

RESPONSE TO COMMENTS

11-12 SEPTEMBER 2008 MEETING OF THE REGIONAL WATER BOARD

TENTATIVE ORDER NO. R5-2008-_____

NPDES NO. CAS082597

WASTE DISCHARGE REQUIREMENTS

CITIES OF CITRUS HEIGHTS, ELK GROVE, FOLSOM, GALT, RANCHO CORDOVA,
SACRAMENTO, AND COUNTY OF SACRAMENTO
STORM WATER DISCHARGES FROM
MUNICIPAL SEPARATE STORM SEWER SYSTEM
SACRAMENTO COUNTY

A tentative Waste Discharge Requirements (WDRs) Order, National Pollutant Discharge Elimination System (NPDES) Permit No. CAS082597, for the Cities of Citrus Heights, Elk Grove, Folsom, Galt, Rancho Cordova, Sacramento and County of Sacramento (hereafter "Permittees") Storm Water Discharges from Municipal Separate Storm Sewer System (MS4), Sacramento County were circulated to known interested parties for review and comment on 16 May 2008. Additionally, a Notice of Public Hearing concerning the tentative order was posted at the City Halls and Post Offices of the cities/county, and published for public review and comment on 23 May 2008. Comments on the proposed action by persons or parties were due 23 June 2008. Comment letters were received from the Permittees; Eugene Bromley, USEPA; Eva S. Butler; Sam Miller, Lewis Planned Communities; and Alta Tura, Urban Creeks Council.

The Regional Water Board will include in the administrative record for this matter these written comments. These comments, and staff responses to these comments, are summarized below:

A. Comments from the Permittees

Attachment 1 - Waste Discharge Requirements

1. **Comment:** The Permittees recommended changes that are typographical, grammatical errors, dates and suggested reference changes throughout the document. Request a change of reference from "Storm Water Quality Improvement Plans" to "Stormwater Quality Improvement Plans."

Response: Comment noted and language revised.

2. Comment: Finding 29 (pp. 6-8) – Unfunded Mandate

Response:

General: Permittees contend that Finding 29 does not comply with *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515, and reads like a legal brief rather than bridging the gap between evidence and conclusions. (This point is asserted in the first introductory paragraph as well as in Comments 4) and 7))

The statements and conclusions in Finding 29 are appropriate because they serve the purpose of bridging the gap between the evidence and the Regional Water Board's conclusion that subvention is not required. Moreover, even if the Permittees' implied assertion that Finding 29 is superfluous were valid, nothing in *Topanga* precludes the Regional Water Board from making more findings than what the law requires. *Topanga* does not prohibit a public agency from adopting findings that are in addition to those required to bridge the gap between the evidence and the conclusions.

1) The Permittees object to Finding 29 because the Regional Water Board does not have jurisdiction to resolve subvention claims, question the purpose and intent of the finding, and dispute that the MS4 permit is a federal mandate.

The Regional Water Board does not dispute that the Commission on State Mandates has the authority to resolve subvention claims. However, the Regional Water Board is the state agency charged with administering and interpreting the Clean Water Act and Porter-Cologne Water Quality Control Act. The Regional Water Board is thus in a unique position to make findings and conclusions about what those laws require of municipalities that operate municipal separate storm sewer systems, and how those requirements compare to similarly situated dischargers.

The Permittees are incorrect that the subvention issue was unsuccessfully litigated in *County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898. In that case, the Trial Court found, solely as a matter of law, that the Government Code section 17516 exemption was unconstitutional. The Court did not consider the specifics of the permit, the Porter-Cologne Water Quality Control Act, or the Clean Water Act. The judge's conclusion was based on a determination that Government Code section 17516 precluded the Commission from considering the Regional Water Board's actions under the Porter-Cologne Act in all circumstances, without regard to whether the action required a new program or higher level of service requiring subvention consistent with the Constitution and court decisions construing the Constitution.

The Court of Appeal's decision affirmed the Trial Court's decision. The Court of Appeal's decision makes clear that the permit's requirements were not properly before the Court and that the Court could not evaluate whether there was an unfunded state mandate requiring subvention. Instead, the Commission will need to evaluate the claims, taking account of constitutional and court-fashioned exemptions to Article XIII B, section 6.

The Permittees suggest that the requirements of the tentative order exceed federal Clean Water Act requirements, but do not cite any permit requirement that is more stringent than federal mandates or otherwise indicate the manner in which the tentative order exceeds federal requirements. The tentative order implements the requirements of the Clean Water Act, as stated in Finding 29. *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564 confirms that requirements imposed by federal law do not lose their character as federal mandates merely because the state has some discretion in carrying out the requirements, as long as the state does not impose more stringent or additional requirements. Like the educational requirements in *Hayes*, the MS4 requirements are part of a comprehensive, nationwide regulatory scheme, and would apply to the permitted agencies even if the state had no NPDES permitting authority.

There is no merit to the Permittees' specific assertion that the permit shifts to the permitted local agencies the State's responsibility to inspect and enforce its general industrial and construction storm water permits. The Regional Water Board administers permits for industrial and construction discharges of storm water within its jurisdiction and accordingly does conduct inspections at businesses to ensure compliance with the permits. In addition, the tentative order incorporates inspections by Permittees as part of the elements of the construction and industrial/commercial programs. U.S. EPA made clear in promulgating storm water regulations that it intended to require industrial facilities that discharge into municipal storm sewers to obtain their own NPDES permits and *also* to require MS4s to regulate these same discharges. Vol. 55 Federal Register, at 48000, 48058. The federal regulations also specifically required local storm water agencies, as part of their responsibilities under NPDES permits, to include such inspections in their management program. 40 C.F.R. §122.26(d)(2)(iv).

2) The Permittees dispute that TMDLs are federal mandates and assert that this is a question of fact outside the Regional Water Board's jurisdiction.

As discussed in the response to 1) above, requirements imposed by federal law do not lose their character as federal mandates merely because the state has some discretion in carrying out the requirements, as long as the state does not impose more stringent or additional requirements. Also as discussed in the response to 1) above, the Regional Water Board does not dispute that the Commission has authority to resolve subvention claims. However, the Regional

Water Board is the state agency charged with administering and interpreting the Clean Water Act and Porter-Cologne Water Quality Control Act and is therefore in a unique position to make findings and conclusions about what those laws require, including whether TMDLs constitute a federal mandate.

3) The Permittees dispute that costs to be incurred by them under the storm water permit requirements are the result of an overarching regulatory scheme that places similar requirements on governmental and non-governmental dischargers.

The municipal stormwater permit requirements under which Permittees are regulated are part of a larger regulatory program for storm water which is in turn part of the NPDES regulatory program. Discharges from non-municipal separate storm sewers are also subject to regulation under the storm water program (40 CFR § 122.26(a)(6)). Further, industrial discharges through MS4s are also subject to NPDES permitting requirements. (40 CFR § 122.26(b)(14).) These requirements support the view that the storm water program is a single “regulatory scheme.”

4) The Permittees dispute the characterization of the regulation of municipal storm water as being more lenient than the discharge of waste from non-governmental sources.

In response to this comment, such characterizations have been removed from the finding.

5) The Permittees contend they have no ability to levy fees to defray costs of permit compliance.

The Permittees’ comment, while noted, focuses entirely on the asserted challenges in levying new or increased storm water drainage fees. In addition to storm water drainage fees, the permitted agencies can defray the costs of their storm water program through increased inspection fees, plan and permit review fees, transit fees, trash collection fees, or other fees related to program components.

6) The Permittees contend that whether they voluntarily sought permit coverage in lieu of a discharge prohibition is a question of fact for the Commission on State Mandates.

See Response to 1). The Regional Water Board does not dispute that the Commission has authority to resolve subvention claims. However, the Regional Water Board is the state agency charged with administering and interpreting the Clean Water Act and Porter-Cologne Water Quality Control Act and is therefore in a unique position to make findings and conclusions about what those laws require of the discharger.

7) Provisions of the Water Code that predate the constitutional subvention requirements do not save the order from subvention.

The Permittees contend that every permit is a discrete action that may implicate state subvention. While that may be the case, the Permittees fail to explain how the subvention implications are different in each of the discrete permits. Since the prohibition of pollution and nuisance predates the subvention provisions, permits implementing it are exempt from subvention requirements. Reissuing new permits based on the pre-existing law would not “revive” a subvention claim.

3. **Comment: Finding 35 (p. 9)** – The Permittees recommend updating the finding to reflect new and proposed actions by the Regional Water Board during the 5-year term on this Order. They involve the newly adopted Order for dewatering and other low threat discharges, proposed General Construction permit and General Industrial permit.

Response: Comment noted and finding revised.

4. **Comment: Finding 71 (p. 18).** The Permittees recommend a revision to the last line of this finding since the experts advise that one or more of the following three approaches should be used for addressing hydromodification impacts: 1) flow duration control, 2) LID, and 3) in-stream methods. Suggested revision: deletion of “and/or mitigation.” The finding states:

Response: Comment noted and finding revised.

5. **Comment: Finding 78 (p. 20)** – The Permittees recommend revising fourth sentence to clarify that LID is not an alternative to traditional flood control facilities, but is an alternative to traditional storm water quality facilities. Suggested revision: Delete “(collection and conveyance through storm drains and pipes to detention basins or directly to waterways).”

Response: Change noted and finding revised.

6. **Comment: Finding 83 (p. 21)** - The Permittees recommend revising the last line of this finding as follows, for consistency with the Permittees’ existing development standards: To meet MEP, “appropriate storm water quality control measures” are needed at RGOs. The finding states:

“Retail Gasoline Outlets (RGOs) are significant sources of pollutants in urban runoff. RGOs are points of convergence for motor vehicles for automotive related services such as repair, refueling, tire inflation, and radiator fill-up and consequently produce significantly higher loadings of hydrocarbons and trace metals (including copper and zinc) than other

urban areas. To meet MEP, **source control and treatment control BMPs** are needed at RGOs.”

Response: Changing the language to “appropriate storm water quality control measures” weakens the intent of this finding. We contend that specifying “source control and treatment control BMPs” provides clear direction to the Permittees. Details of the types of storm water quality control measures to be used shall be included, but not limited to the *Stormwater Quality Design Manual* (aka Development Standards) pursuant to this Order.

7. Comment: Provision C.1.d. Receiving Water Limit for Chlorine (p. 30).

The Permittees recommend that the receiving water limit for chlorine be removed from the tentative order because the Order contains no information that indicates the Regional Water Board determined if it is appropriate.

Response: The numeric receiving water limit for chlorine has been removed from the permit in response to this comment. The Regional Water Board notes that chlorine has adverse effects on freshwater aquatic life related beneficial uses. Sources of chlorine in urban runoff include, but are not limited to, swimming pools, fire hydrant flushing, and sewage system overflows. The Regional Water Board is required to protect beneficial uses of receiving waters that involve freshwater aquatic life (e.g., WARM, COLD, SPWN, MIGR). The Basin Plan’s Toxicity narrative objective, reflected in Provision C.1.I., which states: “Toxic pollutants to be present in the water column, sediments, or biota in concentrations that produce detrimental physiological responses in human, plant, animal, or aquatic life; or that bioaccumulate in aquatic resources at levels which are harmful to human health” is designed to provide such protection.

8. Comment: Provision D.3.d SQIP Modification (p. 34). The Permittees suggest revising the language for clarity with regards to minor, non-substantive revisions to the SQIP.

Response: Comment noted and provision revised.

9. Comment: Provision D.4.b. Legal Authority (p. 35). The Permittees recommend revising language to clarify provision, which does not include “charitable car washes.”

Response: Comment noted and provision revised. The list retains “charitable car washes” as a identified illegal discharge.

Attachment 2 - Monitoring and Reporting Program

10. **Comment: I.B.4 Summary of Monitoring Data (1st para, 2nd sentence).** The Permittees request the following revisions to be more consistent with existing procedures and to more accurately reflect the MEP standard of the Permit. The annual Reports of Water Quality Exceedance are based on a comparison of receiving water quality with water quality standards conducted by the Permittees. The RWQEs are not based on a comparison of urban discharge data to water quality standards (numeric effluent standards). Permittees suggest the following language:

"Summary of the monitoring data and an assessment of each component of the MRP. To comply with Provisions C.1. and C.2 of the Order No. R5-2008-_____ the Permittees shall first compare receiving water ~~and discharge~~ data with applicable water quality standards. The lowest applicable standard from the Basin Plan, California Toxics Rule (CTR), and California Title 22 (Title 22), and constituent specific concentrations limits (e.g., mercury) shall be used for comparison. For those constituents that exceed water quality standards in the receiving water, the Permittees shall examine urban runoff discharge data and assess the extent to which urban runoff may be contributing to the exceedance."

Response: We disagree with the Permittees' interpretation of the Order and MEP standard. We have made revisions to Provision I.B.4 of the MRP to clarify the data reporting requirements; however, we reiterate here that discharge data is a required component of the MRP. MEP is a discharge standard and not a receiving water standard.

Discharge Prohibitions A.1, 2 and 3 Storm Water Discharges are directed at discharges, rather than receiving waters, and Prohibition A.3 prohibits the discharge of pollutants which have not been reduced to the MEP. Discharge Prohibitions B. Non-Storm Water Discharges prohibits all types of non-storm water discharges into its MS4s.

Provision C.2. of the Waste Discharge Requirements (WDRs) states: "The **discharge** shall not cause or contribute to an exceedance of any applicable water quality standards." **(emphasis added)**

Provision C.3 states: "The Permittees shall comply with Discharge Prohibition A.2 and Receiving Water Limitations C.1 and C.2 through timely implementation of control measures and other actions to reduce pollutants in the **discharges** in accordance with the SQIP and other requirements of this Order, including any modifications. ..." **(emphasis added)**

When the data indicate that discharges are causing or contributing to exceedances of applicable water quality standards or constituent specific concentrations limits, the Permittees shall prepare a Report of Water Quality

Exceedance (RWQE), prepared pursuant to Receiving Water Limitations C.3 of this Order, and identify potential sources of the problems, and recommend future monitoring and BMP implementation measures to identify and address the sources.

This is a federally mandated National Pollutant **Discharge Elimination** Program (NPDES). Code of Federal Regulations, Title 40 (40 CFR) Part 122.1(b) states: “*Scope of the NPDES permit requirement.* (1) The NPDES program requires permits for the discharge of “pollutants” from any “point source” into “waters of the United States.” The terms “pollutant”, “point source” and “waters of the United States” are defined at §122.2. *Point source* means any discernible, confined, and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, vessel or other floating craft from which pollutants are or may be discharged.

- 11. Comment: II.D. Water Column Toxicity (last para on p. 11):** The Permittees request changes in language as follows:

“The Permittees shall include a monitoring plan, which shall include a sampling and analysis plan, ~~all data (electronic format), assessment of the data, conclusions, proposed BMPs to be implemented, program effectiveness~~ and an implementation schedule in the SQIP for approval by the Executive Officer. Subsequent information (e.g., data (electronic format), assessment of the data, conclusions, proposed BMPs to be implemented, and assessment of program effectiveness) shall be included in the Annual Reports as required in this MRP Order.”

Response: Comment noted and revised.

- 12. Comment: II.E. Sediment Monitoring** – The Permittees recommend editorial changes which do not change the meaning of the section, but reorganizes the language for clarity.

Response: Comment noted and revisions made. Note that language such as “as necessary” or “as appropriate” were not included. These terms are not suitable when determining compliance.

B. Comments from USEPA, Eugene Bromley

- 13. Comment: Planning and New Development (WDR p. 44-49)** – USEPA suggests the Low Impact Development (LID) section be more prescriptive and include quantitative requirements similar to the Ventura County Draft MS4 permit, which includes a 5% limit on effective impervious area for new development and redevelopment.

Response: The proposed Order provides specific measures that must be addressed in the required Storm water Quality Improvement Program (SQIP), which is their *proposed management plan* pursuant to 40 CFR 122.26(d)(2)(iv). 40 CFR provides specific regulatory language for each required element of the MS4 permit. The proposed Order provides even more specific objectives and control measures, which shall be addressed in the SQIP.

USEPA Phase I Final Rule and Regulations states the Clean Water Act contemplated MS4 permit conditions requiring storm water management programs (e.g., SQIP) to be developed and implemented or required specific practices, those program elements were enforceable in accordance with the terms of permit. This proposed Order is intended to develop, achieve, and implement a timely, comprehensive, cost-effective storm water pollution control program to reduce the discharge of pollutants in storm water runoff to the MEP from the permitted areas in the Sacramento Urbanized Area subject to the Permittees' jurisdiction to receiving waters.

The proposed Order requires LID, as well as the submittal of a Hydromodification Management Plan (HMP). This is consistent with the State Water Board who partnering with other state and federal agencies, non-governmental organizations, and Universities to protect natural resources by providing technical information and practical tools for informed land use decision-making at the local level. California has already made steps toward a regulatory system that encourages better treatment performance and the application of LID; the State Water Resources Control Board's recent emphasis on limiting hydromodification impacts (changes in a site's runoff and transport characteristics) from development will create the framework for broader adoption of LID. In addition, the Porter-Cologne Act (commonly referred to as the California Water Code) allows the Water Boards broad discretion to implement innovative natural resource protection programs because it allows the regulation of any activity or factor that affects water quality and is not narrowly focused on end-of-pipe treatment.

This proposed Order is progressive in requiring LID and HMP in conformance with the State Water Board policy of Sustainable Storm Water Management (http://www.waterboards.ca.gov/water_issues/programs/low_impact_development/index.shtml), as well as guidance from USEPA pursuant to the 16 August 2007 memorandum addressing green infrastructure (http://cfpub.epa.gov/npdes/home.cfm?program_id=298). The USEPA memorandum states: "In developing permit requirements, permitting authorities may structure their permits, as well as guidance or criteria for storm water plans ... to encourage permittees to utilize green infrastructure approaches, where appropriate, in lieu of or in addition to more traditional controls."¹

¹ United States Environmental Protection Agency, Washington, D.C. 20460, Office of Enforcement and Compliance Assurance, Use of Green Infrastructure in NPDES Permits and Enforcement, August 16, 2007

- 14. Comment: TMDL Provisions (Fact Sheet p. 11-14)** – USEPA suggests the FACT SHEET include more detailed information regarding listed TMDLs that may be in effect and which include a Waste Load Allocation (WLA) applicable to the MS4 discharges such as diazinon/chlorpyrifos. A better explanation should be provided that describes how WLAs are to be achieved. The Fact Sheet should discuss other TMDLs under development (such as the mercury TMDL) and what the Board's intent would be if they were adopted within the term of the next permit.

Response: The proposed Order and Fact Sheet provide details of the Pesticides and Mercury programs. We refer you to Findings 86-94 (WDRs p. 21-26). They provide details of the water quality objectives (Finding 91), references to the Basin Plan², Waste Load Allocations (Finding 91) with compliance dates, and specific monitoring and assessment requirements to implement the Provisions of the Order.

Fact Sheet: To implement adopted TMDLs, this proposed Permit implements control programs developed to attain waste load allocations. Permittees are required to submit plans or update their existing plans during each permit term to address new technology, BMPs, and filling data gaps/needs. Those plans include timetables for a phased approach for each stage of the TMDL development, including (1) collecting data; (2) characterizing waste; (3) implementing BMPs; (4) determining the effectiveness of BMPs in reaching a specific TMDL; and ultimately (5) modifications and/or recommending better BMPs. The Regional Water Board reviews and approves each phase as part of the Annual Report submitted by the dischargers.

We have added the following language to the Fact Sheet to address USEPA's specific concerns for pesticides:

"The Permittees submitted to the Regional Water Board a Pesticide Plan (in 2004) to fulfill the need for a pesticide toxicity control plan as required by the urban creeks pesticide TMDL. The Pesticide Plan was subsequently approved by the Regional Water Board. The plan addresses their own use of pesticides including diazinon, chlorpyrifos, and other lower priority pesticides and use of such pesticides by other sources within their jurisdiction. This Order fulfills a component of the TMDL Implementation Plan adopted by this Regional Water Board on 23 June 2006 for diazinon and chlorpyrifos for the Sacramento-San Joaquin Delta Waterways and by requiring a management plan which includes BMPs, BMP implementation plan, effectiveness assessment, and compliance schedule that describes actions that will be taken to reduce diazinon and chlorpyrifos discharges and meet the applicable allocations. This proposed Order includes Provisions consistent with the TMDL waste load allocations and

² The Water Quality Control Plan for the Central Valley Regional Water Quality Control Board, Sacramento River Basin and the San Joaquin River Basin (Basin Plan), Fourth Edition, Revised October 2007 (with Approved Amendments)

the Basin Plan implementation program. This proposed Order specifies monitoring and assessment requirements to implement these Provisions. The establishment of Water Quality Based Effluent Limits expressed as iterative BMPs to achieve the Waste Load Allocation (WLA) compliance schedule is appropriate and is expected to be sufficient to achieve the WLA specified in the TMDL.”

With regards to the mercury TMDL, we refer the USEPA to page 32 of the Fact Sheet under E. Water Quality Based Programs. We have moved the TMDL specific language from the E. Water Quality Based Programs to the TMDL section of the Fact Sheet for clarification.

- 15. Comment: Permit Enforceability (WDRs p. 32-58)** – USEPA commented that wording or assumptions in certain provisions were problematic and suggest clarification to ensure enforceability in Provision D.

Response: Changes have been made to Provision D. to clarify the intent of the sections. Terms such as “feasible” and “practical” have been deleted. The term “should” has been changed to “shall.”

- 16. Comment:** To maintain consistency, USEPA recommends the Municipal program include the same requirement to address the objectives and the listed control measures.

Response: We agree. This was an oversight that has been corrected to ensure language is consistent in the Order.

- 17. Comment: Permit Clarity (WDRs p. 41-57)** – USEPA suggests language be changed for clarity in Provisions D.10-27.

Response: Comment noted. We have changed language where we deemed appropriate for clarity.

- 18. Comment:** The USEPA requests clarification of the public notice process. The permit is not clear on how the public may review and comment on the current SQIP, although EPA notes that public notice and comment is required for revisions of the SQIP (D.3.d., WDRs page 34). Similarly, the public should be able to review and comment on the New and Revised Development Standards (D.14.b., WDRs page 46), Low Impact Development Strategies (D.15.b.i. WDR page 47), Hydromodification Management Plan (D.15.c., WDR page 48), and General Plan Update (D.16., WDRs pages 49-50). In this version, it is unclear whether the public notice process applies to these documents.

Response: As noted by EPA, the public will have an opportunity to comment on the SQIP when it is submitted for review and approval by the Regional Water Board (D.3.d). Provision D.2. STORM WATER QUALITY IMPROVEMENT PLAN identifies all the required components of the SQIP. All the details of each program listed under this section are required to be incorporated into the SQIP for review and approval by the Regional Water Board. Components such as the New/Revised Development Standards under Subsection D.2.c.vi. Planning and New Development are required to be included as a component of the SQIP. For clarity, section Provision D.14.b. has been revised as follows:

"New/Revised Development Standards: Each Permittee shall continue to implement existing development standards as identified in the Permittees Development Standards Plan (a.k.a. *The Stormwater Quality Design Manual for Sacramento and South Placer Regions*) approved by Regional Water Board in May 2005..."

As stated in Provision D.15.b. "*The Stormwater Quality Design Manual for Sacramento and South Placer Regions* currently promotes LID principles..."

To clarify the Regional Water Boards intent, we have revised the following Provision D.3.d. to state:

"A thirty-day public notice and comment period shall apply to all proposed significant revisions to the SQIP. Significant revisions include the Hydromodification Management Plan (HMP) and *The Stormwater Quality Design Manual for Sacramento and South Placer Regions* required under this Order..."

D.15.b.i. states: "Each Permittee shall amend, revise or adopt development standards (including policies, codes, ordinances and/or regulations) to require implementation of LID strategies at priority new development and redevelopment projects **as feasible no later than six months** after approval of the HMP by the Regional Water Board."

Each Permittee as a City/County has their own public review process when developing "policies, codes, ordinances and/or regulations." Ordinances/codes are formally adopted by the County Board of Supervisors and Cities similarly have City Councils. The public process includes public meetings and mailings to interested parties. Policies, as with the State, are considered internal guidance documents. Policies are signed and enacted by the director of the impacted agency. Regulations are not commonly adopted by cities/counties. The County's storm water ordinance allows for regulations to be adopted by the agency administrator, and the process is less formal than an ordinance adoption. For example, the County storm water design standards are a regulation signed by the Municipal Services Agency administration. The County process for the development standards (a.k.a. *Stormwater Quality Design Manual, May 2007*) included presentations, mailings and is posted on their website. With regards to the HMP, the city/county states that they contact interest parties for review and comment, but there is no formal public notification process.

General Plan: Both the City and County conduct a thorough public outreach and input process during a General Plan Update. Outreach efforts include community meetings, focus groups, town hall forums, open houses and workshops. There is a formal comment period on the General Plan and the General Plan EIR. Public Hearings are also held at the Planning Commission and City Council/Board of Supervisors meetings. Both agencies have General Plan Update websites with extensive information on the Plan, the update process, and opportunities for comment or involvement.

City of Sacramento: <http://www.sacgp.org/PublicOutreach.html>

Sacramento County: <http://www.planning.saccounty.net/gpupdate/gpu-index.html>

The Regional Water Board is also noticed that the EIR and Draft Plan are available for review and comment.

- 19. Comment:** The USEPA requests clarification of Provision D.20. (WDRs page 52), Waiver Program. The current description in D.20 raises questions as to who will determine whether structural treatment control measures are deemed “infeasible” as well as how fees will be used, given the permit’s rather vague provision that “funds shall be used for regional or alternative solutions within the Sacramento watershed.” It is unclear whether the permitting authority or public have any oversight regarding issuance or applicability of a waiver and/or use of the fees.

Provision D.20. includes specific information determining what is considered “infeasible,” as well as, the required approval process by the Regional Water Board’s Executive Officer as follows:

”20. **Waiver Program:** A Permittee may develop a waiver program that would require a developer to pay into an in-lieu fund or storm water mitigation fund instead of incorporating a structural treatment control measure into a development project. A waiver may be used for projects where accepted structural treatment control measures have been considered and rejected as infeasible. Infeasibility criteria may include items such as extreme space limitations in redevelopment projects or infill areas, unfavorable soil conditions for infiltration, potential groundwater contamination, or topographic and hydraulic head limitations. The storm water mitigation funds shall be used for regional or alternative solutions within the Sacramento River watershed. The Permittee shall obtain approval from the Executive Officer prior to implementation of a waiver program and shall notify the Regional Water Board annually of waivers granted in that year.”

The SQIP will provide details of this program. It will be the responsibility of the permittees to determine infeasibility based upon the criteria set forth in the SQIP and supporting documents such as the *The Stormwater Quality Design Manual*

for the Sacramento and South Placer Regions. As stated, the Executive Officer shall have the ultimate approval of any waivers on an annual basis, therefore, the Regional Water Board will have the opportunity to review the criteria used to determine infeasibility in this regard. Similar provisions are in the San Diego Region Permit Order R9-2001-0001 (page 19) and Santa Any Permit R8-2002-0010 (page 31). As part of the model SUSMP, the permittees may develop a program to require project proponents who have received waivers to transfer the savings in cost, as determined by the permittee(s), to a storm water mitigation fund. This program may be implemented by all permittees that choose to provide waivers. Funds may be used on projects to improve urban runoff quality within the watershed of the waived project. The waiver program may identify: 1) the entity or entities that will manage the storm water mitigation fund (i.e., assume full responsibility for); 2) the range and types of acceptable projects for which mitigation funds may be expended; 3) the entity or entities that will assume full responsibility for each mitigation project including its successful completion; and 4) how the dollar amount of fund contributions will be determined.

We believe that the current provision provides adequate clarity so we do not propose to change or add language.

20. Comment (WDRs p. 49-51): Clarify the meanings and purpose of the following provisions:

Provision D.16.e., General Plans, "Each permittee shall review and modify the development goals and policies, open space goals and policies including preservation or integration with natural features, and when defined need for specific urban runoff and storm water pollution protection policies are deficient."

Provision D.19., "Mitigation Funding: The Permittees may propose a management framework, for endorsement by the Regional Water Board Executive Officer, to support regional or sub-regional solutions to storm water pollution, where any of the following situations occur:

- a. a waiver for impracticability is granted;
- b. legislative funds become available;
- c. off-site mitigation is required because of loss of environmental habitat; or an approved watershed management plan or a regional storm water plan exists that incorporates an equivalent or improved strategy for storm water mitigation."

Response: General Plans - Comment noted and language has been changed for clarity as follows:

"Each permittee shall review and modify the development goals and policies, open space goals and policies including preservation or integration with natural features, and when defined the need for specific urban runoff and storm water

pollution protection policies (i.e., low impact development policies, hydromodification management plans) if they are determined deficient."

General Plans are the planning document for a community's development and growth; it is the "guidance manual" for the community. The plan should be adhered to and, if changed, must be done so through a public process. General Plans are reviewed and updated approximately every five years. Ordinances, regulatory codes, policies and standards are developed to ensure full compliance with the General Plan.

The statement of "when defined the need for specific urban runoff and storm water pollution protection policies are determined deficient" is directed towards setting the framework for new technologies to ensure the "water quality and watershed protection principles" are the most up to date. These new technologies include low impact development strategies and hydromodification management plans in order to treat storm water and reduce/eliminate impacts to stream channels.

Response: D. 19. Mitigation Funding - a. A project proponent may not be able include storm water pollution solutions using low impact development or hydromodification technology strategies where conditions (e.g., extreme space limitations, impervious soil, shallow groundwater) prevent a project from meeting the standards. The Permittees may collectively or individually develop a program to require project proponents who have received waivers of impracticability to transfer the savings in cost, as determined by the Permittee(s), to a storm water mitigation fund. Funds may be used on projects to improve urban runoff quality within the watershed of the waived project. The waiver mitigation program shall be described in detail in the SQIP. **b.** Legislative funds in the form of grants may be available if the project meets the minimum grant criteria. **c.** This language is self evident.

Other proposed Phase I permits, such as San Diego and Contra Costa Region 2, include "Impracticability Provisions."

C. Summary of Comments from Eva Butler, Urban Creeks Watershed Council and Lewis Planned Communities

- 21. Comment: Waste Discharge Requirements (WDRs p. 47-49), Low Impact Development (LID) and Hydromodification Management Plan (HMP).** The commenters have requested more technically prescriptive language be included in the findings and provisions of the WDRs with regards to the development standards for LID, HMP, and Pesticide Plan.

Response: We believe that the findings and provisions provide an adequate level of technology based and program based performance goals. Based on

these performance goals, the Permittees are required to revise the Storm water Quality Improvement Plan (SQIP). The SQIP is required as part of the ROWD pursuant to 40 CFR 122.26(2)(d)(iv); therefore it is an integral and enforceable component of the MS4 permit. The SQIP is required to be submitted within six months after the date of adoption of the Order for consideration of adoption by the Regional Water Board. At that time, interested parties will have the opportunity to comment on the details of the SQIP and any other documents included in the SQIP (i.e., Pesticide Plan, HMP, Development Standards). Furthermore, the Permittees will be required to provide a detailed assessment of the effectiveness of their programs based on water quality monitoring and BMP implementation monitoring and studies. The required Annual Reports shall include a program effectiveness assessment and recommended modifications for each Program Element. Each Annual Report shall build upon the previous year's efforts. In each Annual Report, the Permittees may propose pertinent updates, improvements, or revisions to the SQIP, which shall be complied with and enforceable under this Order. Since the HMP Work Plan and final HMP will be part of the SQIP, the documents shall be open for public review, as well, therefore the public stakeholders will have the opportunity to comment on the details of the HMP Work Plan and final HMP due one year after approval of the SQIP (see Provision D.15.c.).

Each Permittee will be required to amend, revise or adopt development standards (including policies, codes, ordinances and/or regulations) to require implementation of LID strategies at priority new development and redevelopment projects as feasible no later than six months after approval of the HMP by the Regional Water Board. The development standards are identified as the *Stormwater Quality Design Manual for Sacramento and South Placer Regions*.

Based on the commenter's concerns, we have provided minor changes to clarify and expand upon the meaning of hydromodification to Provision D.15.c.i. as follows:

"i. The HMP shall require controls to manage the increases in the magnitude (e.g., flow control), frequency, volume, and duration of runoff from development projects in order to protect receiving waters from increased potential for erosion and other adverse impacts with consideration towards maintaining (or reproducing) the pre-development hydrology."

Provision D.15.b. provides specific guidance to the Permittees to ensure consistency in other statewide LID programs in other municipalities, as well as a contemporary document published by the USEPA as follows:

"b. ...When developing the LID Program the Permittees shall consider and incorporate all appropriate and applicable LID components and measures that have been successfully and effectively implemented in other municipal

areas. Other programs include, but are not limited to, USEPA's "Managing Wet Weather with Green Infrastructure, Action Strategy, 2008" and LID program elements specified in the permits or Storm Water Management Plans of other MS4s throughout the state."

Details of the referenced strategy may be found at the USEPA's website at: http://www.epa.gov/npdes/pubs/gi_action_strategy.pdf

Other MS4s throughout the state, such as Ventura County and Contra Costa County currently have *draft* NPDES permits which include LID and HMP strategies that are available as guidance to the Permittees when developing their SQIP.

- 22. Comment: WDRs Finding 68, p. 17. Antidegradation Analysis:** The commenter recommends striking language in the finding beginning with, "The Permittees submitted an antidegradation analysis in October 2007..." and additional references to the findings of that report. "When taken out of context in the tentative order, assertions (quoted directly from the AA) imply that the Board accepts and promotes the premise that degradation of water quality from new development is necessary and unavoidable."

Response: We refer to the Fact Sheet section of the WDR package, page 24, H. Planning and New Development Program. This section further explains the necessity and regulatory requirement of the State Water Resources Control Board (SWRCB) Resolution 68-16 known as the Antidegradation Policy, which requires the Regional Water Board to assure maintenance of the high quality of waters of the State unless the Regional Water Board makes certain findings. Under this policy, water quality degradation may be allowed if the following conditions are met: 1) any change in water quality must be consistent with maximum benefit to the people of the State; 2) will not unreasonably affect present and anticipated beneficial uses; 3) will not result in water quality less than prescribed in the Basin Plan; and 4) the discharge is required to meet waste discharge requirements that result in the best practicable treatment or control necessary to assure that pollution or nuisance will not occur and the highest water quality consistent with maximum benefit to the people of the state will be maintained.

The discharge from continued urban development will result in some minimal degradation of waters of the state and navigable waters of the United States, but in this case, such degradation is consistent with the maximum benefit to the people of the state. Limited degradation that does not cause exceedance of water quality objectives is warranted to allow for the economic benefit stemming from local growth. There is also a need in the Sacramento area to accommodate growth. The Regional Water Board does not have the jurisdiction to control growth in the County of Sacramento and associated Cities, but is required to assure that the receiving waters are adequately protected as a result of urban

discharges. The proposed Permit allows storm water utility service necessary to accommodate housing and economic expansion in the area, and is considered to be a benefit to the people of the State. Compliance with these requirements will result in the reduction of discharge pollutants from the urban areas to the maximum extent practicable (MEP). The MEP standard involves applying best management practices (BMPs) that are effective in reducing the discharge of pollutants in storm water runoff. The MEP standard involves applying best management practices (BMPs) that are effective in reducing the discharge of pollutants in storm water runoff. If, from a list of BMPs, a permittee chooses only a few of the least expensive methods, it is likely that MEP has not been met. Alternatively, if a permittee employs all applicable BMPs except those where it can show that they are not technically feasible in the locality, or whose cost would exceed any benefit to be derived, it would have met the standard. MEP requires permittees choose effective BMPs, and to reject applicable BMPs only where other effective BMPs will serve the same purpose, the BMPs would not be technically feasible, or the cost would be prohibitive. MEP is the result of the cumulative effect of implementing, continuously evaluating, and making corresponding changes to a variety of technically and economically feasible BMPs that ensure the most appropriate controls are implemented in the most effective manner.

- 23. Comment: WDRs p. 49, Provision D.16. General Plan Update and 401 Water Quality Certification.** The commenter states that several provisions of the tentative order require the permittees to advance principles of storm water quality management through their General Plans. “We are not encouraged to believe that this will be effectively executed, when the Rancho Cordova City Council is actively working to weaken a modest provision protecting natural streams in its first General Plan, so as to approve projects that propose to relocate natural streams and/or line them with concrete. Surely this action is not consistent with provisions of the expiring storm water permit, much less the MS-4 permit. When the Board consistently issues 401 Water Quality Certification to permit such projects, we have more cause to wonder if anyone is minding the store.”

Response: The purpose of Provision D.16. requiring General Plan Updates is to directly address the commenter’s concerns. As stated under 16.e., “The Permittees shall also provide the Regional Water Board a written summary identifying how the draft amendment or revision complies with this Order.” Once this Order is adopted, the Regional Water Board will have additional enforcement authority based upon this provision.

With regards to the 401 Water Quality Certification, we offer the following reference to the SWRCB’s Resolution No. 2008-0026, *Development of a Policy to Protect Wetlands and Riparian Areas in Order to Restore and Maintain the Water Quality and Beneficial Uses of the Waters of the State*. We direct the commenter to the following SWRCB’s website:

http://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2008/rs2008_0026.pdf

We believe this timely decision addresses the commenter's concerns. The resolution states: "At all phases, the Policy is intended to complement and support Region-specific plans and policies to protect the functionality of wetlands and riparian areas and should recognize the Regional Water Boards' essential role in implementing and informing statewide policy."
