

April 3, 2009

Via Email (MRP@waterboards.ca.gov) and Hand Delivery

MRP Tentative Order Comments
Attn. Dale Bowyer
S.F. Bay Water Board
1515 Clay Street, Suite 1400
Oakland, California 94612

**RE: Revised Tentative Order for the Municipal Regional Stormwater NPDES Permit for Discharges from Municipal Phase I Permittees
Legal Comments on behalf of the ACCWP and Co-Permittees**

These comments are submitted on behalf of the Alameda Countywide Clean Water Program (“ACCWP”) and its 17 member Co-Permittees and are intended to address legal and regulatory concerns relating to the Revised Tentative Order for the Municipal Regional Stormwater NPDES Permit (“MRP”) and accompanying documents that were issued on February 11, 2009.¹

We appreciate the revisions made by your staff to the initial Tentative Order that was issued in December 2007. While some progress has been made in the 15 months since that initial Tentative Order was issued, substantial technical, resource and legal issues remain unresolved and are not effectively addressed by the Revised Tentative Order. Preparation of these comments have been made more difficult due to the compressed formal comment period (less than 60 days) and the late issuance of the summary response to our comments that were made at the end of February 2008 – Comments and Responses Summary were not provided until March 18, 2009.² Under these circumstances, the ACCWP and Co-Permittees have made their

¹ The ACCWP will be submitting separate comments under its own letterhead, and its 17 members that are Co-Permittees may be submitting separate programmatic, technical and/or legal comments as well. All of these and any other comments submitted by other Bay Area municipal stormwater programs and/or their co-permittees and the Bay Area Stormwater Management Agency (“BASMAA”), are incorporated herein by reference. The ACCWP also supports and incorporates by reference, the legal comments being submitted by Bob Falk on behalf of the Santa Clara Program.

² The Summary Response to Comments do not address detailed legal comments.

best efforts to assure adequate internal staff review and seek guidance from their elected public officials.

While I will limit my comments as much as possible to the new and modified parts of the Revised Tentative Order, in some cases it is also necessary to refer to revisions not made while addressing related new and revised provisions.

1. Provision C.1 Needs Further Clarification

In my February 29, 2008 comments to the Board, I requested revisions of Provision C.1 relating to compliance with discharge prohibitions and receiving water limitations. I appreciate the changes that have been made in Provision C.1 that address my comments. However, while Provision C.1 was appropriately modified, other requirements have been added to other provisions of the Revised Tentative Order that substantially expand the reach of Provision C.1. This may be an unintentional drafting oversight, and we request that these additions be deleted.

Provisions where “triggers” have been added to expand the scope of Provision C.1 are in Provision C.8 Monitoring (Table 8.1 Status Monitoring triggers; Table 8-3 Long Term Monitoring triggers; C.8.e.i stressor source identification; C.8.h.i reporting) and in Provision C.10 Trash (C.10.d.iv 2012 Annual Report). The language of C.1 already requires notification to the Water Board where a determination has been made that discharges are causing or contributing to an exceedance of a water quality standard and already requires submission of BMP related reporting for most exceedances. The addition of the new triggers in the Provision C.8 monitoring requirement and Provision C.10 trash requirement cited above adds confusion to the well drafted and more comprehensive requirements of Provision C.1.

Recommended Action

We request that the Provision 8 Table 8.1 Status Monitoring triggers column be deleted, Table 8-3 Long Term Monitoring trigger column be deleted; Provision C.8.e.i stressor identification be deleted; and that Provision C.8.h.i reporting be deleted. In addition we request that the second sentence of Provision C.10.d.iv be deleted. Provision C.1 would remain unchanged.

2. Monitoring and Reporting Requirements Proposed in Provision C.8 of the Revised Tentative Order Continue to Significantly Exceed those Required by Law

I raised this issue in my previous comments, however, some of the important monitoring and reporting requirements of Provision C.8 have not only been unchanged, but many have been revised and expanded. Examples of revised and expanded monitoring and reporting requirements include the following: San Francisco Estuary Receiving Water Monitoring Provision C.8.b; Status Monitoring Elements Table 8.1; various Monitoring Projects in Provision C.8.e; and various Reporting requirements in Provision C.8.h. The ACCWP and Co-Permittee comments demonstrate the dramatic cost increases associated with these expanded monitoring requirements.

Federal regulations require that all permits shall specify required monitoring including “type, intervals, and frequency sufficient to yield data which are representative of the monitored

activity.” 40 CFR §122.48(b). This is the general legal guidance for the scope of required monitoring requirements for NPDES permits, but there is little specific regulatory guidance on how this should be applied in the context of municipal stormwater permitting.

The Fact Sheet/Rationale Technical Report (“Fact Sheet”) points out that each stormwater permit should include a coordinated and cost-effective monitoring program to gather necessary information to determine the extent to which the permit provides for attainment of applicable water quality standards and to determine the appropriate conditions or limitations for subsequent permits. We contend that the monitoring program proposed in the Revised Tentative Order is neither effectively coordinated nor cost-effective – it is overly prescriptive and requires considerably more resources than required by law. Furthermore, no priorities have been established in order to provide better focus for the monitoring program.

The Fact Sheet continues to specify the same legal, technical and policy rationale for the Revised Tentative Order provisions as in the initial Tentative Order. The rationale given in the Fact Sheet for the very detailed monitoring provisions of the proposed permit is essentially as follows: Water quality monitoring requirements in previous permits were less detailed than the requirements in this Permit; and under previous permits, each program could design its own monitoring program with few permit guidelines. The Fact Sheet then cites the case of *San Francisco Baykeeper vs. Regional Water Quality Control Board*³ for the proposition that monitoring programs in the MRP must be detailed and extensive. In the *Baykeeper* case, the trial court held that the monitoring programs in that case, which were essentially non-existent as the permits at issue only contained a directive for the Permittee to design its own monitoring program (very different from what the Bay Area municipal stormwater dischargers are proposing), did not sufficiently specify the type, intervals, and frequency sufficient to yield data that are representative of the monitoring activity. That decision was decided on the specific facts before the court. It is important to note that trial court decisions such as the *Baykeeper* case do not serve as precedent as do cases decided by the Courts of Appeal and the Supreme Court.

The Fact Sheet fails to acknowledge the non-precedential character of the trial court decision in the *Baykeeper* case and further fails to discuss or disclose the more recent appellate case of *Divers’ Environmental Conservation Organization v. SWRCB* decided by the California Court of Appeal, Fourth District that does serve as precedent.⁴ In that case the appellate court carefully analyzed the Clean Water Act requirements for municipal and industrial stormwater discharges and concluded that the Act provides the permitting authority broad discretion to use BMPs for stormwater discharges and provides wide flexibility in designing stormwater controls. In contrast to the trial court’s opinion in *Baykeeper*, the *Divers’* case held as a precedential matter that so long as the permit provides sufficient details and standards, management plans and monitoring plans *can* be developed by permittees.

Neither the *Baykeeper* opinion nor the *Divers’* case requires the extensive monitoring provisions and the revised and expanded requirements proposed in the Revised Tentative Order. To the contrary - as a matter of law, the *Divers’* appellate decision provides Permittees

³ Consolidated Case No. 500527 (November 14, 2003).

⁴ See 145 Cal.App.4th 246.

and the Water Board extremely broad discretion in formulating monitoring programs. The Revised Tentative Order goes considerably beyond the federal regulatory requirement of providing for monitoring that would include the type, intervals, and frequency sufficient to yield data which are representative of the monitored activity. In fact, as detailed in comments by other Bay Area stormwater Programs and Permittees, the staff proposal imposes significantly expanded monitoring requirements that result in a major additional resource burden on the Permittees beyond that required by law. The result is an overly detailed, unduly burdensome, and highly prescriptive monitoring program that is unaffordable, impracticable, goes beyond assuring water quality improvement/protection and is destined to create much data that will serve little useful purpose.

Meaningful compliance data can be provided by the Permittees that satisfies federal regulations with a much less prescriptive and less detailed monitoring program than that required by the revised Tentative Order and that would be consistent with the *Divers* appellate court decision and the non-precedential *Baykeeper* decision.

Recommended Action: We request that a more reasonable monitoring program be included in the MRP as has been set forth in comments submitted in the comments of the ACCWP.

3. Trash Reduction Requirements of Revised Provision C.10 Contain Inappropriate References to the Reduction Requirements

As stated in the ACCWP comments, we agree that trash reduction is an appropriate primary focus for this permit term and the Program is ready to take significant steps in toward this objective. Revised Provision C.10 requires attainment of Trash Action Levels (“TALs”), terminology that is used throughout this provision. The term “Action Levels” is not defined in the Glossary and no justification is given in the Fact Sheet for the use of trash requirements as TALs.

In June 2006 a blue ribbon State Storm Water Panel made recommendations to the State Water Board regarding the feasibility of numerical effluent limitations applicable to stormwater discharges.⁵ While the Panel found that it is not feasible at this time to set enforceable numeric effluent criteria for municipal urban runoff, it stated that it may be possible that Action Levels could be developed for certain catchments not treated by a structure or treatment BMPs. It noted that such Action Levels could be developed using three different approaches – a consensus based approach, ranked percentile distributions and statistically based population parameters. The Panel then went on to describe each approach in detail.

The Revised Tentative Order fails to follow any of these recommended State Storm Water Panel approaches in arriving at the TALs. Action Levels may be appropriate as an interim approach where they are scientifically defensible and where adequate data is available to establish them. However, this data has not been proposed nor evaluated in order to develop appropriate TALs for the MRP.

⁵ See Storm Water Panel Recommendations to the California State Water Resources Control Board – the Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial and Construction Activities – June 19, 2006

Even the much-discussed third draft of the Ventura MS4 NPDES Permit uses “Action Levels” for some pollutants in a carefully prescribed manner – they do not apply Action Levels to trash.⁶ The Ventura draft establishes Municipal Action Levels (“MALs”) to identify subwatersheds requiring additional BMPs to reduce pollutant loads and prioritize implementation of additional BMPs. MALs for selected pollutants would be based on carefully selected and referenced protocols. The State Board Panel recommended protocols have not been followed in the Revised Tentative Order to establish TALs.

In addition to the inappropriate use of TALs as a trash reduction measure, the revised Tentative Order incorrectly refers to a trash “water quality standard” (C.10a.i) and a trash “water quality objective” (C.10.a.iv). Water quality standards and water quality objectives are defined in the Glossary. Neither a water quality objective nor a water quality standard has been established for trash in the Basin Plan. Thus, such references are inappropriate.

In summary, use of TALs is not an appropriate way to require trash reduction in the MRP at this time. Trash reduction, while being an important objective of the MRP with which the ACCWP is in accord, could better be referred to as trash Hot Spot Reduction Goals to be achieved.

Recommended Action

We request that reference to Trash Action Levels (“TALs”) be deleted in the MRP and replaced with the term, trash Hot Spot Reduction Goals. In addition, references to trash water quality standards and water quality objectives should be deleted.

4. Non-Stormwater Conditionally Exempt Discharge Provisions in C.15.b are Overly Prescriptive, too Narrowly Described and are More Stringent than Requirements of Federal Law

Proposed Discharge Prohibition A.1 requires that Permittees shall “effectively prohibit” the discharge of non-stormwater into the storm drain system and watercourses. This discharge prohibition is based on federal requirements that require that discharges from municipal storm sewers shall include a requirement to “effectively prohibit” non- stormwater discharges into storm sewers. Clean Water Act §402(p)(3)(B)(ii).

This does not mean that all non-stormwater discharge is prohibited. Prohibition A.1 states that Provision C.15 describes a tiered categorization of non-stormwater discharges, based on potential for pollutant content, that may be discharged upon adequate assurance that the discharge does not contain pollutants of concern at concentrations that will impact beneficial uses or cause exceedances of water quality standards. Thus, the intent is to allow certain non-stormwater discharges where water quality problems will not be created by the discharges. Federal regulations support this approach and give municipalities considerable latitude in this determination. 40 CFR 122.26(d)(2)(iv). Municipalities must implement a BMP/control

⁶ The draft Ventura permit addresses trash in a manner requiring implementation of BMPs to achieve trash waste load allocations in certain named watersheds, not with Action Levels.

measure related program where certain types of non-stormwater discharges are identified by the municipality as sources of pollutants to waters of the United States.

The Revised Tentative Order Provisions C.15.b.i-vii describe various non-stormwater “discharge types” that may be entitled to conditional exemptions from the discharge prohibition and therefore allowed to discharge to the storm drain system. However, These conditional exemptions as set forth in Provisions C.15.b.i-vii are narrowly drawn and are overly prescriptive in nature, thus, going well beyond requirements of federal law. In fact the Revised Tentative order not only fails to respond to our previous comments but is more detailed and prescriptive in many respects than the previously issue Tentative Order.

NPDES Municipal Stormwater Permits issued by the Environmental Protection Agency (“EPA”) address this issue by simply permitting these types of non-stormwater discharges unless there is an affirming showing that they are a source of pollution. In contrast with the EPA approach, the Revised Tentative Order sets up detailed requirements described therein to allow these discharges regardless of whether it is known or suspected of being a source of pollutants.

Provision C.15.b.i provides a good example of this overly prescriptive and cumbersome approach - for a very common type of non-stormwater discharge: pumped groundwater, foundation drains, water from crawl space pumps and footing drains.⁷ Regardless of the nature or magnitude of threat of the non-stormwater discharge to water quality posed from these common discharges, unless the Tentative Order is revised so as to made clear that municipalities have discretion in determining the extent to which they are appropriately applied to the situation, the BMPs would have to include 1) treatment if necessary to remove total suspended solids or silt to allowable levels (levels not specified) with methods suggested; 2) reporting of uncontaminated groundwater at flows greater than 10,000 gallons per day before discharging; 3) assurance that the discharges must meet water quality standards consistent with effluent limits in Water Board general permits; 4) required monitoring with prescribed methods for a required duration; 5) attainment of prescribed turbidity levels; 6) attainment of prescribed pH limits; 7) dewatering discharges to be discharged to landscape areas or the sanitary sewer if available; 8) erosion prevention requirements; and 9) maintenance of records of the discharges, BMPs implemented and monitoring activity. Finally, if the dischargers are unable to comply with these requirements, the dischargers would be directed to the Water Board for approval.

Other categories of conditionally exempted non-stormwater discharges set forth in Provision C.15.b of the Revised Tentative Order contain similar control measures and requirements. The Revised Tentative Order in effect sets up an entirely new and detailed permitting system that must now be implemented by the Permittees requiring lengthy applications, water quality sampling, monitoring and reporting. The municipalities must be allowed more discretion in the determination of the applicable control measures relating to discharges that may be sources of pollutants to receiving waters as envisioned in and as intended by the federal regulations.

⁷ The ACCWP comments note that that there are thousands of these discharges in the Alameda County area alone.

Recommended Action: We request that the introductory paragraph of Provision C.15.b. be revised to read as follows:

“The following non-stormwater discharges are also exempt from Discharge Prohibition A.1 if they are either identified by the Permittees or the Executive Officer as not being sources of pollutants to receiving waters, or if they are identified as sources of pollutants to receiving waters, that BMPs/control measures are developed and implemented, as the Permittee deems appropriate to address the threat posed to water quality, including consideration of the tasks and implementation levels of each category of Provision C.15.b.i-vii below.”

The language of each of the discharge types should also be modified accordingly.

5. The Revised Tentative Order Inappropriately Assigns to the Executive Officer the Authority to Approve Certain Projects Using Low Impact Development Measures for Vault-Based Treatments Systems

Provision C.3.c.i sets forth minimum Low Impact Development (“LID”) measures that must be implemented for all regulated projects. However, C.3.c.i.(6) then further provides that the Executive Officer must approve any regulated project that proposes to install vault-based treatment systems to provide primary treatment for more than 50% of the total Provision C.3.d specified runoff.

The Fact Sheet states “Executive Officer approval of projects will ensure that vault-based systems are installed only at sites with site constraints that make landscaped-based measures truly infeasible.” However, no standards for determining “infeasibility” are set forth. Further, there is no indication that such systems would contribute to water quality problems. In effect, this required approval inappropriately attempts to transfer local planning approval authority away from local governments and is contrary to Water Code section 13360. Assurances and determinations regarding these treatment systems can be provided to the Permittees and they can make these decisions much more expeditiously in accord with the other requirements of this Provision. The ACCWP and some of its Co-Permittees provide in their comments why such an additional requirement of Executive Officer approval is cumbersome and in some cases unworkable.

Recommended Action

We request that the Executive Officer approval as set forth in Provision C.3.c.i.(6) be deleted.

6. Permittees are Significantly Restricted in Their Ability to Increase Fees for Stormwater Improvements

Permittees are faced with significant increased costs to local government associated with more stringent requirements mandated by the provisions of the Revised Tentative Order. This applies not only to stormwater-specific costs but also to funding of certain other municipal programs that are beneficial to achievement of stormwater related water quality improvements. Many other commentors including the ACCWP and Co-Permittees have noted and described these financial impacts in their written responses to the Water Board. Permittees are restricted

in their ability to increase certain fees and assessments for stormwater improvement and control by the provisions of Proposition 218.

In November 1996, California voters adopted Proposition 218, the Right to Vote on Taxes Act, which added articles XIII C & D to the California Constitution. These constitutional provisions specify various restrictions and requirements for assessments, fees, and charges that local governments impose on real property or on persons as an incident of property ownership. As a general rule, it is no longer possible to create a new or increase an existing stormwater-specific fee without complying with Proposition 218, which, with the exception of sewer, refuse, and water service, requires voter approval (and even the latter are subject to ratepayer protest procedures).

California courts have carefully considered such fee and assessment cases before them and have very closely scrutinized proposed fee increases. In the landmark case of *Howard Jarvis Taxpayers Association v. City of Salinas*, the California Court of Appeals, Sixth Appellate District, held imposition of certain stormwater-specific fees invalid for failure to subject the fees to a vote by the property owners or the voting residents of the affected area. The Court found the fees to be property-related fees, as the provisions of Proposition 218 require liberal construction of the language to effectuate the purpose of limiting local government revenue and enhancing taxpayer consent. This decision has had considerable impact on efforts of public agencies to obtain local revenues to fund the storm water programs mandated by municipal NPDES permits. Subsequent court decisions have continued this close scrutiny of fee increases.

The possibility of receiving grant funding is problematic because it entails expense, and then, is not guaranteed. Recent state directives have reduced the possibilities for potential state grants at this time. Grant funding, even when it is available, is limited and the application process for grants can be very time consuming - many costs are not eligible for reimbursement; matching funding is often required; the applicant must advance funds; and there is no guarantee of receiving a grant. Potential funding under the federally enacted American Recovery and Reinvestment Act of 2009 is of limited value as few municipal stormwater related projects are "shovel ready" and may not have satisfied relevant NEPA requirements. At the same time, municipal revenues are decreasing and rate payer and political sensitivity has increased with regard to other potential forms of revenue increases. With so little funding available from grants, decreasing municipal revenues, and general revenues being constrained by competing service demands, it is a monumental task to fund new or increased stormwater programs. This situation has only become worse since the last public comment period.

While Water Board staff in the Fact Sheet to some extent have acknowledged the financial difficulties and challenges facing Permittee local government agencies, the Revised Tentative Order itself stops far short of adequately recognizing the fiscal constraints on local government.

Recommended Action

In light of the significant fiscal constraints facing municipal stormwater Permittees, exercise further discretion to reduce the scope of new requirement mandates in this MRP for this permit term.

7. Many Requirements of the Revised Tentative Order are More Stringent than Required by Federal Law and Constitute State Unfunded Mandates

The revised Tentative Order for the MRP imposes many obligations that both exceed those set forth in federally-issued municipal stormwater permits and that exceed those required by federal law, making them State mandates for “new programs and/or higher levels of service” intended to provide greater benefits to the public.⁸ Thus, unless state funding is provided for the implementation of these state imposed obligations by local governments for these aspects of the MRP, they will violate Article XIII B, Section 6, of the California Constitution.⁹

Many of the new programs and higher levels of service envisioned in the Revised Tentative Order are extremely expensive, staff intensive, or otherwise impracticable without such measures moderating their burden on local governments. These burdens have been explained at length in comments separately submitted by the Bay Area municipalities, Countywide Stormwater Programs, and the Bay Area Stormwater Management Agencies Association. In addition, Regional Board staff members have acknowledged the significant funding problems facing local governments. Consequently, to avoid contentious advocacy proceedings that may consume large amounts of resources on detailed administrative appeals and litigation that could instead be spent on water quality improvement, the Revised Tentative Order should be further modified in a manner reflecting consensus with Bay Area local governments on priorities and realistic implementation timetables (which in some cases may have to be phased into future permit terms) and/or the relevant requirements must be conditioned on the receipt of State funding guaranteed to help the municipalities staff and finance their implementation. This approach could be a significant benefit for the improvement of water quality and beneficial uses in the San Francisco Bay area.

Examples of some of the more obvious required new programs and/or higher levels of service are the following: green streets pilot projects (Provision C.3.b.ii); low impact development requirements (Provision C.3.c); site design measures for small projects (Provision C.3.i); various monitoring mandates (Provisions C.8.b-g); various trash control mandates (Provisions C.10.a-d); mercury and PCB control Programs (Provisions C.11&12); and BMP/control measure requirements for conditionally exempted non-stormwater discharges (Provision C.15.b).

⁸ Neither the ACCWP nor its Co-Permittees have submitted a permit application that endorses such control as funded under municipal stormwater control programs nor do they endorse the issuance of such requirements or voluntarily undertake funding or implementing them absent adequate funding from the State.

⁹ Please refer to more lengthy development of this complex issue by Bob Falk that has been submitted on behalf of the Santa Clara Program. We concur with those comments.

Recommended Action

Regional Board should either (1) direct staff to revise those aspects of the Revised Tentative Order that exceed federal minimum requirements in a manner reflective of a consensus with local governments concerning priority-setting and phasing over time, or (2) absent the achievement of such a consensus, condition the effectiveness of such discretionarily imposed stormwater management, monitoring, and reporting requirements on local government receipt of funding from the State.

8. Additional Comments on Other Provisions of the Revised Tentative Order

In addition to the significant legal issues discussed above that respond to the Revised Tentative Order, we have several further comments. They are as follows

A. Provision C.3.b.iii addition of requirement for green streets pilot projects.

This new provision requires Permittees to complete 10 pilot green streets projects that incorporate LID requirements. While some Permittees will be pursuing green streets projects, this provision contains requirements and standards that exceed the authority of the Permittee's jurisdiction with respect to pollutants conveyed through their municipal separate storm sewer systems. These requirements are contained in Provisions C.3.b.iii.(2)(b) – attractive streetscapes; C.3.b.iii.(2)(c) – greenway segments; C.3.b.iii.(2)(d) – parking management; and C.3.b.iii.(2)(e) – meeting broader community goals. While Permittees implementing green streets projects may generally consider these standards, they should not be required. Therefore, **we request** that these provisions either be deleted or be included only as discretionary considerations for Permittees.

B. Provision C.3.h.iii operation and maintenance of stormwater treatment systems.

This Provision requires Permittees to “ensure” that stormwater treatment systems and HM controls are properly operated and maintained for the life of the projects. However, while Permittees can require such systems, require controls and provide appropriate inspections and enforcement, they cannot always “ensure” the results. Therefore, **we request** that the heading for Provision C.3.h.iii and the narrative language of this provision be changed to replace “ensure” with “require.”

C. Provision C.11 mercury control pilot projects. It is our understanding that the pilot projects for mercury and PCBs in Provision C.12.c are being treated in a similar manner. In the heading for PCB Provision C.12.c the reference to “Private Property” has been deleted in response to our previous comments, but not in the similar heading for Provision C.11.c. For consistency and to avoid confusion, **we request** that the reference to “Private Property” be deleted in C.11.c heading as well.

D. Provisions C.11.c.i (should be ii) mercury control pilot project implementation and C.12.c.ii PCB control pilot project implementation. In follow-up to the previous comment, since the reference to Private Property has been deleted in the heading relating for PCBs, **we request** that the reference to “private

property” in the text regarding implementation for C.11.c.i (should be ii) and C.12.c.ii be deleted.

E. Provisions C.11.c.i (should be ii) mercury control pilot project implementation and C.12.c.ii PCB control pilot project implementation. These two provisions discuss appropriate action when contamination is located. The provisions request that Permittees ensure cleanup by either exercising direct authority to cleanup or by notifying appropriate authorities to ensure that oversight is established. However, Permittees cannot always “ensure that cleanup occurs.” Furthermore, in some cases, other appropriate agencies may have broader and more comprehensive enforcement authority. Therefore, **we request** that this language of Provisions C.11.c.i and C.12.c.ii be changed to read as follows: “When contamination is located, Permittees must either exercise direct authority to cleanup or notify and request other appropriate authorities to exercise their cleanup authority.”

F. Provisions C.11.f for Mercury and C.12.f for PCBs still contains language indicating mandatory diversions of dry weather and first flush flow projects to publicly owned treatment systems (“POTWs”). While the language of these provisions has been slightly modified in the Revised Tentative Order, it must be clarified that diversions and pilot projects are only required if the coordination with the relevant POTWs find that such diversions and pilot projects are legally, technically and economically feasible. **We request** that this be clarified either with additional language in these provisions or in further responses to comments.

G. Provision C.15.b fails to include conditionally exempted non-stormwater discharges from individual residential car washing. The ACCWP existing NPDES permit contains a conditional exempted category for individual residential car washing. However, this exemption has not been included in the Revised Tentative Order. Federal regulations state that this category “shall be addressed.” 40 CFR 122.26(d)(2)(iv)(B)(1). Therefore, **we request** that a conditionally exempted discharge category be added to the Revised Tentative Order for residential car washing.

H. Provision C.15.b.iii planned, unplanned and emergency discharges of the potable water system. This provision provides detailed regulation and additional monitoring of potable water primarily from water supply agency discharges. However, Permittees may not have jurisdiction within special water supply districts to take the steps required by this provision. These discharges are more appropriately directly regulated through a Water Board general permit, individual permit or in the Phase II permitting process.

I. Intended revisions and revisions that were inadvertently omitted. The summary response to comments and conversations with Water Board staff indicate that there are numerous revisions that staff intends to make or revisions that were inadvertently omitted from the Revised Tentative Order. We request that these

revisions be provided in writing in the form of an addendum or supplement to the Revised Tentative Order prior to the May 13 hearing.

Thank you for the opportunity to submit these comments on behalf of the ACCWP and its Co-Permittees. We hope that the Water Board staff prior to the May 13, 2009 hearing will circulate further revisions to the Tentative Order. In addition, we urge the Water Board to take appropriate time to further resolve these difficult issues that are so important to the Water Board, the Programs and the Permittees prior to adoption of the MRP. It is our hope that the MRP will be one that the ACCWP and Co-Permittees can support and not one that would create risks of non-compliance.

Sincerely,

Gary J. Grimm

cc via email:

Bruce Wolfe
Tom Mumley
Kathy Cote
Jim Scanlin
Dorothy Dickey
Geoff Brosseau
Bob Falk