-site in-stream measures. Two other commenters stated that the Tentative Order does not sufficiently allow waivers for projects that would not increase the potential for hydromodification or projects that would discharge to waters, such as hardened channels, that are not susceptible to hydromodification. The commenters further argue that the Regional Board does not have the authority to require in-stream mitigation measures as a condition to obtain a waiver.

Response: Language in the Tentative Order already explicitly allows for off-site in-stream measures within the same watershed (Section D.1.h.3.c.ii.b) and discusses that a waiver may be implemented in situations where the receiving waters are already severely degraded, including significantly hardened channels (Section D.1.3.c.ii). Response No. 34 of RTC 1 discusses these points in greater detail. The Regional Board is responsible for requiring that management measures be implemented to the MEP in order to prevent or mitigate any adverse effects of water pollution from MS4 discharges. The Tentative Order does not, however, dictate the manner of compliance, as there are a number of options available for improving degraded receiving water conditions. No changes to the Tentative Order are proposed.

Development and Implementation of Hydromodification Criteria (D.1.h.4)

Comment: Two commenters proposed that it is inappropriate to require use of findings from hydromodification studies conducted by the Stormwater Monitoring Coalition (SMC) and the Southern California Coastal Waters Research Program (SCCWRP) without public review of those findings. Additionally, the commenters requested that final hydromodification control criteria should be allowed to deviate from the findings as long as the final criteria address certain minimum elements.

Response: First, the SMC/SCCWRP study will not likely result in recommended criteria, but rather a set of tools that can be used to assess hydromodification effects. Further, the SMC/SCCWRP study is subject to substantial peer review, including a technical advisory committee (TAC) that includes representatives of municipal Copermittees and interested parties (e.g., the building industry, consultants, and environmental organizations). Public and peer review may also be facilitated as the TAC will identify other individuals to review draft products from the study.

It is also expected that there will be public review at the municipal level prior to incorporation into local requirements. Finally, the Tentative Order affords each Copermittee sufficient flexibility to deviate from the SMC/SCCWRP report in terms of devising a final hydromodification control strategy, as long as the strategy accounts for certain minimum elements from the SMC/SCCWRP report, including findings and numeric limits. Section D.1.h.4 has been revised for clarity. No significant changes have been made.

Interim Requirements (D.1.h.5)

Comment: Several comments were received regarding the interim hydromodification requirements for large projects, Section D.1.h.5 of the Tentative Order. Two commenters requested that the phrase “or equivalent” be added when discussing the requirement to disconnect impervious areas and that subsection D.1.h.5.iii clarify expectations for stream setbacks when the site does not afford sufficient space to do so. One commenter also expressed that the interim requirements should only apply to large sites, greater than 20 acres.

Response: As explicitly stated in this section of the Tentative Order, the interim requirements only apply to sites disturbing 20 acres or more, not to small sites. Other issues raised in the comments are discussed in Response No. 34 of RTC 1 (page 51).

21. Section D.1.f: Treatment Control BMP Maintenance Tracking

Commenter: City of Aliso Viejo

Comment: One commenter stated that the Tentative Order should be revised to specifically state that self-certification and third-party inspections are permissible for post-construction BMP verification.

Response: Section D.1.f.2.c.iii of the Tentative Order contains language allowing third-party inspections. This is discussed in Response No. 33 of RTC 1. No changes have been made in response to this comment.

22. Section D.2: Construction General Comments

Commenters: City of Aliso Viejo

Comment: One comment restated concerns that the Revised Tentative Order requires municipalities to essentially enforce the Statewide General Construction NPDES permit (State Board Order No. 99-08-DWQ).

Response: This comment was previously addressed in Response No. 38 of RTC 1. The intent of the requirement is for Copermittees to review the plans required by their local ordinances, not the Construction NPDES permit. No changes have been made in response to this comment.

Comment: One commenter objected to imposing new planning requirements on construction projects that have already been approved by municipalities.

Response: The Revised Tentative Order requires Copermittees to address potential effects from construction-related MS4 discharges at the planning, permitting, and enforcement stages of oversight. Construction projects that have received planning-related approvals must still meet current permitting and enforcement expectations. Projects that receive planning-level approvals are still subject to enforceable local ordinances. To the extent that a Copermittee is legally able to add requirements during the permitting phase of prior-approved projects, it must attempt to do so. No changes have been made in response to this comment.

23. Section D.2.d.1: Construction BMPs

Commenters: City of Dana Point, Rancho Mission Viejo, Construction Industry Coalition on Water Quality

Comment: Several commenters discussed the requirements for construction projects in Section D.2.d.1. One commenter sought additional specificity, arguing that the Revised Tentative Order lacked sufficient guidance. That commenter provided examples of tables and lists referring to industry guidebooks (e.g., Caltrans and CASQA) to be incorporated into the Permit. Other commenters objected to the management measures for erosion controls at disturbed areas in Section D.2.d.1.a.vi of the Revised Tentative Order.

Response: The requirements for construction management measures are intended to provide each Copermittee with discretion appropriate to its jurisdiction and issues of concern. The Copermittees have relied on industry guidance, such as that cited by the commenter, when developing their own requirements. In addition, the Copermittees have developed increased practical knowledge based on the last few years of program implementation. For these reasons, the basic management measures required in the Tentative Order are appropriate.

For example, Section D.2.d.1.a.vi. requires that each Copermittee determine a threshold for disturbed areas after which temporary or permanent erosion control measures must be implemented. It further allows Copermittees to temporarily increase the threshold if adequate control practices are being implemented. As a result, the concerns raised by the commenters are addressed within the current language. No changes have been made in response to this comment.

24. Section D.2.d.1.c.i: Active Sediment Controls

Commenters: Building Industry Association of Orange County and Building Industry Legal Defense Fund, Rancho Mission Viejo, Construction Industry Coalition on Water Quality

Comment: Several comments restated general and specific concerns with requirements for the use of active (formerly termed “advanced”) sediment treatment (Section D.2.d.1.c.i). Commenters generally are opposed to the requirement related to the use of active treatment systems, though some comments misinterpret the actual requirement. Some commenters are concerned that chemicals used in active treatment systems pose a threat to receiving waters. Others suggest that the Permit include specific alternatives to be used in place of active treatment systems.

Response: These comments were considered previously and addressed in Response No. 37 of RTC 1. The Revised Tentative Order allows each Permittee to establish the conditions under which it would require the use of active treatment. Such conditions include the ineffectiveness of other BMPs and the condition of receiving waters. Therefore, the concerns expressed by commenters are misplaced. No revisions have been made to this section other than replacing the term “advanced” with “active.”

25. Section D.2.g: Reporting of Non-Compliant Sites

Commenters: City of Dana Point

Comment: One commenter stated that it prefers language in the existing Permit (Order No. R9-2002-01) regarding when the Copermittees must notify the Regional Board about non-compliant construction sites.

Response: The Tentative Order requires notification when a Copermittee issues a stop work order or takes another high level enforcement action related to storm water violations at a construction site. The current MS4 Permit requires that notification proceed when a Copermittee determines a non-compliant site poses a threat to human or environmental health. The Tentative Order improves clarity regarding when notification is required. No changes have been made in response to this comment.

26. Section D.3.a.4: Flood Control Structures

Commenters: City of Aliso Viejo, City of Lake Forest

Comment: Commenters sought clarification that only municipalities that own flood control structures are subject to the requirements pertaining to such devices (Section d.3.a.4).

Response: As stated in Response No. 42 of RTC 1, each Copermittee must meet the requirements of the Tentative Order for its structural flood control devices. The Regional Board expects that the Flood Control District and other Copermittees will communicate with each other regarding structures owned by the District that serve other municipalities. No changes have been made in response to this comment.

27. Section D.3.b.3: Mobile Businesses

Commenter: City of Dana Point

Comment: The State Division of Labor Standards Enforcement requires registration of car washing businesses. Because many of the cities currently do not require registration, this may be a good opportunity for the State to regulate, educate and enforce environmental protection requirements or share information regarding these businesses.

Response: According to State Division of Labor Standards, the registration requirement applies only to stationary or mobile car washing businesses that provide car washing and polishing as a primary service and employ at least one person for labor code and industrial welfare purposes. For this reason, the Division may serve as a good, if incomplete, resource for Copermittees. As part of the Division's registration process, applicable businesses must demonstrate that they have complied with local requirements including water quality requirements to the extent that the Division is aware that such requirements exist. For this reason, Copermittees are encouraged to work with the Division to make sure that their information remains updated. No changes have been made in response to this comment.

28. Section D.4: Illicit Discharge Detection and Elimination

Commenters: City of Aliso Viejo, City of Lake Forest, City of Laguna Hills, City of Mission Viejo

Comment: With respect to prevention of and response to sewer spills, two municipalities suggested that in cases where special districts own and operate sanitary sewers, Copermittees should simply be required to cooperate with sewer districts.

Response: This comment was addressed in Response No. 50 of RTC 1. Through municipal functions such as planning, permitting, code inspections, and enforcement, municipalities have several avenues to address potential and actual threats from discharges of waste water, regardless of whether the sanitary sewer is operated by a special district. No changes have been made to this section.

Comment: Three Copermittees sought revisions to language in Section D.4.e, D.4.f, and D.4.h to provide more flexibility in the types of responses required by Copermittees to spills.

Response: This general issue was discussed in Responses Nos. 44, 48, 49, and 50 of RTC 1. The Revised Tentative Order provides sufficient flexibility for how Copermittees must respond to incidents.

Comment: Two Copermittees requested that the Regional Board clarify its expectations for the types of management measures and procedures required in Section D.4.h.1 to prevent, respond to, and contain and clean up sewage and other spills that may discharge into its MS4.

Response: As discussed in Response No. 50 of RTC 1, examples of management measures can be found in Section D.3.a.7 and in the 2007 Drainage Area Management Plan (DAMP) submitted by the Copermittees as part of their Report of Waste Discharge. For instance, the Model Sewage Spill Response Procedure within the DAMP outlines responsible procedures. No changes have been made in response to this comment.

Comment: One Copermittee requested that the language added to section D.4.h.1 in the Revised Tentative Order also be added to Section D.4.h.2. This would add the phrase “implement management measures and procedures” to address spills from private sewer laterals.

Response: Section D.4.h.2 has been revised to add the suggested language.

29. Section E: Watershed Programs

Commenters: City of Aliso Viejo

Comment: One comment asked that further revisions to the watershed urban runoff programs should be made to encourage, rather than require, participation. The same commenter suggested that implementation of the jurisdictional programs is hampered by the complexity of participating in the watershed programs.

Response: Following the earlier round of comments, significant changes were made to the watershed program requirements. Watershed-based programs are necessary to address priority issues in watersheds draining several municipalities, where the sources of the pollution are spread among the municipalities. Based on the information presented at meetings of the Aliso Creek Watershed Copermittees, participation in watershed programs has facilitated the ability of municipalities to implement jurisdictional programs. No further changes have been made to this section.

30. Section F.3: Storm Water Funding Business Plan

Commenters: City of Aliso Viejo, City of Lake Forest, City of Laguna Hills, City of Laguna Niguel

Comment: Commenters generally repeated previous concerns about requirements within Section F.3 for the development of a business plan for storm water program funding. Generally, commenters continue to object to the requirement. One comment claims that the Regional Board lacks the authority to require such a plan be developed. Another suggests the business plan be recommended rather than required. Other comments note that information about future fiscal and water quality conditions is unknown, thus the plan would be difficult to produce. Finally, one comment inaccurately suggested that the Tentative Order requires the Regional Board to approve the funding plan.

Response: The Tentative Order does not require the Regional Board to approve the funding plan. Other general comments were addressed in the development of the Tentative Order and in Response No. 55 of RTC 1. This requirement is intended to improve long-term viability of urban runoff management programs by identifying sources of funding associated with implementing proposed management measures. Without a plan, future obligations proposed in the Report of Waste Discharge, DAMP, and jurisdictional plans are at risk. Some commenters fail to recognize that the business plan does not commit or restrict the actual financing mechanisms used by the Copermittees. No further changes have been made to this section.