



County of San Diego

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September 14, 2015

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Dear Mr. Chiu:

COMMENT LETTER – TENTATIVE ORDER NO. R9-2015-0100 PLACE ID:786088WCHIUI

The County of San Diego (County) appreciates the opportunity to comment on the Regional Water Board's *Tentative Order R9-2015-0100, an Order Amending Order No. R9-2013-0001, NPDES No. CAS010266, as amended by Order No. R9-2015-0001, National Pollutant Discharge Elimination System (NPDES) Permit and Waste Discharge Requirements for Discharges from the Municipal Separate Storm Sewer Systems (MS4) Draining the Watersheds within the San Diego Region (Tentative Order or Permit)*. Comments are followed by specific recommendations for modifications to the language in the Tentative Order. The noted references and page numbers refer to the redline strikeout version of the Tentative Order provided on the Regional Water Board's website.

County comments on the Tentative Order address the following general areas of concern:

- Receiving Water Limitations and the Alternative Compliance Pathway in Provisions A and B;
- BMP Design Manual Updates; and
- Total Maximum Daily Loads (TMDLs), specifically for Indicator Bacteria Project I and Los Peñasquitos Lagoon.

The County respectfully submits the following comments with respect to Tentative Order R9-2015-0100. These comments should not be construed as amending or modifying any of the County's positions with respect to any prior Regional Board order or action. The County reserves its right to continue to pursue any and all of its positions, arguments, challenges, petitions, and appeals with respect to any such prior Regional Board order or action.

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**1. Provision A.2. Receiving Water Limitations (page 17/138)
Receiving Water Limitations Provisions are not required in the Tentative Order**

The County appreciates the inclusion of a Compliance Option in Provision B.3.c of the Tentative Order; however, we continue to believe that the Regional Board has ultimate discretion in regards to requiring strict numeric compliance with water quality standards as noted in the State Board Order addressing receiving water limitations¹. The County respectfully requests that the Regional Board use its discretion to remove the requirement to comply with receiving water limitations in Provision A.2 of the Tentative Order. While the County recognizes that the State Board has issued an order on the Los Angeles MS4 Permit that includes findings about the receiving water limitations language, the County feels that the San Diego Regional Water Board should utilize the discretion discussed in the order:

"Although it would be inconsistent with USEPA's general practice of requiring compliance with water quality standards over time through an iterative process, we may even have the flexibility to reverse our own precedent regarding receiving water limitations and receiving water limitations provisions and make a policy determination that, going forward, we will either no longer require compliance with water quality standards in MS4 permits, or will deem good faith engagement in the iterative process to constitute such compliance." (Footnotes omitted).²

While the State Board Order declined to reverse course and discontinue including receiving water limitations provisions in MS4 permits, the County respectfully submits that this is not a sound policy decision. The State Board broadly concluded that "the iterative process has been underutilized and ineffective to date in bringing MS4 discharges into compliance with water quality standards."³ To the contrary, significant advances in reducing pollutants in receiving waters have been made and will continue to be made as science and technology improve and watershed management approaches are implemented. The County feels the Regional Water Board should allow the comprehensive and prioritized watershed planning efforts to be implemented and the effectiveness evaluated prior to incorporating receiving water limitations.

The inclusion of receiving water limitations language seems to overlook the intent of Congress in enacting §402(p) of the Clean Water Act, the Chief Counsel 1993 Memorandum explaining the rationale for the separate Maximum Extent Practicable (MEP) standard for MS4 systems, and Congress' recognition of the unique challenges that an MS4 faces with an open system.⁴

For example, the Caltrans Permit (Order 2012-0011 DWQ) contains language that is more consistent with Clean Water Act §402(p).⁵ It recognizes the infeasibility of setting

¹ Order WQ 2015-0075, p. 13; [http://www.waterboards.ca.gov/sandiego/water_issues/programs/stormwater/docs/2015-0731_Tentative_Order_Attachment%201_\(Amended_Order\).pdf](http://www.waterboards.ca.gov/sandiego/water_issues/programs/stormwater/docs/2015-0731_Tentative_Order_Attachment%201_(Amended_Order).pdf).

² *Id* at 14

³ *Ibid*.

⁴ 1993 Memorandum of Chief Counsel, p. 2

⁵ Order 2012-0011 DWQ, Finding 20, p. 11; Provision A.1., p. 18.

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numeric effluent criteria for municipal BMPs and urban discharges. Setting a policy consistent with these realities and using language that reflects the appropriate MEP standard and iterative process would advance improvement of water quality by creating a climate of cooperation and innovative solutions.

The County requests that the Regional Water Board use the discretion noted to remove the receiving water limitations from this MS4 permit. However, should the Board decide to keep the receiving water limitations language, we have recommended some modifications for consideration in the specific comments below.

SPECIFIC COMMENTS ON RECEIVING WATER LIMITATIONS

2. Provision A. Prohibitions and Limitations (page 16/138)

Request: Add sentence to Provision A to clarify its link to Provision B.

Rationale: The Prohibitions and Limitations language in Provision A should be aligned with and reference the compliance alternatives provided through the Water Quality Improvement Planning process described in Provision B.

The proposed Prohibitions and Limitations provisions may be construed as standalone provisions that could expose the Copermitttees to state and federal enforcement actions, as well as to third-party actions under the federal Clean Water Act's citizen suit provisions. A clear linkage between the compliance provisions and the prohibitions, receiving water limitations, and effluent limitations must be established. Compliance with Provisions A.1, A.2, and A.3 should be linked to Provision B so that it is clear that the compliance mechanism for A.4 is the Water Quality Improvement Plan (Provision B) and/or the TMDL (Attachment E), as applicable.

Recommendation: Include language in Provision A to indicate that compliance can be achieved through implementation of the Water Quality Improvement Plan, specifically through the Alternative Compliance Pathway added as Provision B.3.c. Add a sentence at end of first paragraph:

Implementation of the Compliance Option described in Provision B.3.c of this Order shall constitute compliance with the Discharge Prohibitions (A.1.a, A.1.c, A.1.d), Receiving Water Limitations (A.2), and Effluent Limitations (A.3.b) Provisions of this Order.

3. Provision B.3.c. Prohibitions and Limitations Compliance Option (page 33/138)

Request: Restructure the annual milestone requirements in the Compliance Option so they are meaningful and realistic.

Rationale: Provision B.3.c.(1)(a)(vii) requires annual milestones to be established for each numeric goal. Further, footnote #9 requires the following:

“Annual milestones for each final numeric goal must build upon previous milestones and lead to the achievement of the final numeric goal. The annual

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milestones may consist of water quality improvement strategy implementation phases, interim numeric goals, and other acceptable metrics.”

While the County appreciates the desire to establish additional accountability toward the attainment of final numeric goals, the approach proposed in the Tentative Order is unrealistic and will not provide meaningful goals beyond the first few years. The County has three specific issues with the annual milestone approach:

Issue 3A: The process of implementing BMPs is often not linear in such a manner that actions would consistently “build upon” previous milestones. Copermitees may proceed with the implementation of one BMP (or packages of BMPs), but may later determine that a change of course is needed (e.g., a BMP’s not effective, a better approach is identified). This concept has been recognized many times by the Regional Board in discussing the approach to Water Quality Improvement Plans. The County requests that this language be modified to reflect that course corrections may be warranted.

Recommendation: *Replace “build upon previous milestones” with “cumulatively.” (For complete proposed text revisions, see the Overall Recommendation at the end of this comment that integrates all suggested revisions for Comment #3.)*

Issue 3B: Annual milestones lose meaning after a certain timeframe. For example, it is reasonable to foresee milestones in the first several years of implementing a project, or even to foresee bigger picture milestones over a longer timeframe. Indeed, it is important to forecast the amount of time needed to implement projects to obtain the final goals. However, in forecasting longer-term efforts, milestones are typically not annual, but are at a much larger scale (e.g., multi-year periods). Practically speaking, it is reasonable to identify concrete milestones in Years 1 – 5 of a 30 year effort, whereas the milestones identified today for Year 10, 15, 20, etc. lose significant meaning and value.

Recommendation: *Revise the annual milestones to require establishment of committed milestones for the permit term (e.g., Years 1 -5) and the forecasting of additional milestones for the next permit term (e.g., Years 6 – 10). This approach will result in firm commitments for each permit term and ensure that Copermitees are planning ahead in a meaningful way for the following permit term. This process continues until the final numeric goals are achieved. (For complete proposed text revisions, see the Overall Recommendation at the end of this comment that integrates all suggested revisions for Comment #3.)*

Issue 3C: While a requirement to identify annual milestones for each numeric goal may initially sound reasonable, the realistic number of annual milestones generated by such a requirement is unrealistic to measure and track. Take for example an estimate of the number of milestones that would be required just of the County:

8 Watershed Management Areas (WMA) x
2 waterbodies (assuming 1 creek and 1 beach) per WMA x
3 to 5 numeric goals per waterbody x
5 years in a permit term =
48 to 80 annual goals; 240 to 400 goals per permit term

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The intent of the milestones is to increase accountability. However, tracking 48 to 80 milestones each year just for the County of San Diego would create an administratively intensive process that far outweighs the benefit. Alternatively, milestones could be established based on the permit term, rather than on an annual basis. Further, the Tentative Order should also explicitly acknowledge and allow for a specific milestone to apply to multiple numeric goals and/or waterbodies (as justified to be applicable and appropriate). This approach would streamline the process and create a more meaningful and clearer process of accountability.

Recommendations: (1) *Replace the requirement for annual milestones with a requirement to establish at least one milestone per permit term. This would result in approximately 48 – 80 goals in a permit term (based upon the estimate above), still providing significant accountability.* (2) *Explicitly allow a milestone to apply to more than one numeric goal and/or waterbody (as applicable and appropriate). (For complete proposed text revisions, see the Overall Recommendation at the end of this comment that integrates all suggested revisions for Comment #3.)*

Overall Recommendation for Comment #3: *Modify Provision B.3.c.(1)(a)(vii) , footnote 9, B.3.c.(2)(c), and B.3.c.(2)(d) as follows:*

B.3.c.(1)(a) (vii): For each final numeric goal developed pursuant to Provisions B.3.a and B.3.c.(1)(a)(i)-(v), at least one ~~annual~~ milestone⁹ and date for its achievement must be included **for the permit term within each Water Quality Improvement Plan and progress toward attaining the milestone(s) reported upon during each Annual Report reporting period. Further, for each final numeric goal developed pursuant to Provisions B.3.a and B.3.c.(1)(a)(i)-(v), at least one milestone forecasted to be achieved in the next subsequent permit term must be included within each Water Quality Improvement Plan. This process will continue** until the final numeric goal is achieved.

Footnote 9: ~~Annual~~ ~~m~~ **Milestones** for each final numeric goal must ~~build upon previous milestones and~~ **cumulatively result in** ~~lead to~~ the achievement of the final numeric goal. The ~~annual~~ milestones may consist of water quality improvement strategy implementation phases, interim numeric goals, and other acceptable metrics. **The milestones may also address multiple numeric goals and/or multiple waterbodies, as applicable and appropriate.**

B.3.c.(2)(c): The Copermitttee's' assessments in the Water Quality Improvement Plan Annual Report submitted pursuant to Provision F.3.b.(3) support a conclusion that: 1) the Copermitttee is in compliance with the **annual** milestones and dates for achievement developed pursuant to Provision B.3.c.(1)(a)(vii), OR 2) the Copermitttee has provided acceptable rationale and recommends appropriate modifications to the interim numeric goals, and/or water quality improvement strategies, and/or schedules to improve the rate of progress toward achieving the final numeric goals developed pursuant to Provisions B.3.a and B.3.c.(1)(a)(i)-(vi); AND

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B.3.c.(2)(d): Any proposed modifications to the numeric goals, schedules, and/or **annual** milestones are accepted by the San Diego Water Board as part of subsequent updates to the Water Quality Improvement Plan pursuant to Provision F.2.c; AND

4. Provision B.3.c. Prohibitions and Limitations Compliance Option (page 36/138)

Request: Add a compliance pathway to Provision B.3.c during development of or updates to the WQIP.

Rationale: While developing a plan to comply with the Alternative Compliance Pathway, Copermittees should be deemed in compliance with Receiving Water Limitations where all Permit-required milestones related to development and/or implementation of the Water Quality Improvement Plan is met.

Recommendation: Add language consistent with former recommendations provided during the reissuance process in 2013⁶, consistent with the Los Angeles MS4 Permit⁷, and consistent with the recently adopted State Board Order⁸ upholding the alternative compliance approach used in the Los Angeles MS4 Permit. This would require: (1) language to require a Notice of Intent to utilize a WQIP-based compliance option, and (2) all deadlines for development and implementation of a WQIP pursuant to Provision F.1.(a) and (b), and Provision B are met AND the WQIP, or revised WQIP, ultimately receives approval. The following language should be added as Provision B.3.c.(3):

(3) For cases when applicable discharge prohibitions (A.1.a, A.1.c, A.1.d), receiving water limitations (A.2.a), or effluent limitations (A.3.b) are not attained during the time period between a Copermittee's notification of intent to utilize a Water Quality Improvement Plan based compliance option and San Diego Water Board executive officer acceptance of the Water Quality Improvement Plan, a Copermittee is in compliance with Provision A.1.a, A.1.c., A.1.d, A.2.a, and A.3.b if all of the following conditions are met:

a. All deadlines for development of a Water Quality Improvement Plan pursuant to Provision F.1.(a) and (b) or implementation of an existing Water Quality Improvement Plan pursuant to Provision B are met;

b. For the areas of the watershed to be covered by the alternative compliance option, the Copermittee(s) must initiate targeted implementation of programs through the agencies' existing programs that focus on the watershed's priority pollutants to effectively prohibit non-stormwater discharges to the MS4 and to reduce pollutants in stormwater discharges from the MS4 to the MEP;

c. Receives acceptance of the Water Quality Improvement Plan or updated Water Quality Improvement Plan within the time periods specified in Provision F.

⁶ "SDCopermitteeFinal R9-2013-0001 Tentative Order DRAFT Strikeout_010413 –comments_3_27_TO_Copy.doc"

⁷ Order No. R4-2012-0175, Part VI.C.2.d

⁸ Order WQ-2015-0075, B.6, page 48

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5. Provision B.3.c.(1)(a)(iii) Prohibitions and Limitations Compliance Option (page 34/138)

Request: Numeric goals developed for 303(d) listed constituents should be applicable only if the MS4 is determined to be a source of the pollutant causing the impairment.

Rationale: Provision B.3.c.(1)(a)(iii) appears to include all 303(d) listings in receiving waters without specifying that the impairment must be linked to MS4 discharges. There may be instances where MS4 discharges are not causing or contributing to the impairment. While that situation would result in a Permittee complying with Provision A without the need for the alternative compliance pathway in Provision B.3.c, clarity would avoid future confusion as to whether or not interim and final numeric goals need to be developed.⁹

Recommendation: *Modify Provision B.3.c.(1)(a)(iii) as follows:*

(iii) Interim and final numeric goals applicable to the Copermittee's MS4 discharges within the Watershed Management Area expressed as numeric concentration-based or load-based goals for all pollutants and conditions listed on the Clean Water Act Section 303(d) List of Water Quality Impaired Segments for the receiving waters in the Watershed Management Area that do not have a TMDL incorporated into Attachment E to this Order **and where MS4 discharges are causing or contributing to the impairment;** AND/OR

6. Provision B.5. Iterative Approach and Adaptive Management Process (page 37/138)

Request: Permit language should address a trigger for updates to the watershed modeling/analysis as part of the adaptive management process.

Rationale: Provision B.5 requires that the adaptive management process is performed annually. As drafted, the language could be interpreted to mean that the watershed model/analysis would have to be updated annually.

Recommendation: *Include a new Provision B.5.d to clarify that updates to the watershed model/analysis within the adaptive management process are required only if conditions have changed significantly such that they would alter the model results. As part of the ROWD, the watersheds would conduct an analysis of whether conditions have changed sufficiently to warrant an update to the watershed model/analysis and, if so, provide a schedule for conducting the updated analysis.*¹⁰

⁹ Consistent with CASQA recommendations to SWRCB. California Stormwater Quality Association, Letter to Ms. Jeanine Townsend, Clerk to the Board, State Water Resources Control Board, Subject: SWRCB/OCC Files A-2236(a) through (kk); Comments on Proposed Order *In Re Petitions Challenging 2012 Los Angeles Municipal Separate Storm Sewer System Permit* (Order No. R4-2012-0175), January 19, 2015.

¹⁰ Consistent with CASQA recommendations to SWRCB. California Stormwater Quality Association, Letter to Ms. Jeanine Townsend, Clerk to the Board, State Water Resources Control Board, Subject: SWRCB/OCC Files A-2236(a) through (kk); Comments on Proposed Order *In Re Petitions Challenging 2012 Los Angeles Municipal Separate Storm Sewer System Permit* (Order No. R4-2012-0175), January 19, 2015.

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B.5.d. Updates to Optional Watershed Analysis [B.3.c.(1)(b)]

Updates to the optional watershed analysis included in Provision B.3.c.(1)(b) are required only if conditions have changed significantly within the watershed or where new information is available that would significantly alter the model results.

7. Provision F.2.b. BMP Design Manual Updates (Page 126/138)

Request: Allow adequate time for Copermittees to update and implement their BMP Design Manuals.

Rationale: The current Order establishes the Effective Date of the BMP Design Manual (and therefore of the requirements of Permit Section E.3.a-d) as December 24, 2015. This date was appropriate at the time of initial Permit adoption because it provided Copermittees sufficient time to develop updated content and modify the programs and regulatory authorities needed for implementation. The Tentative Order would now require Copermittees to *update* their BMP Design Manuals to incorporate the amended Provisions E.3.a-d within 90 days after the amended Provisions E.3.a-d are adopted by the Regional Board. Given that the Tentative Order proposes critical new modifications, additional time is requested to allow for their completion *and implementation*. The first of these are the changes in the definition of redevelopment Priority Development Projects (PDPs) proposed in Section II.E.3.b.(1)(c) through (e). The second is the addition of a modified process for establishing Prior Lawful Approval (PLA) under Section E.3.e.(1). We appreciate the work that Regional Board staff put into working with stakeholders and crafting these PLA provisions, and we support their adoption. However, we must also note that the current schedule for implementing updated BMP Design Manual provisions under the Tentative Order severely limits their potential application. Additional time is needed to: allow Copermittees to ensure regional consistency; modify local BMP Design Manuals; update policies, procedures, and other program documentation; conduct outreach to industry and project proponents; and modify local ordinances.

At a minimum, the Regional Board should allow six months from the adoption of new requirements to complete and implement these tasks. As currently written, if these provisions are adopted as proposed on November 18, Copermittees would have just 90 days to implement them. Please note the following inconsistencies in the Tentative Order and Technical Report regarding the extension of dates. First, the Technical Report (page F-110) states "Provisions E.3.e.(1)(a)[a]-[d] are dependent on the effective date of the BMP Design Manual. Unless otherwise directed by the San Diego Water Board, the effective date of the BMP Design Manual is December 24, 2015 for the San Diego County Copermittees ..." This is in contrast to Provision F.2.b.(4), which requires that *revision* of the updated BMP Design Manual be completed not later than 90 days after the date the San Diego Water Board adopts the amendments (i.e., by February 16, 2016). Since it is not possible for the BMP Design Manual effective date to precede its revision date, it must be assumed that the intent of Provision F.2.b.(4) is to also extend the effective date.

In recent correspondence on this issue, Regional Board staff has indicated their intent to explicitly extend the effective date by the same 90 days allowed for the BMP Design Manual revision using the discretion granted the Executive Officer under other proposed amendments to Section E.3.d. However, this is problematic for three reasons. First, since any extension granted by the Executive Officer could only be executed after the hearing,

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Copermittees would have no assurances that it would actually occur. Second, extending the effective date by 90 days would merely make the revision and effective dates concurrent rather than rectifying the inconsistencies causing the confusion. Third, a 90-day extension of the effective date simply does not provide adequate time for both completing and implementing the BMP Design Manual update. We recommend that the *effective* date of the BMP Design Manual for the Copermittees be extended 180 days from the adoption of the Tentative Order (i.e., May 14, 2016). Modifying the Permit to specifically incorporate this effective date, rather than relying on the ability of the RWQCB Executive Officer to do so after the fact, would both provide the time necessary for critical program updates and the certainty needed to plan for them. It would also ensure that these critical changes are fully vetted in an open public forum.

We also recommend that Provision E.3.d. be modified to clarify that the date the BMP Design Manual is implemented (rather than revised) is the same as the “effective date”. This will help to prevent any future confusion regarding the applicability of dates.

Since the County has already modified its Watershed Protection Ordinance (WPO) to reflect existing Permit content in anticipation of the December 24, 2015 BMP Design Manual effective date, we will now need to repeat this process to incorporate the modified PDP definition and the updated PLA process. The schedule below illustrates an anticipated *best case scenario* for updating and obtaining Board of Supervisors approval of the WPO.

12/06/15	Deadline for first draft Board letter and supporting materials (incl. update Watershed Protection Ordinance)
12/30/15	File the public notice with the Clerk of the Board
12/31/15	Official Public Notice Period
01/05/16	Board of Supervisors Hearing, 1 st reading
01/26/16	Board of Supervisors Hearing, 2 nd reading and approval
02/16/16	BMP Design Manual Effective Date if Extended by RWQCB Executive Officer
02/25/16	Revised WPO effective date (30 days after approval of amendments)
05/16/16	BMP Design Manual Effective Date proposed by County and Copermittees

As shown, completion of a WPO update alone would exceed the 90 days currently allowed by the Tentative Order. This means that even if the County is able to move another WPO update forward on the most aggressive possible schedule (which we cannot guarantee since this item would have to compete with other potential content on the Board agenda), the anticipated effective date of the WPO revisions would be after the BMP Design Manual effective date. We expect that other Copermittees will experience similar problems with the timing of their ordinance updates. While a nine-day discrepancy might not initially sound significant, it's important to emphasize that this could be much more, depending on actual WPO hearing schedules. This means, for instance, that the County would lack the legal authority to require that redevelopment projects under the updated PDP definition be considered PDPs during that interim period. It is not sound policy to knowingly impose updated Permit requirements on a schedule that the County or any other Copermittee

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cannot meet. The RWQCB has been responsive to such concerns in the past, and we are requesting the same consideration here.

Even if ordinance revisions could be completed within 90 days, it is still insufficient time for completing other critical tasks (updating the County BMP Design Manual, then training staff and conducting industry outreach, etc.), all of which are required to responsibly and legally impose updated requirements on public and private projects. While Regional Board staff has suggested that Copermitees can start this process now, it is unrealistic to expect that they do so based only on the proposed requirements of this Tentative Order. It would be speculative to assume that the Tentative Order will be adopted as currently drafted, and Copermitees should not be expected to initiate specific program changes or ordinance revisions based on speculation. Moreover, asking project proponents to implement updated requirements without sufficient time to consider and design to them is unreasonable. We therefore request that the BMP Design Manual effective date be extended by 180 days in the adopted Order. As shown in the table above, this would provide additional time that necessary to avoid imposing a de facto condition of Copermitee non-compliance, and that is critical to getting these new requirements right.

Recommendations: *The County recommends that the Regional Board modify the requirement to specify that the updates be made to the BMP Design Manual, as follows:*

Provision E.3.d

Each Copermitee must update its BMP Design Manual pursuant to Provision F.2.b. Until the Copermitee has updated its BMP Design Manual pursuant to Provision F.2.b.(1), the Copermitee must continue implementing its current BMP Design Manual. The Copermitee must implement the updated BMP Design Manual within 180 days following completion of the update pursuant to Provision F.2.b.(1), unless directed otherwise by the San Diego Regional Water Board Executive Officer. **The date the BMP Design Manual is implemented is the “effective date” of the BMP Design Manual.** The update of the BMP Design Manual required pursuant to Provision F.2.b.(1) must include the following:

Provision F.2.b.(4)

If the San Diego Water Board amends Provisions E.3.a-d during the permit term but after the Copermitee has completed the update pursuant to Provision F.2.b.(1), the Copermitee must revise its BMP Design Manual to incorporate the amended Provision E.3.a-d requirements as soon as possible but no later than **180** days after the date the San Diego Water Board adopts the amendments to Provisions E.3.a-d, unless otherwise directed by the San Diego Water Board Executive Officer. **Under these circumstances, the effective date of the BMP Design Manual is 180 days after the date the San Diego Water Board adopts the amendments to Provisions E.3.a-d.**

8. Provision E.3.c.(2)(b) – Requirements to Manage Critical Coarse Sediment Yield

Request: Allow adequate time for Copermitees to study and collaboratively develop approaches to compensate for the loss of critical sediment supply.

Rationale: Section E.3.c.(2)(b) of the Order requires that each development project conduct studies and compensate for the loss of onsite sediment supply. In our January 11,

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2013, comment letter on the initial adoption of this Permit, the County noted that the imposition of these requirements is speculative and premature given the current state of science and technology regarding these impacts and potential mitigation options. While the County and others continue to work to meet these requirements, we reiterate our previous comments. Until the impact of individual development projects on receiving water coarse sediment supply is better understood, the ability of Copermitees to require sediment compensation on a project-by-project basis in a technically and legally defensible manner will remain severely limited. Moreover, pursuing a longer-term, study-based approach will help to avoid unintended environmental impacts.

***Recommendations:** We recommend the language be removed from Section E.c.3.(2)(b) and moved to Section E.3.d as line item (6) so that it can be addressed regionally instead of at a project level.*

9. Provision E.3.c. Priority Development Project Structural BMP Performance Requirements

Request: Clarify the intent and applicability of TCBMP treatment requirements to flow-thru BMP designs.

Rationale: Provision E.3.c.(1)(a)(i) describes performance requirements for biofiltration BMPs where retention of the full design capture volume is not feasible. Proposed revisions would clarify that option [a] under this Provision is intended for flow-based BMPs and that option [b] is intended for volume-based BMPs. Removal of the reference to “flow-thru design” would eliminate any unintended implications that the flow-thru treatment requirements of Provision E.3.c.(1)(a)(ii)[b] apply to BMPs addressed by the design criteria of Provision E.3.c.(1)(a)(i)[b]. The addition of “static storage” language clarifies this volume based BMP is not subject to flow routing requirements.

Recommendation: *Modify Provision E.3.c.(1)(a)(i)[b] as follows:*

[b] Treat the design capture volume not reliably retained onsite with a ~~flow thru design that has a total~~ **static storage** volume, including pore spaces and pre-filter detention volume, sized to hold at least 0.75 times the portion of the design capture volume not reliably retained

SPECIFIC COMMENTS ON TMDL PROVISIONS

10. Attachment E-6. Revised Total Maximum Daily Loads for Indicator Bacteria, Project I – Twenty Beaches and Creeks in the San Diego Region (Including Tecolote Creek)

Request: Issue 10A: Modify wet weather compliance timelines for delisted 303(d) waterbodies to 20 years to be consistent with the TMDL Resolution.

Rationale: Issue 10A: Footnotes and dates were added to Tables 6.1 and 6.4 to note earlier final and interim wet weather compliance dates, respectively, if the Water Quality Improvement Plans do not include “load reduction programs” to address other constituents.

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Draft Tentative Order Attachment E Tables 6.1 and 6.4 should be modified for consistency with the TMDL. The proposed addition of a 10-year wet-weather compliance deadline of April 4, 2021, to Table 6.1, for water bodies in a WQIP that does not include load reductions for pollutants besides bacteria, is inconsistent with the adopted TMDL and thereby violates the Clean Water Act regulations at 40 C.F.R. § 122.44(d)(1)(vii)(B). This proposed amendment would subject the segments of beaches and creeks that were removed from the 303(d) list to requirements from which the de-listed segments are specifically exempt under the adopted TMDL. Under the TMDL, no BLRP or CLRP is required for the de-listed segments. The WQIP is a requirement of the MS4 Permit, not the TMDL, and is not a BLRP. Thus, there is no justification to require a 10-year compliance schedule for the de-listed segments, and the proposed amendment is not consistent with the TMDL.

Recommendation: *Delete proposed language in Table 6.1 and footnote.*

However, should the Regional Water Board decide to keep the footnote, we recommend modifications to be consistent with the adopted TMDL:

Recommendations:

Table 6.1 Footnote: **Except for segments removed from the 303(d) list, the Wet Weather TMDL Compliance Date in parenthesis applies if the applicable Water Quality Improvement Plan does not include anticipated load reductions programs for other constituents analogous to the Comprehensive Load Reduction Plan together with bacteria load reduction requirements of this TMDL.**

Table 6.4: Remove dates included in parentheses for segments removed from the 303(d) list.

Table 6.4 Footnote: The Interim Compliance Dates to achieve the Interim Wet Weather WQBELs in parenthesis apply if the applicable Water Quality Improvement Plan does not include **anticipated load reductions programs for other constituents analogous to the Comprehensive Load Reduction Plan** together with bacteria load reduction requirements of this TMDL.

Request: Issue 10B: Clarify that compliance with receiving water limitations will be assessed at the compliance points identified in the TMDL Monitoring Plan.

Rationale: Issue 10B: Compliance with the final and interim receiving water limitations as allowed by Attachment E-6.b.(3)(b), E-6.c.(3)(b), and E-6.c.(3)(f) should be consistent with the TMDL, Basin Plan Amendment, and approved TMDL Monitoring Plan. The Basin Plan Amendment defines the points for compliance in the receiving waters as follows:

“For beaches addressed by these TMDLs, monitoring locations should consist of, at a minimum, the same locations used to collect data required under MS4 NPDES monitoring requirements and beach monitoring for Health and Safety Code section 115880” and “[f]or creeks addressed by these TMDLs, monitoring locations should consist of, at a minimum, a location at or near the mouth of the creek (e.g., Mass

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Loading Station or Mass Emission Station) and one or more locations upstream of the mouth (e.g., Watershed Assessment Stations).”¹¹

The approved monitoring plans have defined monitoring compliance points consistent with the language in the Basin Plan Amendment. For consistency, the language in Attachment E-6 should be modified.

Recommendation: *Modify the appropriate language in the final and interim compliance pathways in Attachment E-6 as follows:*

E-6.b.(3) Final TMDL Compliance Determination

(b) There are no exceedances of the final receiving water limitations under Specific Provision 6.b.(2)(a) in the receiving water at, ~~or downstream of the Responsible Copermitee's MS4 outfalls~~ **the compliance point in the receiving water as defined in the approved TMDL monitoring plan**; OR

E-6.c.(3) Interim TMDL Compliance Determination

(b) There are no exceedances of the final receiving water limitations under Specific Provision 6.b.(2)(a) in the receiving water at, ~~or downstream of the Responsible Copermitee's MS4 outfalls~~ **the compliance point in the receiving water as defined in the approved TMDL monitoring plan**; OR

(f) There are no exceedances of the interim receiving water limitations under Specific Provision 6.c.(2)(a) in the receiving water at, ~~or downstream of the Responsible Copermitee's MS4 outfalls~~ **the compliance point in the receiving water as defined in the approved TMDL monitoring plan**; OR

11. Attachment E-7. Total Maximum Daily Load for Sediment in Los Peñasquitos Lagoon

Request: Incorporate a land use-based compliance pathway that is consistent with the approach used to develop the TMDL¹².

Rationale: Attachment E-7 incorporates Los Peñasquitos Sediment TMDL (Sediment TMDL) requirements for Phase I MS4 Permittees. Both the TMDL and its incorporation into the MS4 Permit through Revised Tentative Order R9-2015-0100 provide multiple pathways for the responsible parties to demonstrate compliance. The County supports the flexibility provided by these options and, based on the following rationale, requests that the Regional Board also include an option for land use-based TMDL compliance.

The Sediment TMDL provides the framework and milestones to restore lagoon

¹¹ California Regional Water Quality Control Board, San Diego Region. *Resolution No. R9-2010-0001, Attachment A. Amendment to the Water Quality Control Plan for the San Diego Basin (9) to Incorporate Revised Total Maximum Daily Loads for Indicator Bacteria, Project I – Twenty Beaches and Creeks in the San Diego Region (Including Tecolote Creek). Chapter 7(h)(7)(i) – Monitoring for TMDL Compliance and Compliance Assessment, p. A50.*

¹² California Regional Water Quality Control Board, San Diego Region. *Resolution No. R9-2012-0033 and Sediment TMDL for Los Penasquitos Lagoon, Staff Report, June 13, 2012.*
http://www.waterboards.ca.gov/sandiego/water_issues/programs/tmdls/los_penasquitos_lagoon.shtml

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saltmarsh habitat to 80% of the acreage that existed in 1973 through numeric targets for sediment loading during the critical wet period based on 1970s conditions, when the sediment water quality standard was met.

The Sediment TMDL provides the following support for this approach:

- The numeric targets section finds that the water quality objective for sediment in the Lagoon was attained and beneficial uses were supported under 1970s land use conditions, and that the Lagoon was capable of assimilating 1970s sediment loads.
- The source assessment section links hydromodification caused by land development within the watershed to increased scouring and sediment transport. Phase I MS4s are noted as the main point source of sediment, primarily through the increased volume, velocity, frequency and discharge duration of runoff from developed areas, which transports built-up sediment, and accelerates downstream erosion. Hydromodification, the change in natural runoff characteristics caused by urbanization or other land use changes, is named as the driver for increased sediment loads from MS4s.
- The linkage analysis section relies on results from a computer model that relates sediment loading to land use, and notes that the 1970s condition represents a time period prior to major land development in the watershed.

Consequently, if the land use of a TMDL Responsible Party has not changed significantly since the 1970s baseline, the sediment loads from that Party's MS4 outfalls are expected to be approximately the same as the baseline level and within the amount allowed as part of the approved wasteload allocation. Therefore, since wasteload allocations are based on achieving 1970s sediment loads, if it can be demonstrated that limited land use change has resulted in sediment loads from a Responsible Party that have remained the same since the 1970s, and within the levels allowed by the wasteload allocation, the Party should be deemed in compliance with the Sediment TMDL.

Recommendation: *The County requests that a land use-based TMDL compliance pathway be incorporated into Attachment E-7 through the following amendments (underlined text to be inserted):*

7.b.(2).(c) Best Management Practices

(i) The Water Quality Improvement Plan for the Los Penasquitos Watershed Management Area must incorporate the Sediment Load Reduction Plan required to be developed pursuant to Resolution No. R9-2012-0033. Areas within the Los Penasquitos Watershed Management Area where it can be demonstrated that sediment loading has not increased beyond the allowable wasteload allocation as a result of limited or no land use changes since the 1973 baseline may be excluded from the Sediment Load Reduction Plan or Water Quality Improvement Plan.

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(ii) The Responsible Copermittees must implement BMPs to achieve the receiving water limitations under Specific Provision 7.b.(2)(a) and/or the Copermittee's portion of the effluent limitations under Specific Provision 7.b.(2)(b) for Los Penasquitos Lagoon, unless it can be shown pursuant to Specific Provision 7.b.(2)(c)(i) that sediment loading has not increased beyond the allowable wasteload allocation as a result of limited or no land use changes since the 1973 baseline.

7.b.(3) Final TMDL Compliance Determination

(b) The Responsible Copermittees develop and implement the Water Quality Improvement Plan as follows:

(ii) Include an analysis in the Water Quality Improvement Plan, utilizing a watershed model or other watershed analytical tools, to demonstrate that the implementation of the BMPs required under Provision 7.b.(2)(c)(ii) for land areas with significant land use changes from the TMDL baseline, or other implementation actions achieve compliance with Specific Provision 7.b.(3)(a).

(v) The Responsible Copermittees continue to perform the specific monitoring and assessments specified in Specific Provision 7.d to demonstrate compliance with Specific Provision 7.b.(3)(a). Responsible Copermittees that can demonstrate land use-based TMDL compliance per the requirements in provision 7.b.(2)(c)(i) , and any jurisdictional areas with changes that are demonstrated to be in compliance with the TMDL as specified in Specific Provision 7.b.(3)(b)(ii), are exempt from Specific Provision 7.d, as they are fully attaining the final TMDL requirements.

7.c.(2) Interim TMDL Compliance Determination

(e) The Responsible Copermittees have demonstrated they are in compliance with the final TMDL as specified in Specific Provision 7.b.(3).

If you have questions or require additional information, please contact Jo Ann Weber, Planning Program Manager at (858) 495-5317 or e-mail at JoAnn.Weber@sdcounty.ca.gov.

Sincerely,



TODD E. SNYDER, Manager
Watershed Protection Program

