

Proposed modification:

Program implementation of this new monitoring program should be postponed until the end of storm season 2010-11.

II.B.1 Wet Weather Runoff Monitoring – MS4 Outfall Monitoring [page 15 and May 5 updates]

See comment above with respect to implementation schedule.

Proposed modification:

Program implementation of this new monitoring program should be postponed until the 2010-2011 monitoring year.

II.B.2 Wet Weather Runoff Monitoring – Source Identification Monitoring [page 15]

The requirement that the new Source Identification monitoring program be implemented within each watershed and must begin no later than the 2008-2009 monitoring year occurs during a timeframe prior to permit adoption.

Proposed modification:

Program implementation of this new monitoring program should be postponed until the 2010-2011 monitoring year to allow the Permittees adequate time to develop this new monitoring program and integrate it into the next budget cycle (2001-11).

II.C Dry Weather Non-stormwater Effluent Limits [page 20 and May 5 updates]

The 1-hour composite sampling requirement (if flow is observed) will make monitoring of three sites in a single day (by a single team) difficult because of holding time requirements for bacteriological samples.

Proposed modification:

Dry Weather Reconnaissance monitoring should be conducted with grab samples. Composite sampling should be considered as an ancillary assessment tool for use when additional source identification efforts are deemed necessary.

III.A.1 Reporting Program – Planned Monitoring Program [page 30]

The requirement that the Planned Monitoring Program be submitted September 1st of every year, beginning on September 1, 2009, does not allow adequate time for analysis of the monitoring data from the prior year as it is affected by management actions undertaken throughout the MS4, subject of the annual Performance Effectiveness Assessment.

Proposed modification:

Rather than additional reporting requirements to describe routine monitoring efforts, Board staff and the Permittees should conduct an annual meeting after submission of the Annual Report to discuss the content of the report and any changes to the monitoring program or suggestions for special studies. This approach will promote a more collaborative relationship between the Permittees and Board staff and may help streamline the renewal of future permits.

III.A.2 Reporting Program – Monitoring Annual Report [page 30]

The requirement that the Receiving Waters and Urban Runoff Monitoring Annual Report be submitted October 1st of every year, beginning on October 1, 2010, does not provide adequate time for relevant analysis of the monitoring data collected in the 12-month period immediately prior to the proposed reporting date. Previous annual reports were submitted on November 15th of each year and assessed the results of monitoring activities conducted in the 12-month period ending 4 ½ months prior to the reporting date.

Proposed modification:

The Receiving Waters and Urban Runoff Monitoring Programs Annual Report should be submitted in conjunction with the Unified Annual Report and Performance Effectiveness Assessments





COUNTY OF ORANGE

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January 24, 2008

By E-mail and U.S. Mail

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Subject: Revised Tentative Order No. R9-2008-0001; NPDES No. CAS0108740

Dear Mr. Robertus:

We are in receipt of the December 12, 2007 revised draft of the Waste Discharge Requirements for Discharges of Urban Runoff from the Municipal Separate Storm Sewer Systems (MS4s) Draining the Watersheds of the County of Orange, the Incorporated Cities of Orange County, and the Orange County Flood Control District Within the San Diego Region, Tentative Order No. R9-2008-0001; NPDES No. CAS0108740 (the "December 2007 Order"). The December 2007 Order was prepared and distributed for public comment by staff of the Regional Water Quality Control Board ("Regional Board"). The County of Orange, as the Principal Permittee, provides these comments for you, Regional Board staff, and members of the Regional Board to consider before the Regional Board adopts the Order. The Copermitees were involved in the development of these comments and the cities of Aliso Viejo, Dana Point, Laguna Beach, Laguna Niguel, Laguna Woods, Laguna Hills, Mission Viejo, San Juan Capistrano and San Clemente have directed that they be recognized as concurring entities.

As you know, we submitted extensive comments on the initial February 9, 2007 Tentative Order on April 4, 2007 ("Initial Comments"). We also submitted comments on the July 6, 2007 Revised Tentative Order on August 22, 2007 ("August 2007 Comments"). For your convenience, our Initial Comments and August 2007 Comments are attached and incorporated herein. While you and your staff clearly have considered our comments, our principal legal and strategic technical concerns, as raised in our prior comments, remain largely unresolved in the December 2007 Order. Accordingly, our comments in this letter need to be considered in the context of our prior written comments.

In these comments we focus on two issues: (1) the requirements for facilities that extract, treat and discharge water from waters of the United States and back into waters of the United States ("FETDs") which initially were incorporated in the July 2007 Order (and which relate to our concerns with the Order's requirements regarding treatment control BMPs); and (2) staff's new attempt at justifying the provisions in the December 2007 Order that go beyond what is required

by federal law. We reserve the right to supplement these comments up until the time the Water Board convenes to adopt the permit.

I. Requirements for "FETDs" in the December 2007 Order are Not Supported by Law and Provide Disincentives to Improving Water Quality.

The County reiterates its opposition to the FETD requirements originally imposed in the July 6, 2007 Revised Tentative Order. As previously noted, these requirements are not supported by law and will impose unnecessary burdens on Copermitees for attempting to improve water quality.

A. The Regional Board Does Not Have Authority to Impose the Proposed FETD Requirements.

According to the December 2007 Revised Fact Sheet, discharges from FETDs are discharges of non-stormwater. December 2007 Revised Fact Sheet, IX.B. Directives, Section B.5, page 84. As noted in the County's previous comments, Federal law requires that Copermitees "effectively prohibit non-stormwater discharges into the [MS4]." CWA Section 402(p)(3)(B)(ii), 33 U.S.C. Section 1342(p)(3)(B)(ii). Provision B.5 of the December 2007 Order goes beyond this federal requirement. First, it would impose obligations on Copermitees for discharges not *into* the MS4, but *from* a FETD. Nothing in the Clean Water Act or federal regulations provides the Regional Board with such authority. Second, Provision B.5 would make Copermitees absolutely responsible for discharges of non-stormwater from FETDs that cause or contribute to conditions of erosion.¹ Under federal law, Copermitees only are responsible for *effectively prohibiting* discharges of non-stormwater. The December 2007 Revised Fact Sheet provides no authority for imposing requirements that go beyond the federal requirement.

In addition, to the extent FETDs are not part of the MS4, the Regional Board has no authority under the Clean Water Act to regulate them in an MS4 permit. Under the Clean Water Act, the Regional Board only can regulate discharges of pollutants in stormwater from the MS4 and discharges of non-stormwater into the MS4. As currently implemented, and as acknowledged in the December 2007 Revised Fact Sheet, FETDs remove pollutants that have already been discharged into receiving waters *from* MS4s. December 2007 Revised Fact Sheet, VIII.E. Findings, Discussion of Finding E.9, page 78. If this is the case, a FETD cannot be *part of* the MS4. A discharge from a FETD, therefore, is neither a discharge of pollutants *from an MS4* (which must be controlled to the maximum extent practicable) nor as noted above is it a discharge of non-stormwater *into an MS4* (which discharges must be effectively prohibited).

Finally, to the extent FETDs do not add any pollutants to waters of the U.S. that are not already present in the influent to the FETDs, there is no basis for regulating FETDs under the federal NPDES permit program. Under federal law, the Regional Board only can regulate discharges of pollutants, meaning the addition of pollutants to receiving waters. See, e.g., CWA Section 502(12)(A), 33 U.S.C. Section 1362(12)(A). Where the pollutants being discharged from a

¹ We note that Regional Board staff removed from the December 2007 Order the absolute prohibitions vis-à-vis contributing to conditions of pollution or nuisance. By removing this prohibition, we understand that a discharge from a FETD that causes or contributes to a condition of pollution or nuisance will be subject to the iterative approach described in Section A.3 of the Tentative Order. See Response to Comments II, Response No. 14, page 13. As noted above, the County disagrees that FETDs necessarily are part of the MS4.

FETD simply are being passed through, without the addition of pollutants to the receiving water, there is no basis for regulating the discharge.

B. Copermitees Should Not be Unnecessarily Burdened for Attempting to Improve Water Quality.

As a policy matter, the Regional Board should encourage the use of FETDs, as well as other regional BMPs, as a tool in improving water quality. As noted in the County's previous comments, Copermitees have constructed FETDs as part of a comprehensive set of measures to address water quality impairments along beaches in Southern Orange County, specifically, impairments due to fecal indicator bacteria. With the help of State Board administered Clean Beach Initiative funding, FETDs have enabled a number of Copermitees to request 303(d) delisting for fecal indicator bacteria for Orange County's beaches. Copermitees currently monitor these FETDs as part of their existing and comprehensive environmental monitoring program. Notwithstanding the success of the FETDs, the December 2007 Order would impose burdensome and unnecessary monitoring obligations on the facility's operator.² Moreover, to the extent a FETD is a form of regional BMP used to reduce the discharge of pollutants from the MS4, the current MS4 permit already addresses such BMPs through the iterative process; there is no need for separate FETD-specific requirements. Similarly, to the extent a FETD is more accurately considered a "diverted stream flow," there is no need for FETD-specific requirements because diverted stream flows already are addressed in Section B.2 of the current MS4 permit.

Accordingly, because the proposed FETD requirements clearly exceed the Regional Board's authority under federal law and would be unnecessarily burdensome and prescriptive, the County renews its request that the FETD requirements be deleted.

II. The December 2007 Order Imposes Requirements on Copermitees That Go Beyond Federal Law and Constitute Unfunded State Mandates.

In the previous drafts of the Tentative Order, Finding E.6 stated that requirements in the Order that were more explicit than federal regulations were nonetheless necessary to meet the federal MEP standard. See, e.g., July 6, 2007 Revised Tentative Order, Finding E.6. This appeared to the County to be an attempt by Regional Board staff to get around the unfunded state mandate problem and other state law requirements; if the Order imposed state-law requirements, the Regional Board would have to comply with state-law economic analyses in adopting the Order and any state mandates would have to be funded.

In the December 2007 Order, Finding E.6 has been revised. It now explicitly provides that for no less than five reasons, the Order does not constitute an unfunded mandate. Because the County disagrees with all five stated reasons, we ask that the Regional Board remove from the Order all requirements that go beyond federal law or, in the alternative, agree that all such mandates will be funded by the State. As an initial matter, we note that the issue of unfunded state mandates and municipal stormwater permits currently is before the California Commission on State Mandates. See *Commission on State Mandates, Test Claim Nos. 03-TC-04, 03-TC-*

² The County acknowledges that preventing pollution at its source often is preferable to treating pollutants downstream before they can adversely affect beneficial uses in receiving waters. However, in a highly developed region, it may take many decades before real source reduction goals may be achieved. In the meantime, treatment control BMPs such as FETDs provide a very useful tool for improving water quality and should be encouraged, not discouraged, by the Regional Board.

19, and 03-TC-21. We reserve the right to supplement our comments once the Commission rules on this issue.

A. As Noted in the County's Previous Comments, the Order Does Impose Requirements that Go Beyond Federal Law.

The first reason the December 2007 Fact Sheet gives for why the Order does not constitute an unfunded mandate is that the Order implements only federally mandated requirements. This is the same argument made in the prior drafts of the Order. In the County's previous comments we pointed out that, to the extent the Tentative Order imposed requirements that go beyond what is required by federal law, the Regional Board is required to consider and address among other things the constitutional prohibition on unfunded state mandates. The County provided examples of at least two provisions or areas where the Tentative Order does, in fact, impose requirements that go beyond federal law – the Business Plan requirement and requirements that Copermitees prohibit and/or control discharges into the MS4. The December 2007 Order and Fact Sheet do not address these areas.³ Instead, the December 2007 Fact Sheet simply reasserts that the Order only implements federally mandated requirements of section 402(p)(3)(B) of the Clean Water Act: (1) to effectively prohibit non-stormwater discharges into the MS4, (2) to reduce the discharge of pollutants from the MS4 to the maximum extent practicable, and (3) to include such other provisions as the State determines appropriate for the control of such pollutants.

The County agrees that the first two provisions impose federally mandated requirements. The third provision, however, is not a federal mandate. To the extent it is a separate provision of CWA Section 402(p)(3)(B),⁴ it is a discretionary provision; the State may impose such additional requirements, but it is not required to do so. See, e.g., *Defenders of Wildlife v. Browner*, 191 F.3d 1159 (9th Cir. 1999). To the extent the State does impose such discretionary requirements in the Order, they cannot be said to be federally mandated.

B. The Fact That Industrial Dischargers are More Strictly Regulated Than Municipal Dischargers is Irrelevant to the Unfunded Mandate Issue.

The second reason the December 2007 Fact Sheet gives for why the Order does not constitute an unfunded mandate is that the Order regulates discharges of waste from municipal sources more leniently than the Regional Board could regulate discharges from industrial sources. The County fails to see how this statutory distinction between the regulation of municipal and industrial dischargers affects whether the Order imposes requirements on Copermitees that go beyond federal law and, therefore, must be funded by the State.

C. Copermitees Do Not Necessarily Have the Requisite Authority to Levy Fees to Pay For Compliance With the Order.

³ The December 2007 Fact Sheet does concede that federal law only requires that Copermitees control the discharge of pollutants in stormwater from the MS4 to the maximum extent practicable, not discharges into the MS4.

⁴ The question of whether the "third" provision allows the State discretion to impose conditions that go beyond the MEP standard, or only the discretion to impose conditions to achieve the MEP standard, is a continuing debate. See, e.g., *Building Ind. Assn. of San Diego County v. State Water Resources Control Board*, 124 Cal.App.4th 866 (2004).

The third reason the December 2007 Fact Sheet gives for why the Order does not constitute an unfunded mandate is that Copermitees have the authority to levy service fees to pay for compliance with the Order. Pursuant to Government Code Section 17556(d), if a local agency can levy service fees to pay for a State mandate, the State is not required to provide funding for the mandate.

In support for this position, the December 2007 Fact Sheet cites to *County of Fresno v. State of California*, 53 Cal.3d 482 (1991). That case held that Section 17556(d) is facially constitutional under Article XIII B, Section 6 of the State Constitution. The dispute in *County of Fresno* arose over the implementation of the Hazardous Materials Release Response Plans and Inventory Act ("Act"), which required local governments to implement its provisions. The Act, however, also authorized the local governments to collect fees from hazardous material handlers to cover the costs the local governments might incur in implementing the Act. *County of Fresno*, 53 Cal.4th at 485. Thus, the same legislation that imposed the mandate on the local governments also authorized them to levy fees to pay for the mandated service. In this context, the court found Section 17556(d) facially constitutional.⁵ It is not clear that Section 17556(d) would withstand a challenge as applied to the current situation, where the Order imposing the state mandate does not authorize the Copermitees to levy fees to pay for the mandated service.

Moreover, Copermitees do not necessarily have the authority to levy service fees to pay for the State mandate. The December 2007 Fact Sheet presumes, but makes no specific findings, that Copermitees have the authority to levy such service fees. In fact, to the extent such service fees are "property-related," Copermitees can only levy them once approved by the affected property owners or electorate. See California Constitution, Article XIII D, Section 6(c); *Howard Jarvis Taxpayers Ass'n v. City of Salinas*, 98 Cal. App. 4th 1351 (2002). The *City of Salinas* case dealt precisely with this issue. The City of Salinas established a fee to recover costs related to compliance with its MS4 Permit. The fee was based largely on the amount of impervious area on a developed parcel. The Court held that this fee was property-related and, thus, subject to voter-approval requirements. 98 Cal. App. 4th at 1356. Only if the fee was a use-based charge, directly based on use of city services (such as the metered use of water), could the fee avoid the voter-approval requirements of Article XIII D. The City of Salinas' method to allocate the fee based on the amount of impervious area so as to assure that the fee charged would be proportional to the burden being placed on the city's storm drain system was not sufficiently direct to qualify as a use-based fee exempt from the requirements of Article XIII D. 98 Cal. App. 4th at 1355.⁶

⁵ The authority to levy fees also was at issue in *Connell v. Santa Margarita Water District*, 59 Cal. App. 4th 382 (1998). In that case, as in *County of Fresno*, there was no question as to whether the local agency had authority to levy service fees to pay for the increased costs. A provision in the Water Code provided local water districts the authority to levy fees to pay for the increased costs resulting from the new wastewater regulation at issue.

⁶ *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles*, 24 Cal. 4th 830 (2001), cited in the December 2007 Fact Sheet, is not to the contrary. That case simply held that a rental inspection fee imposed on landlords who rent their property is not imposed solely because of property ownership; rather, it is imposed because the property is being rented. Therefore the fee is exempt from the voter-approval requirements of Article XIII D. If the rental ceases, the fee ceases, whether or not property ownership remains in the same hands. 24 Cal. 4th at 838. In the case of stormwater, the need to regulate stormwater runoff continues regardless of the use of the property. Even if a developed property was vacant, stormwater would continue to flow into the MS4. While the use of the property may impact the quality of stormwater runoff, it is the property itself that must be regulated.

Because stormwater running off of real property and into the MS4 is not capable of precise measurement, it would be impossible to meet the direct usage requirements of *City of Salinas*. Accordingly, without voter approval, Copermitees do not have the authority to levy service fees to pay for compliance with the Order. Section 17556(d), thus, is not dispositive on the unfunded mandate issue.

D. Copermitees Do Not Have a Real Choice.

The fourth reason provided in the December 2007 Fact Sheet for why the Order does not constitute an unfunded mandate is that Copermitees chose to apply for coverage under the Order; they have "voluntarily availed themselves of the permit." December 2007 Fact Sheet, Section VIII.E., Discussion of Finding E.6., page 73. Thus, according to the Fact Sheet, Copermitees have not been mandated to do anything. The Fact Sheet suggests that, in lieu of coverage under the Order, Copermitees could cease all discharges from their MS4s. Alternatively, instead of a program-based stormwater permit, Copermitees could seek a permit based on numeric effluent limits.

The County respectfully disagrees that these suggested alternatives provide Copermitees with any real choice. A permit based on numeric limits clearly would go beyond what is required by federal law and trigger even more unfunded mandate issues than the proposed Order. To cease discharging from their MS4s is impossible and, thus, not a real choice. Accordingly, it is disingenuous for Regional Board staff to suggest that Copermitees have voluntarily chosen coverage under the Order and, thus, the Order cannot be considered a state mandate.⁷

E. The Porter Cologne Water Quality Control Act May Predate Article XIII B, Section 6 of the State Constitution But the Mandates in the Tentative Order Do Not.

The final reason given in the December 2007 Fact Sheet for why the Order does not impose unfunded mandates also is unpersuasive. Section 6(a)(3) of Article XIII B of the State Constitution provides that the Legislature does not need to provide funding for legislative mandates enacted prior to January 1, 1975. The Porter-Cologne Water Quality Control Act was enacted in 1970. However, it is not the 1970 legislation that imposes the mandates at issue here; it is the proposed Order of the Regional Board, a state agency. Section 6(a) explicitly requires that the State fund mandates of any state agency.

In sum, because none of the five reasons discussed in the December 2007 Fact Sheet provide support for the finding that the Order does not constitute an unfunded state mandate, the County renews its request that the Regional Board remove from the Order all requirements that go beyond federal law or, in the alternative, provide State funding for all such mandates.

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⁷ The stormwater permitting cases cited in the December 2007 Fact Sheet do not support Regional Board staff's position. Both cases address the issue of "choice" in the context of Tenth Amendment challenges, not unfunded state mandate challenges. The issue in these Tenth Amendment decisions is whether the available choices all similarly require the permittees to regulate third parties. See *City of Abilene v. U.S. EPA*, 325 F.3d 657 (5th Cir. 2003) and *Environmental Defense Center, Inc. v. United States Environmental Protection Agency*, 344 F.3d 832 (9th Cir. 2003).

John H. Robertus
Page 7 of 7

Thank you for your attention to the County's concerns with the December 2007 Order. As mentioned previously, we appreciate the effort you and your staff have devoted to the development of the fourth-term MS4 permit for the Orange County Program. We look forward to discussing the Order with you and with Regional Board members at the public hearing on February 13, 2008.

Thank you for your attention to our concerns. Please contact me directly if you have any questions. For technical questions, please contact Chris Crompton at (714)834-6662 or Richard Boon at (714)973-3168.

Sincerely,



Mary Anne Skorpanich, Director
Watershed & Coastal Resources Division

Attachment A: Letter of April 4, 2007

Attachment B: Letter of August 22, 2007

cc: Technical Advisory Committee
Permittees





COUNTY OF ORANGE

RESOURCES & DEVELOPMENT MANAGEMENT DEPARTMENT

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August 22, 2007

By E-mail and U.S. Mail

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Subject: Revised Tentative Order No. R9-2007-0001; NPDES No. CAS0108740

Dear Mr. Robertus:

We are in receipt of the July 6, 2007 Waste Discharge Requirements for Discharges of Urban Runoff from the Municipal Separate Storm Sewer Systems (MS4s) Draining the Watersheds of the County of Orange, the Incorporated Cities of Orange County, and the Orange County Flood Control District Within the San Diego Region (Revised Tentative Order No. R9-2007-0001; NPDES No. CAS0108740) (the "Revised Tentative Order"). The Revised Tentative Order was prepared and distributed for public comment by staff of the Regional Water Quality Control Board ("Regional Board"). The County of Orange, as the Principal Permittee, provides these comments for you, Regional Board staff, and members of the Regional Board to consider before the Regional Board adopts the Order. The Copermittees were involved in the development of these comments and the cities of Aliso Viejo, Dana Point, Laguna Beach, Laguna Hills, Laguna Niguel, Laguna Woods, Lake Forest, San Clemente, San Juan Capistrano, and Rancho Santa Margarita have directed that they be recognized as concurring entities.

As you know, we submitted extensive comments on the initial Tentative Order on April 4, 2007 ("Initial Comments"). For your convenience, our Initial Comments are attached. While these comments clearly have been considered by your staff, our principal legal and strategic technical concerns are not resolved in the Revised Tentative Order or in Regional Board staff's Response to Comments (Section X of the July 6, 2007 Revised Fact Sheet distributed with the Revised Tentative Order). In these comments on the Revised Tentative Order, we re-iterate and emphasize our outstanding concerns. We also comment on the new requirements in the Revised Tentative Order regarding so-called FETDs – facilities that extract, treat and discharge water from waters of the United States and back into waters of the United States.

As with our Initial Comments, the overarching message we wish to convey with these comments is that considerable progress is being made by the Orange County Stormwater Program (the "Orange County Program" or "Program") and the critical need during permit re-issuance is for a fourth-term permit that sustains the Program's momentum. As recognized in the Revised Fact Sheet, Copermittees' storm water programs have improved under the current MS4 permit. "Since adoption of Order No. R9-2002-01, the Copermittees' storm water programs have expanded dramatically." Revised Fact Sheet, p. 8. We recognize that water quality challenges remain. That is why we proposed additional commitments and changes in the 2006 Report of

Waste Discharge ("ROWD") and proposed Drainage Area Management Plan ("DAMP"), the foundational guidance and policy-setting document for the Orange County Program.

Instead, rather than building on the existing Program, the Revised Tentative Order proposes to dismiss the DAMP as mere "procedural correspondence." This dismissal is not the approach recommended by the United States Environmental Protection Agency ("U.S. EPA"). In the context of a MS4 permit renewal such as the current Revised Tentative Order, U.S. EPA states that the focus should be "maintenance and improvements of [the existing] programs." 61 Fed.Reg. 41698 (August 9, 1996). In their permit renewal application, "municipalities should identify any proposed changes or improvements to the storm water management program and monitoring activities for the upcoming five year term of the permit." *Id.* That is precisely what Copermittees proposed in the ROWD. Rather than dismissing an existing, effective program as the Revised Tentative Order does, U.S. EPA states: "The components of the original storm water management program which are found to be effective should be continued and made an ongoing part of the proposed new storm water management program." *Id.* at 41699.

Our principal comments on the Revised Tentative Order follow. We reserve the right to supplement these comments up until the time the Regional Board convenes to adopt the permit.

I. The Restrictions in the Revised Tentative Order Regarding the Placement of Treatment Control BMPs are not Supported By Law and Will Inhibit Effective Storm Water Management on a Regional Level.

In our Initial Comments, we commented that Section D.1.d.(6) of the Tentative Order, which places restrictions on where Copermittees can locate treatment control BMPs, would unduly limit their ability to implement effective regional controls. Because Regional Board staff provided no legal support for the restrictions and because the restrictions amount to an impermissible mandate on how Copermittees are to comply with the "maximum extent practicable" or "MEP" standard, the County asked that Regional Board staff remove the restrictions. In the Revised Tentative Order Regional Board staff have chosen to retain the restrictions.¹ Accordingly, the County renews its request to have the restrictions removed.

A. The Restrictions on Treatment Control BMPs are not Supported by Federal Law and Violate State Law.

As noted in the County's initial comments, Regional Board staff did not articulate the basis for the restrictions on treatment control BMPs. In its response to comments, Regional Board staff cite to U.S. EPA guidance that says that treatment wetlands generally should not be constructed in existing wetlands or other waters of the U.S. See Response to Comments, No. 11, pp. 26-28. Regional Board staff state that the restrictions on treatment control BMPs in the Revised Tentative Order are intended to be consistent with this guidance. The County submits that they are not. Not only do the restrictions on all treatment control BMPs go beyond the *treatment wetlands* addressed in the U.S. EPA guidance, the restrictions also are *absolute* whereas the

¹ In its Response to Comments, Regional Board staff provide clarification as to certain types of projects that it would not consider to be "treatment control BMPs" and, therefore, not subject to the restrictions of Section D.1.d.(6). The County appreciates the clarification. However, unless Section D.1.d.(6) itself is clarified, Copermittees could face challenges from other parties (or the Regional Board itself) if they believe Copermittees are not complying with the restrictions.

U.S. EPA guidance only suggests that, *generally*, treatment wetlands are not appropriately located in existing wetlands.²

Nor does Regional Board staff explain why the restrictions on treatment control BMPs are not a violation of Section 13360 of the Water Code. As noted in the County's Initial Comments, the Regional Board may order Copermitees to comply with waste discharge requirements (which in this case are to reduce the discharge of pollutants from the MS4 to the maximum extent practicable) but may not specify "the design, location, type of construction, or the particular manner in which compliance may be had" with those requirements. Water Code Section 13360(a).

Accordingly, because Regional Board staff have provided no legal support for the restrictions on treatment control BMPs, and the restrictions would violate Section 13360(a) of the Water Code, the Regional Board should not adopt the restrictions in Section D.1.d.(6) of the Revised Tentative Order.

B. Effective Regional BMPs Will be Severely Limited If All Natural Drainages that Convey Urban Runoff are Both MS4 and Receiving Waters; the Revised Tentative Order and Response to Comments Do Not Support This Position.

The restrictions on placement of treatment control BMPs are exacerbated by the proposed finding that all natural drainages or streams that convey urban runoff are both an MS4 and a receiving water. In its response to comments, Regional Board staff did not address the fact that under the federal definition of "MS4" (which definition is adopted verbatim in Attachment C of the Revised Tentative Order) and guidance regarding the same, a natural drainage is only potentially an MS4 where the drainage has been "channelized" or otherwise altered by man. See Initial Comments, Attachment A, Issue I.A., pp. 1-2.

Regional Board staff also misconstrue the relevance of the recent United States Supreme Court decision in *Rapanos v. United States*, 126 S.Ct. 2208 (2006). Regardless of whether the controlling opinion from *Rapanos* is the plurality opinion written by Justice Scalia or Justice Kennedy's concurring opinion and regardless of whether the *Rapanos* decision is relevant to determining whether any waters are waters of the U.S. or only whether wetlands may be waters of the U.S., Regional Board staff have not provided support for their blanket assertion that *all* natural drainages or streams that convey urban runoff are receiving waters. At a minimum, Regional Board staff must make a showing that a given drainage or stream has a "significant nexus" to traditionally "navigable" waters.³

² It also is worth pointing out that "guidance" is just that; it is not a legal requirement. As U.S. EPA recently stated in guidance on determining jurisdictional wetlands: "This guidance does not substitute for [CWA] provisions or regulations, nor is it a regulation itself. . . . Any decisions regarding a particular water will be based on the applicable statutes, regulations, and case law. Therefore, interested persons are free to raise questions about the appropriateness of the application of this guidance to a particular situation. . ." See *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States*, U.S. EPA and U.S. Army Corps of Engineers, p. 4, n. 16 (June 5, 2007).

³ At least one District Court in the Ninth Circuit has held that *Rapanos* is applicable to non-wetlands decisions. See, e.g., *Environmental Protection Information Center v. Pacific Lumber Co.*, 469 F. Supp. 2d 803 (N.D. CA 2007).

Because Regional Board staff have not provided adequate support for the position that all natural streams that convey urban runoff are either an MS4 or a receiving water, Finding D.3.c of the Revised Tentative Order should be deleted.

II. New Requirements for "FETDs" in the Revised Tentative Order are Unwarranted, Burdensome and Unsupported by Law.

As noted above, the County appreciates the clarification as to what will and what will not be considered to be treatment control BMPs. However, the Revised Tentative Order contains new requirements for certain treatment facilities that are even more onerous than the treatment control BMP restrictions. Because these new requirements for so-called "FETDs" (facilities that extract, treat, and discharge water from waters of the U.S. and back into waters of the U.S.) are unwarranted, burdensome and unsupported by law, the County requests that they be deleted from the Revised Tentative Order.

A. *FETDs are Part of the Solution to Water Quality Impairments; Copermittees Should Not be Punished with Burdensome and Unnecessary Requirements for Attempting to Improve Water Quality.*

Copermittees have constructed FETDs as part of a comprehensive set of measures to address water quality impairments along beaches in Southern Orange County, specifically, impairments due to fecal indicator bacteria. While the FETDs are effective at reducing fecal indicator bacteria levels, they are not designed to remove all pollutants that might be affecting coastal waters. Notwithstanding that FETDs have enabled a number of Copermittees to request 303(d) de-listing for fecal indicator bacteria for Orange County's beaches and that they represent investments of State Board administered Clean Beach Initiative funding, the FETD requirements in the Revised Tentative Order potentially would punish Copermittees for their efforts. If a discharge from a FETD caused or contributed to a condition of pollution or nuisance, from any pollutant, Copermittees could be in violation of the Section B.5.c of the Revised Tentative Order. In other words, unless the FETD treats all pollutants to acceptable levels, not just the fecal indicator bacteria it was designed to address, Copermittees may be in violation of the Order. This "all or nothing" approach is unwarranted, contrary to a Fact Sheet that makes a compelling case for clean beaches, and clearly counter to the public interest.

The new FETD requirements also impose a burdensome monitoring obligation on the facility's operator. In the context of the Copermittees existing and comprehensive environmental monitoring program, the prescribed suite of analytes and requirements for toxicity testing, toxicity identification evaluations and toxicity source investigations, appear to be simply punitive.

The FETD requirements also are unnecessary. To the extent discharges from FETDs cause or threaten to cause a condition of pollution, contamination, or nuisance (and provided FETDs can be considered part of the MS4), such discharges already would be prohibited by Section A.1 of the Revised Tentative Order. If such discharges cause or contribute to a violation of water quality standards, they would be subject to the iterative process provided by Section A.3.a of the Revised Tentative Order. Imposing additional requirements on FETDs will not result in additional improvements to water quality. Thus, there is no need for the FETD requirements.

B. The Revised Fact Sheet Provides No Support for Imposing the FETD Requirements.

Regional Board staff have provided no legal support for the new FETD requirements. According to the Revised Fact Sheet, discharges from FETDs are discharges of non-storm water. Revised Fact Sheet, IX.B., Section B.5, p. 81. Federal law requires that Copermittees "effectively prohibit non-stormwater discharges into the [MS4]." CWA Section 402(p)(3)(B)(ii), 33 U.S.C. Section 1342(p)(3)(B)(ii). This requirement is reflected in Provision B.1 of the Revised Tentative Order which states: "Each Copermittee must effectively prohibit all types of non-storm water discharges into its MS4" unless such discharges are otherwise authorized or are in a category of non-storm water discharges that are non prohibited.

Provision B.5 of the Revised Tentative Order goes beyond this federal requirement. First, it would impose obligations on Copermittees for discharges not *into* the MS4, but *from* a FETD. Nothing in the Clean Water Act or federal regulations provides the Regional Board with such authority. Second, Provision B.5 would make Copermittees absolutely responsible for discharges of non-storm water from FETDs that cause or contribute to conditions of erosion, pollution or nuisance. Under federal law, Copermittees only are responsible for *effectively prohibiting* discharges of non-storm water. Accordingly, because the proposed FETD requirements clearly exceed the Regional Board's authority under federal law and Regional Board staff have provided no other specific legal authority for the requirements, the County requests that the FETD requirements be deleted.

III. The Revised Tentative Order Imposes Requirements on Copermittees That Go Beyond Federal Law; The Regional Board Must Comply With State Law Before Imposing Such State Mandates.

In its Initial Comments, the County pointed out that, to the extent the Tentative Order imposed requirements on Copermittees that go beyond the federal MEP requirement, the Regional Board must comply with state law requirements, including the requirement to consider economic factors and the prohibition on unfunded state mandates. See Initial Comments, Attachment A, Section III. The basis for this comment was in part Finding E.6 ("[r]equirements in this Order that are *more explicit than* the federal storm water regulations..." [emphasis added]). In its Response to Comments, Regional Board staff denied that the requirements of the Tentative Order exceed federal law. See Response to Comments No. 5, p. 13. The County respectfully disagrees with staff's denial.

A. Without Considering Economic Factors, the Regional Board Cannot Adopt the Revised Tentative Order's Business Plan Requirement or the Requirements to Prohibit or Control Discharges Into the MS4, Both of Which Go Beyond Federal Law.

The requirement in the Fiscal Analysis section of the Revised Tentative Order that Copermittees submit a "Municipal Storm Water Funding Business Plan" clearly exceeds the requirements of federal law. See Revised Tentative Order, Provision F.3. Federal law requires that, as Part 2 of the MS4 permit application, Copermittees must include fiscal analysis. The regulations provide:

For each fiscal year to be covered by the permit, [Part 2 of the permit application must include] a fiscal analysis of the necessary capital and operation and maintenance expenditures necessary to accomplish the activities of the programs under paragraphs (d)(2)(iii) and (iv) of this section [i.e., Characterization

Data and Proposed Management Programs]. Such analysis shall include a description of the source of funds that are proposed to meet the necessary expenditures, including legal restrictions in the use of such funds.

40 CFR 122.26(d)(2)(vi). Regional Board staff cite to no other specific legal authority in support of the business plan requirements.

Nothing in this fiscal analysis requirement remotely resembles the prescriptive requirement in the Revised Tentative Order to prepare and submit a business plan that "identifies a long-term funding strategy for program evolution and funding decisions" and that identifies "planned funding methods and mechanisms for municipal storm water management." If the Regional Board has the authority to impose such requirements, it does not derive from federal law. Such a requirement exceeds federal law.

Similarly, many of the requirements in the Revised Tentative Order to prohibit and/or control discharges *into* the MS4 exceed federal law. Under federal law, Phase I MS4 Copermittees do have some obligations regarding discharges into the MS4. For example, they must demonstrate in Part 2 of the MS4 permit that they have adequate legal authority to control discharges from industrial sites into the MS4. See 40 CFR 122.26(d)(2)(i)(A). They also must demonstrate legal authority to prohibit illicit discharges into the MS4 and to control the discharge into the MS4 of spills, dumping, or disposal of materials other than storm water. *Id.* at 122.26(d)(2)(i)(B) and (C). The County commented generally on the scope of Copermittees' obligations vis-à-vis discharges into the MS4 in its initial comments. See Initial Comments, Attachment A, Section IV, pp. 10-14.

There is a significant difference, however, between an obligation to have legal authority to control certain third party discharges into the MS4 and a requirement to prohibit and/or control discharges from all third parties into the MS4. See Revised Fact Sheet, Discussion of Finding D.3.d. See also Revised Fact Sheet, Finding D.3.e. ("[P]ollutant discharges into the MS4s must be reduced.") The requirement to prohibit and/or control all third-party discharges into the MS4 exceeds federal law.⁴

Because the Revised Tentative Order would impose obligations on Copermittees that exceed federal law, state law requires that it include an analysis of the costs of such obligations. See *City of Burbank v. State Water Resources Control Board*, 35 Cal. 4th 613 (2005); Initial Comments, Attachment A, Section III.C., pp. 8-9. Because the Revised Tentative Order does not include such an analysis, the business plan requirement must be deleted. Similarly, all requirements that would impose obligations vis-à-vis third-party discharges into the MS4 that exceed federal law must be deleted.⁵

⁴ As noted in the County's Initial Comments, Regional Board staff's reliance on Phase II storm water regulations and guidance to support imposing requirements in the Revised Tentative Order not required by the Phase I regulations is misplaced. See Initial Comments, Attachment A, Section IV.A.1., p. 11. Even if Phase II regulations and/or guidance are relevant to a Phase I permit, the Phase II regulations require only that small MS4 Copermittees develop and implement ordinances to require erosion and sediment controls at construction sites. See 40 CFR Section 122.34(b)(4)(ii)(A). They do not impose absolute obligations on Copermittees to prohibit or control all discharges into the MS4.

⁵ It also is worth noting that, to the extent the Revised Tentative Order imposes federal requirements on Copermittees requiring them to regulate third parties, it runs afoul of the Tenth Amendment of the United States Constitution. See, e.g., *Environmental Defense Center, Inc. v. United States Environmental Protection Agency*, 344 F.3d 832, 847 (9th Cir. 2003).

B. Orders Issued by the Regional Board Must Comply With the State Constitution's Ban on Unfunded Mandates.

Even if the Regional Board did consider the required state-law economic analysis with respect to the requirements that exceed federal law, unless the state is going to fund the requirements, they would run afoul of the constitutional ban on unfunded state mandates. See Initial Comments, Attachment A, Section III.D., pp. 9-10. In its Response to Comments, Regional Board staff dismiss the County's unfunded state mandate claim, claiming that the State Regional Board has heard and repeatedly denied similar claims and that since the State Regional Board last decided the issue, "nothing has occurred that would change how unfunded state mandates are determined." See Response to Comments, No. 5, pp. 14-15. In fact, there recently has been a significant development in how unfunded state mandates are determined.

In *County of Los Angeles v. Commission on State Mandates*, 150 Cal.App.4th 898 (2007), the Court of Appeals held that Government Code Section 17516 is unconstitutional to the extent that it exempts Regional Regional Boards from the constitutional state mandate subvention requirement.⁶ Government Code 17516 defines "executive order" which is a prerequisite for asserting an unfunded state mandate claim. It excludes from the definition any order or requirement issued by the State Regional Board or a Regional Regional Board. With the holding that the statutory exemption is unconstitutional, there no longer is a statutory basis for excluding orders issued by Regional Boards from state unfunded mandate claims. Accordingly, the Regional Board must adhere to the constitutional requirement to fund state mandates.

C. Copermittees Must Be Allowed to Comply With the MEP Standard in Any Manner They Choose.

Finally, regarding the proposed obligations on discharges into the MS4, even if Regional Board staff believe that the best way for Copermittees to meet the MEP standard for discharges from the MS4 is by controlling discharges into the MS4, as noted previously, Water Code Section 13360 prohibits the Regional Board from specifying the manner in which Copermittees are to comply with the MEP standard.

IV. Without Justification, Inconsistencies Between the Revised Tentative Order and Other MS4 Permits Adopted by the Regional Board are Arbitrary.

As discussed above, the requirement in the Revised Tentative Order to develop and submit a Business Plan exceeds federal law. This requirement also exceeds the requirements set forth in other Phase I MS4 permits adopted by the Regional Board. For example, on January 24, 2007, the Regional Board renewed the MS4 permit for San Diego County (Order No. R9-2007-0001). Notwithstanding, however, that the Regional Board largely has developed the permitting programs for San Diego and Orange Counties in tandem, the Regional Board chose not to adopt a Business Plan requirement in the new San Diego permit. If Regional Board staff believe a Business Plan is necessary for Orange County Copermittees, why was such a requirement not necessary just eight months ago for San Diego County Copermittees? The Revised Fact Sheet and Tentative Order provide no explanation. Without justification for why the requirement is proposed in the Revised Tentative Order but was not proposed in R9-2007-

⁶ "Subvention" generally means a grant of financial aid or assistance, or a subsidy. See *County of Los Angeles v. Commission on State Mandates*, *supra*, at 906.

0001, the Business Plan requirement appears to be arbitrarily imposed only on Orange County Copermittees.

Another example of an unjustified inconsistency between the two permits is the use of "violation" versus "exceedance." As noted in the County's initial comments, the Tentative Order inappropriately used the term "violation" in several instances instead of "exceedance." For example, in Finding C.7., the Tentative Order provided that data submitted by Copermittees documents "persistent violations" of Basin Plan water quality objectives. This is not accurate. The data may have shown *exceedances* of water quality objectives, but they do not show *violations* of water quality objectives. In its Response to Comments, Regional Board staff stated that the word "violation" was appropriately used in Finding C.7. However, in a nearly identical finding in the San Diego County permit (Order R9-2007-0001), staff correctly used "exceedance" rather than "violation." See Order R9-2007, 0001, Finding C.7 ("... data submitted to date documents persistent *exceedances* of Basin Plan water quality objectives.") (Emphasis added.) If "exceedance" was correct in R9-2007-0001 why is it not correct now?

The County appreciates that the two permits need not be the same in all respects. There are differences between the two counties' storm water programs that may warrant differences in their respective permits. However, where, as here, there appears to be no basis for imposing different requirements (*e.g.*, the Business Plan requirement) or for using different terms (*e.g.*, "violation" instead of "exceedance"), the inconsistencies between the two permits are arbitrary and should be resolved.

V. The Drainage Area Management Plan (DAMP) is an Effective and Integral Part of the Orange County Storm Water Program; Without It, the Revised Tentative Order Becomes Unnecessarily Prescriptive.

As noted above and described in detail in the County's Initial Comments, the Revised Tentative Order dismisses the DAMP as mere "procedural correspondence." The County strongly disagrees with any attempt to undermine the significance and importance of the DAMP. The DAMP is the principal policy, programmatic guidance and planning document for the Orange County Storm Water Program. The main objectives of the DAMP are to fulfill the commitment of the Copermittees to present a plan that satisfies federal storm water permitting requirements (*i.e.*, NPDES requirements) and to evaluate the impacts of urban storm water discharges on receiving waters.

By dismissing the DAMP while incorporating some of the DAMP's provisions directly into the permit, the Revised Tentative Order unnecessarily limits the required flexibility of the Orange County Storm Water Program. With programmatic elements memorialized in the permit rather than the living DAMP, the iterative nature of effective storm water management is lost. For all of the above reasons, and as discussed in detail in the Initial Comments, the County respectfully requests that Revised Tentative Permit be fully revised as described in Attachment B of the Initial Comments. See Initial Comments, Attachment B, pp. 2-30.

* * * *

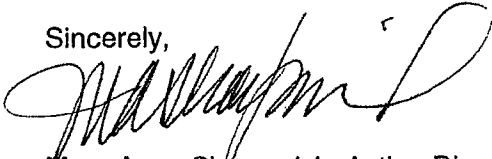
Thank you for your attention to the County's concerns with the Revised Tentative Order. We appreciate the effort you and your staff have devoted to the development of the fourth-term MS4 permit for the Orange County Program. While we believe the Revised Tentative Order is deficient in several significant respects, as discussed above and in our Initial Comments, we believe it should be fairly simple to significantly improve the permit. With respect to the "FETD"

John H. Robertus
Page 9

issue, because these new requirements only were added to the proposed permit in the Revised Tentative Order, we believe it would be appropriate to allow for additional time for public comment on this issue before the Regional Board convenes to adopt the order.

We look forward to discussing the Revised Tentative Order with you and with Regional Board members at the public hearing on September 12, 2007. Please feel free to contact me if you have any questions. For technical questions, please contact Chris Crompton at (714) 834-6662 or Richard Boon at (714) 973-3168.

Sincerely,



Mary Anne Skorpanich, Acting Director
Watershed & Coastal Resources Division

Attachment: Initial Comments

cc: Regional Board Members
Technical Advisory Committee
Copermittees





COUNTY OF ORANGE
RESOURCES & DEVELOPMENT MANAGEMENT DEPARTMENT

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April 25, 2007

By E-mail and U.S. Mail

Jeremy Haas
California Regional Water Quality Control Board, San Diego Region
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4353

Subject: Tentative Order No. R9-2007-0002; NPDES No. CAS0108740

Dear Mr. Haas:

Please find attached additional comments regarding the Fact Sheet/Technical Report for Tentative Order No. R9-2007-0002.

Please contact me directly if you have any questions. For technical questions, please contact Richard Boon at (714)973-3168.

Sincerely,

A handwritten signature in black ink, appearing to read "CC", is written over the typed name of Chris Crompton.

Chris Crompton, Manager
RDMD/Environmental Resources

Attachment A: Additional Comments

cc: Permittees

Attachment 1
Comments on Fact Sheet/Technical Report For Tentative Order R9-2007-0002

Economic Issues (p.11)

The Fact Sheet's discussion of Economic Issues considers the costs and benefits of water quality protection and management. This discussion is prefaced with a reference to the work of Ribaldo and Hellerstein (2002). These authors note that that a "knowledge of benefits and costs to water users is required in any complete assessment of policies to create incentives for water quality improving changes in agricultural practices." The paraphrasing of this work in the Fact Sheet unfortunately omits consideration of the context and scope of this work. Since their work is advocating cost-benefit analysis to initially inform policy development rather than subsequently validate its implementation, Ribaldo and Hellerstein's target audience are clearly the policy writers (or permit writers) and not the practioners of agricultural production. This key point is missed by the Fact Sheet author.

The scope and limitations of environmental cost-benefit analysis also have to be recognized. Indeed, the beach closure studies noted in the Fact Sheet quite possibly represent the limits of meaningful cost-benefit analysis as it can be applied to water quality protection and management in Orange County. In environmental cost-benefit analysis there are no markets for environmental quality and no prices with which to completely measure environmental value. Consequently, such analyses have to determine economic effects through the measurement of observed changes in the behavior of water users (e.g. a reduction in beach use) and the determination of direct use values. However, direct use values such as those identified by Lew et. al. (2001) only capture a portion of the total economic value of an environmental asset. For example, NOAA observes that indirect use values (e.g. biological support, climate regulation etc.), non-use values (e.g. potential future use), and intrinsic values (biota has a value irrespective of usefulness to humanity) also have to be considered in the evaluation of an environmental resource

In summary, cost-benefit analysis requires that the natural environment be translated into monetary terms. The Center for Progressive Regulation (CPR) (2007) believes that this feature is one aspect of cost-benefit analysis that "makes it a terrible way to make decisions about environmental protection, for both intrinsic and practical reasons." CPR also believes that "it is not useful to keep cost-benefit analysis around as a kind of regulatory tag-along, providing information that regulators may find useful even if not decisive. Cost-benefit analysis is exceedingly time- and resource-intensive, and its flaws are so deep and so large that this time and these resources are wasted on it." Part of this latter observation is underscored by the 1998 the state of Minnesota's scoping study on a cost-benefit model to analyze water-quality standards. Its task force estimated costs of \$3.6 to \$4.4 million over four years to support model development and the project was stopped at the conclusion of the scoping study. If the Fact Sheet retains a discussion of cost benefit analyses, this discussion should be revised to explicitly recognize the limited utility of the approach when applied to environmental protection.

Discharge Characteristics (p.21)

The Fact Sheet presents a chronological record of investigations into the environmental significance of dry and wet weather runoff from urban areas starting with Nationwide Urban Runoff Program (NURP). This discussion is overly selective in its sources and needs to temper some of the assertions predicated on NURP and the federal assessments of water quality with more recent research (see discussion below).

Illicit Connections/Discharges: NURP clearly identified illicit connections as an issue of concern with respect to dry weather processes. However, the NURP studies of this issue were predominantly from the older urban environments of the East Coast. For example, USEPA's investigative guidance cites studies from Washentaw County, Michigan; Toronto, Canada; and Inner Grays Harbor, Washington. While the Fact Sheet reports that NURP "found pollutant levels from illicit discharges were high enough to significantly degrade receiving water quality," and thereby connotes the potential significance of this issue in Orange County, the Permittees' extensive and repeated inspections of their storm drain infrastructure during the first and second term permits found very few illicit connections. Moreover the most recent annual report identified only 12 illegal discharges identified through the dry weather reconnaissance program. The Fact Sheet needs to recognize this significant regional disparity.

Fecal Indicator Bacteria: The Fact Sheet notes Haile et. al's (1996) epidemiological study conducted in the summer of 1996 to assess adverse impacts from swimming in ocean water receiving untreated urban runoff. The study presents adverse health effects as risk ratios, comparing the risk to swimming near storm drains with swimming varying distances (1-50, 51-100, and >400 yards) from storm drains. It also assessed risk by Fecal Indicator Bacteria (total coliform, fecal coliform, enterococcus, and E. coli), and by virus. The study found elevated risk for the majority of the disease symptoms, most notably for Highly Credible Gastro-intestinal Illness (HCGI) when swimming near the storm drain. However, the only statistically significant results were for a subset of symptoms: fever, chills, ear discharge, cough and phlegm, and significant respiratory disease. The correlation between health effect and FIB was poor. For HCGI, the relationship was strongest with the FIB enterococcus since the risk increases with concentration. However, this risk was not statistically significant.

The Fact Sheet is significantly remiss in not discussing Colford et al. (2005) who conducted an epidemiological study at Mission Bay, California during the summer of 2003. The study's goal was to evaluate health impacts in relation to traditional fecal indicator bacteria where non-point sources, non-human fecal sources are dominant. One important finding was that no significant correlation was observed between increased risk of illness and increased levels of traditional water quality indicators, including enterococcus, fecal coliform, or total coliform (see Table 15 in Colford et al., which summarizes health outcome and odds ratio). The Table shows a weak correlation, or an odds ratio greater than 1 for various symptoms, but the confidence intervals indicate the results are not statistically significant. On the other hand, significant associations were observed between the levels of male-specific coliphage and HCGI-1 (vomiting and

diarrhea, or fever; or cramps and fever), HCGI-2 (vomiting and fever), nausea, cough, and fever-but this was a rare circumstance, possibly indicative of the presence of human sewage, and not many swimmers were exposed.

The results from the epidemiological studies conducted both at Santa Monica and Mission Bay agree that fecal indicator bacteria do not adequately assess risk. However, it is anticipated that the results from a new epidemiological study being conducted by Southern California Coastal Water Research Project (SCCWRP) in association with the City of Dana Point will offer insight about the impact from fecal indicator bacteria reaching beaches. The Fact Sheet needs to be revised to correct its current oversimplification of epidemiological understanding and omission of both current and impending research in this area.

Environmentally Sensitive Areas (ESAs): The Fact Sheet contends that CWA 303(d) impaired waterbodies have a much lower capacity to withstand pollutant shocks than might be acceptable in other areas. This contention appears contrary to the Permittees' bioassessment data which finds degraded habitats to be characterized by diminished biological diversity and higher numbers of a limited range of pollutant tolerant taxa. CWA 303(d) impaired waterbodies might be better characterized as pollution *insensitive* areas.

Infiltration and Groundwater Protection: The Fact Sheet notes the Tentative Order's incorporation of existing guidance regarding urban runoff infiltration and groundwater quality protection. This discussion needs to be re-considered in the context of studies that suggest that the threat to groundwater may be overstated. Nightingale (1987) examined the impact of urban runoff on water quality beneath five retention/recharge basins in Fresno as part of NURP. He concluded that "no significant contamination of percolating soil water or groundwater underlying any of the five basins has occurred for the constituents monitored in the study." More recently, the Los Angeles Basin Water Augmentation Study (2005) has specifically examined the fate and transport of urban runoff-borne pollutants by monitoring storm water quality as it infiltrates through the soil to groundwater. The data collected during this study showed no immediate impacts, and no apparent trends to indicate that storm water infiltration will negatively impact groundwater.

In Summary: Regarding urban stormwater discharges, it has been observed that:

- Impacts to water quality in terms of chemistry tend to be transient and elusive, particularly in streams;
- Impacts to habitat and aquatic life are generally more profound and are easier to see and quantify than changes in water column chemistry;
- Impacts are typically complex because urban stormwater is one of several sources of adverse impact including agricultural and non-urban area runoff, and
- Impacts are often interrelated and cumulative. For example, the condition of an urban stream system's biological resources reflects both degraded water quality and hydromodification.

Prefacing the Discharge Characterization discussion with an equivalent summary would help balance the chronological presentation of information that has the effect of perhaps overly connoting the significance of urban stream chemistry.

Urban Runoff Management Programs (p.34)

Sweeping of Municipal Areas: Street sweeping was essentially discredited as a BMP after the 1983 NURP report. However, since that time technological advances, specifically the development of vacuum assisted dry sweepers, have led to street sweeping as a practice that can potentially be effective in improving water quality. For example, RWMWD (2005) reports a number of studies that show regenerative air and vacuum sweepers capable of 70% total suspended solids (TSS) removal. Higher rates of TSS recovery are reported by Bannerman (2007).

On the specific issue of effectiveness and the relative significance of street sweeping frequency, frequency is clearly subordinate to other considerations. The Center for Watershed Protection (2002) notes that "arguably the most essential factor in using street sweeping as a pollutant removal practice is to be sure to use the most sophisticated sweepers available." The Center also notes the ability to regulate parking as another important aspect. Martinelli (2002) concludes that "...freeway sweeping with a high efficiency sweeper can be a BMP for the control of stormwater runoff pollutant..." and that his study supports the purchase and use of high efficiency sweepers. [These findings are consistent with the current and proposed 2007 DAMP.]

The significance of the technology is also a recurrent message in the extensive annotated bibliography of street sweeping studies in RWMWD (2005). RWMWD notes street sweeping effectiveness begins first with the choice of the right equipment. Other important variables include the timing of sweeping in relation to rainfall events and the speed of sweeper operation. Where frequency has been examined, the Center for Watershed Protection also observes that efficiency at greater frequencies than weekly declines because of (1) only small incremental gain and (2) higher removal could be obtained on residential streets versus heavily traveled roads. This finding contradicts CASQA's (2002) recommendation to increase frequency in high traffic areas.

It is clear from a review of the available literature there is no robust technical justification for working to try to optimize street sweeping based on traffic counts. Consequently, while street sweeping will continue to be a focus of the Permittees efforts with respect to pollutant load reduction efforts. The requirement to try to optimize frequency based upon traffic counts needs to be deleted from the Order.





COUNTY OF ORANGE
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April 4, 2007

By E-mail and U.S. Mail

John H. Robertus
Executive Officer
California Regional Water Quality Control Board, San Diego Region
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4353

Subject: Tentative Order No. R9-2007-0002; NPDES No. CAS0108740

Dear Mr. Robertus:

We are in receipt of the February 9, 2007, Waste Discharge Requirements for Discharges of Urban Runoff from the Municipal Separate Storm Sewer Systems (MS4s) Draining the Watersheds of the County of Orange, the Incorporated Cities of Orange County, and the Orange County Flood Control District within the San Diego Region (Tentative Order No. R9-2007-0002) (NPDES No. CAS0108740). The County of Orange, as the Principal Permittee, welcomes the opportunity to provide comments on the Regional Water Quality Control Board's ("Regional Board") Tentative Order as prepared and distributed by the Regional Board staff. The Copermittees were involved in the development of these comments and the cities of Aliso Viejo, Laguna Hills, Laguna Niguel, Laguna Woods, Lake Forest, Mission Viejo and Rancho San Juan Capistrano, Santa Margarita have directed that they be recognized as concurring entities.

The Copermittees reserve the right to submit additional comments up to the close of the public comment period. In order to accommodate the need for discussions with Regional Board staff to attempt to resolve our many concerns, the Copermittees hereby request that the Regional Board extend the comment period beyond the scheduled April 11 hearing.

The Orange County Stormwater Program (the "Orange County Program or Program") has been in existence under a National Pollutant Discharge Elimination System (NPDES) permit since 1990. The permit was reissued in 1996 and 2002. The Program is now a mature program, recognized as a statewide leader in municipal stormwater management. To provide a sound technical basis for the fourth term permit, the Copermittees conducted comprehensive program assessments using a multiple lines of evidence approach, including audit findings and the California Stormwater Quality Association (CASQA) Program Effectiveness Guidance. Based on these assessments, the Copermittees prepared and submitted the 2006 Report of Waste Discharge ("ROWD") to Regional Board staff. The ROWD identified many positive program outcomes, and where the assessments indicated improvements are needed, the Copermittees

proposed changes and added commitments to the Drainage Area Management Plan ("DAMP"), the foundational guidance and policy-setting document for the Program.

The Copermittees developed the ROWD, including the proposed DAMP, to provide strategic direction for the management of future water quality improvements. Given the progress of the Orange County Program to date, the demonstrated commitment of the Copermittees, and the comprehensive assessments of Program effectiveness, the Copermittees expected the ROWD and the revised DAMP would provide the basis for the fourth term permit. Instead, the Tentative Order imposes a management strategy and new technical requirements on the Orange County Program that may confound the ability of the Copermittees to deliver the water quality improvements that the Regional Board and the Copermittees seek to obtain. The Tentative Order imposes unnecessary burdens on the resources of the Copermittees and fails to provide any justification for disregarding many of the approaches set forth in the ROWD and revised DAMP.

We look forward to meeting with you to discuss these matters and achieve a satisfactory resolution. In the meantime, we have summarized our overarching concerns with the Tentative Order as General Comments in this letter and provide additional comments and concerns in the following Attachments:

- Attachment A presents comments on our main legal and policy issues.
- Attachment B presents technical comments and suggested language on specific requirements contained within the Tentative Order.
- Attachment C includes comments on the Monitoring and Reporting Program.

GENERAL COMMENTS

I. The Orange County Program is a Mature and Successful Program – A State Leader in Municipal Stormwater Management

At the inception of the Program the County of Orange and the 12 Copermittees developed a DAMP to serve as the principal policy and guidance document for the entire program. Over successive permit terms the Copermittees have modified the DAMP through an iterative development process designed to better reflect the needs of the Copermittees, ensure Copermittee accountability and deliver positive water quality and environmental outcomes. The DAMP now comprehensively guides each Copermittee in the development of its Local Implementation Plans (LIP), which describes how the program will be implemented on a city/jurisdiction basis. The DAMP also includes for each watershed in the San Diego Region an action plan that details the Copermittees' pollution prevention and control efforts on a watershed level related to constituents of concern, particularly those on the 303(d) List.

The Orange County Program has matured and made significant advances in stormwater pollution prevention and control with the DAMP as its foundational document. The DAMP serves as the basis for organizing our efforts and obtaining the necessary commitments of local governments to a common plan of attack. The result is that the Orange County Program has gained the strong participation and commitment of each of its local government jurisdictions to water quality improvements served by the Program. This level of participation and commitment has enabled the Program achieve many of its goals:

- The Orange County Program is proactive.

- The Copermittees are engaged in the Program and provide valuable input into the process.
- The program uses several separate, but highly inter-related water quality planning processes to address urban sources of pollutants
- The Program recognizes the benefits of watershed-based planning and regional controls and has an increased emphasis to support these approaches as foundational to the success of the program.
- The Copermittees adaptively manage the Program - the iterative process is actively employed and the necessary program modifications proposed and incorporated into the program.
- The existing framework and implementation of the program meets or exceeds the permit requirements.
- Throughout its history, the Program has received and continues to receive the significant funding and resources it requires to ensure its success.

As a result of the long history of Program development and achievement, the Orange County Program has become a statewide leader in municipal stormwater quality management efforts. For example, the Copermittees have been actively involved in the efforts of CASQA in developing and applying the practice of stormwater program effectiveness assessment. In addition, the Program has received statewide recognition for the excellence of its public education program, Project Pollution Prevention, and the South Orange County Integrated Regional Water Management Plan recently prevailed in statewide competition for \$25 million in grant funding. This progress points an Orange County Stormwater Program that would now benefit from general regulatory direction rather than prescriptive requirements.

II. Toward Attaining Water Quality Standards – Where Do We Go From Here?

Where we want to get to and how we want to get there during the course of the fourth term permit, is set forth in the 2006 ROWD, which includes the proposed DAMP for the period 2007-2012 ("Proposed DAMP"). The ROWD describes the Copermittees' compliance activities, enumerates Program accomplishments, and based upon comprehensive assessments of program effectiveness and the iterative process for achieving water quality standards, identifies the programmatic changes necessary to address areas of the Program that can be improved.

A. The ROWD and the Proposed DAMP Provide a Sound Basis for the Fourth Term Permit.

The Copermittees spent a significant amount of time and energy developing the ROWD and Proposed DAMP. As a part of this process, the Copermittees conducted comprehensive effectiveness assessments using the CASQA Program Effectiveness Assessment Guidance. The Orange County Program is one of the few programs to date to have actively defined a series of performance metrics and used an assessment framework to define the relationships between compliance actions and positive changes in water quality. This assessment process is important because it measures the success of the Program in terms of its achievement of water quality improvements. It further provides a basis for identifying the changes that are needed to improve the Program's effectiveness in achieving water quality goals. The ROWD and the Proposed DAMP are, therefore, based on rigorous systematic assessments that should provide a sound technical basis for the fourth term permit.

Given the strong technical basis for the recommendations presented in the ROWD and the Proposed DAMP, and the commitments of the Copermitees to the success of the Program, our ROWD and Proposed DAMP deserve the respect and consideration of the Regional Board and its staff. It appears, however, that the Tentative Order, to a large extent, disregards the demonstrated successes of the Program, overrides the thoughtful recommendations in the ROWD without any justification and dismisses the Proposed DAMP as simply "procedural correspondence."

B. The Tentative Order Unreasonably Limits the Use of Regional BMP Treatment Controls and Innovative Approaches.

While the Copermitees and Regional Board are in agreement that, at the end of the day the common goal is to improve stormwater quality, the way in which this is achieved and the necessary timeframes for achieving Program improvements clearly differ. The Attachments to this letter identify and discuss many of these differences in detail. The most troubling of these are the limitations imposed on the location of treatment control BMPs. By its two Findings that (1) natural drainages, whether channelized or not, that are used to convey urban stormwater are both a "receiving waters" and an MS4, and (2) that treatment of urban stormwater must take place prior to discharge from an MS4 to a receiving water, the Tentative Order effectively mandates a "site-by-site" approach to stormwater treatment. This mandate is not supported on a technical basis or required by law, and it severely limits the ability to effectively manage stormwater in a manner that will help ensure attainment of water quality standards and maintain key watershed hydrologic and geomorphological processes.

For example, the Copermitees' efforts to address pathogen indicator bacteria unequivocally demonstrate the need for a regional treatment approach. Because it has been discovered that bacteria are incubated throughout the MS4 and receiving water system, effective treatment designed to improve water quality at Orange County beaches must occur at the end of the system prior to discharge to estuary and ocean receiving waters. Indeed, as a result of the coordinated efforts of the Orange County Program and implementation of regional controls, such as diversions and treatment systems, the Copermitees were able to make data submittals that now support 303(d) delisting of certain Orange County's beaches for pathogen indicator bacteria. While this delisting effort clearly represents a significant outcome, protecting beaches is not the only goal, of course, because the streams also have beneficial uses, including recreation. However, the watershed approach and the iterative process of implementation support the prioritization of efforts and an initial emphasis on protecting recreational uses in the places where the vast majority of those uses occur, which in South Orange County is at the beaches. Moreover, if regional treatment can protect public health by preventing pollution from reaching heavily used beaches, this approach should not be explicitly prohibited because it does not also solve all of the other water quality problems that we have identified.

From the perspective of future urban development, applying the proposed BMP site requirements at a project level may lead to poor project design from a broader sub-watershed and watershed level of analysis. The geomorphologic planning principles being given practical expression in the Rancho Mission Viejo project, place considerable emphasis on preserving sources of coarse sediments (e.g., sandy soils and crystalline terrains) important to streamcourse processes and beach sand replenishment by concentrating development in terrains that would otherwise generate fine sediments. Similarly, from a broader sub-watershed and watershed scale, it may be far better to avoid soils with high infiltration capabilities (e.g., sandy soils) by concentrating development in areas with higher levels of natural runoff rates (e.g. clayey soils) than to minimize impervious surface on a project-by-project basis.

These accomplishments and emerging and innovative approaches to surface water management and protection are threatened by overly restrictive and unnecessary limitations on the use of regional treatment BMPs.

C. The Fourth Term Permit Should be Based on the ROWD and the Proposed DAMP; Any Other Requirements Must Have a Strong Technical and Legal Basis and Be Supported With Appropriate Findings in the Tentative Order.

The Orange County Program has demonstrated continuous improvement over the past three permit terms. Looking forward, the Copermittees have provided a strong technical basis for the further improvements they have recommended in the ROWD. The Copermittee jurisdictions have the political will and adequate funding to achieve the Program policies and objectives as further detailed in the Proposed DAMP. For these reasons, the Regional Board and its staff should carefully consider the recommendations of the Copermittees as the basis for the fourth term permit. The Regional Board and its staff should incorporate other permit changes, especially more prescriptive programmatic requirements, only where they are necessary to achieve water quality improvements and are supported by strong technical justification and the requirements of the federal CWA. To the extent that such additional changes are incorporated into the fourth term permit, the Regional Board must set forth in the Fact Sheet/Technical Report the legal basis and technical justification for such changes and with appropriate Findings in the Tentative Order.

* * *

We appreciate the effort that you and the Regional Board staff have devoted to development of the fourth term permit for the Orange County Program. We look forward to working with you and the staff to revise the Tentative Order to ensure that it meets our mutual goals. We trust that the comment period will be extended beyond April 11, 2007 in order to accommodate such discussions.

Thank you for your attention to our concerns. Please contact me directly if you have any questions. For technical questions, please contact Chris Crompton at (714)834-6662 or Richard Boon at (714)973-3168.

Sincerely,



for Bryan Speegle, Director
Resources & Development Management Department

Attachment A: Legal & Policy Comments
Attachment B: Technical Comments
Attachment C: Technical Comments on Monitoring Program

cc: Technical Advisory Committee
Permittees

ATTACHMENT A

**ORANGE COUNTY COMMENTS ON
CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION
TENTATIVE ORDER No. R9-2007-0002
NPDES NO. CAS0108740**

INTRODUCTION

This Attachment A contains the principal legal and policy comments of the County of Orange (the "County") on Tentative Order No. R9-2007-0002 dated February 9, 2007 ("Tentative Order"). Although the supporting Fact Sheet/Technical Report ("Fact Sheet") is referenced in this attachment, the County has not attempted, at this time, to provide detailed legal comments on the Fact Sheet. The County reserves the right to provide additional legal comments, on both the Tentative Order and Fact Sheet, before the close of public comment.

PRINCIPAL LEGAL AND POLICY COMMENTS

I. The Blanket Finding That All Natural Streams That Convey Urban Runoff Are Both An MS4 And A Waters Of The U.S. Is Inconsistent With Federal Law And Unsupported In the Fact Sheet

Tentative Order Finding D.3.c. (page 10) states that:

Historic and current development makes use of natural drainage patterns and features as conveyances for urban runoff. Urban streams used in this manner are part of the municipalities MS4 regardless of whether they are natural, man-made, or partially modified features. *In these cases, the urban stream is both an MS4 and a receiving water.* (Emphasis added.)

The Finding has two parts. First, it states that urban streams that are used to convey urban runoff are part of an MS4. Second, it states that such urban streams are both an MS4 and a receiving water. Neither part of this Finding withstands scrutiny.

A. Under The CWA Definition Of MS4, A Natural Stream Is Not An MS4 Unless It Is Channelized And Owned Or Operated By The Copermittee

An MS4 or "municipal separate storm sewer system" is a system of municipal separate storm sewers. "Municipal separate storm sewer" is defined as:

[A] conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains):

(i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) . . . that discharges to waters of the United States;

- (ii) Designed or used for collecting or conveying storm water;
- (iii) Which is not a combined sewer; [and]
- (iv) Which is not part of [a POTW].

40 C.F.R. § 122.26(b)(8). The Tentative Order includes the same definition. Tentative Order at Appendix C-6.

According to the definition of MS4, to the extent that a municipality “channelizes” a natural stream and the man-made channel is owned or operated by a Copermittee and designed or used for collecting or conveying storm water, it might fit within the definition of MS4. Man-made storm drain conduits installed in natural drainages would also be part of an MS4. Otherwise, urban streams are not roads, streets, catch basins, curbs, gutters, ditches, or storm drains and thus are not MS4s. If the USEPA had intended the definition to include “natural streams” that convey storm water, then it would not have limited the relevant specific items included to “ditches and man-made channels.” All of the specified conveyances are part of a constructed storm drainage system. Natural streams that also convey storm water are not.¹

The Fact Sheet discussion of Finding D.3.c. does not support the assertion that “all natural streams” that are used to convey urban runoff are part of the MS4. The Fact Sheet limits its discussion to the circumstance where “an unaltered natural drainage[] receives runoff from a point source (channeled by a Copermittee to drain an area within [its] jurisdiction), which then conveys the runoff to an altered natural drainage or a man-made MS4.” Fact Sheet at 54. Even with this narrowed focus, the “natural drainage” described still does not fall within the definition of an MS4, and the Fact Sheet provides no legal analysis in support of this finding.

Accordingly, the County recommends that the Regional Board delete Finding D.3.c. from the Tentative Order.

B. Under *Rapanos*, A Channel Through Which Water Flows Intermittently Or Ephemeraly Or That Periodically Provides Drainage For Rainfall Is Not A Waters Of The U.S.

Finding D.3.c of the Tentative Order states that natural streams used to convey urban runoff are both a part of the MS4 and a receiving water. The term “receiving waters” is defined in the Tentative Order as “[w]aters of the United States.” Tentative Order at Appendix C-7. In 2006, the United States Supreme Court issued its most recent pronouncement as to what is (and is not) a “waters of the United States” under the Clean Water Act (“CWA”). The plurality decision in *Rapanos v. United States* 126 S. Ct. 2208, 2225 (2006) concluded:

¹ USEPA’s proposed definition of an MS4 was limited to conveyances (including roads with drainage systems) “designed solely for collecting or conveying storm water.” See 53 Fed. Reg. 49416, at 49467 (Dec. 7, 1988). Under the proposed definition, a natural stream clearly could not be an MS4 since it is not “designed.” In light of comments that the proposed definition needed to be clarified to state that road culverts, road ditches, curbs and gutters are part of the MS4, USEPA “clarified that municipal streets, catch basins, curbs, gutters, ditches, man-made channels or storm drains” are MS4s. See 55 Fed. Reg. 47990, at 48036 (Nov. 16, 1990). Since not all of these man-made features are designed solely for collecting storm water, the final definition of MS4 provides “designed or used for collecting or conveying storm water” rather than “designed solely for collecting or conveying storm water.” *Id.* at 48065 (emphasis added).

In sum, on its only plausible interpretation, the phrase “the waters of the United States” includes only those relatively permanent, standing or continuously flowing bodies of water “forming geographic features” that are described in ordinary parlance as “streams[,] . . . oceans, rivers, [and] lakes.” See Webster’s Second 2882. The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.

Under this definition, the most that the Regional Board can say with respect to natural drainages used to convey urban runoff is that, to the extent they are relatively permanent, standing or continuously flowing bodies of water forming geographic features that would be described as streams or rivers, they might be considered to be waters of the U.S.. To the extent a drainage has only intermittent or ephemeral flows or only periodically provides drainage for rainfall, the finding that the drainage is a waters of the U.S. would be inconsistent with the current U.S. Supreme Court interpretation of the term. Moreover, to make a Finding that any particular drainage used to convey urban runoff is a waters of the U.S. would require a factual analysis on a case by case basis.² The Regional Board’s blanket Finding D.3.c. is merely a broad declaration unsupported in fact or current law and should be deleted from the Tentative Order.

C. To The Extent A Natural Drainage Is A Waters Of The U.S. It Cannot Also Be An MS4; By Definition An MS4 Discharges To Waters Of The U.S.

As noted above, the Tentative Order and federal CWA regulations define an MS4 as a conveyance that discharges *to* waters of the United States. The notion that a drainage can be both part of an MS4 and a receiving water is inconsistent with this definition. Thus, to the extent a natural drainage is a waters of the U.S., it cannot also be an MS4 and vice versa. The Regional Board should revise the Tentative Order to make clear that if a conveyance is deemed part of an MS4 in accordance with the CWA definition, then it cannot also be deemed a waters of the United States.

II. The Proposed Prohibition Of Treatment Control BMPs In Receiving Waters Is Unsupported By Federal Law And Inconsistent With State Law

The Tentative Order Finding E.7 (page 14) states that “[u]rban runoff treatment and/or mitigation must occur prior to the discharge of urban runoff into a receiving water.” Given Finding D.3.c., which states that all natural drainages that carry urban runoff are “both an MS4 and a receiving water,” Finding E.7 presents significant practical issues for the placement of treatment control BMPs and creates a legal conundrum. Moreover, the Finding is based on a misinterpretation of CWA regulations and misconstrues USEPA guidance on storm water treatment BMPs.

Finding E.7 apparently is intended to support Tentative Order revisions to the Standard Urban Storm Water Mitigation Plan (SUSMP) requirements for Priority Developments. Tentative Order Section D.1.d.(6)(c) (page 28) is a new provision that provides, “All treatment control BMPs must be located so as to infiltrate, filter, or treat runoff prior to its discharge to any waters of the U.S.,” except where multiple projects use shared treatment. Section D.1.d.(6)(f) (page 28) provides that treatment control BMPs for all Priority Development Projects must be

² Even under Justice Kennedy’s concurring opinion, the determination of a “significant nexus” must be made on a case-by-case basis. See 126 S. Ct. at 2250-51.