

E. PERMIT RENEWAL APPLICATION AND RELATED DOCUMENTS

16. The Report of Waste Discharge (the permit renewal application) included the following major documents/information:
 - a) A summary of status of current Storm Water Management Program;
 - b) A Proposed Plan of Storm Water Quality Management Activities for 2007-20012, as outlined in the Draft 2007 Drainage Area Management Plan (DAMP). The 2007 DAMP includes all the activities the permittees propose to undertake during the next permit term, goals and objectives of such activities, and an evaluation of the need for additional source control and/or structural and non-structural BMPs and proposed pilot studies;
 - c) The permittees have developed Local Implementation Plans (LIPs); established a formal training program; and developed a program effectiveness assessment strategy and Watershed Action Plans;
 - d) A Performance Commitment that includes new and existing program elements and compliance schedules necessary to implement controls to reduce pollutants to the maximum extent practicable;
 - e) A summary of procedures implemented to detect illicit discharges and illicit connection practices;
 - f) A summary of enforcement procedures and actions taken to require storm water discharges to comply with the approved Storm Water Management Program;
 - g) A summary of public agency activities, results of monitoring program, and program effectiveness assessment; and,
 - h) A fiscal analysis.
17. The documents referenced in Finding E.16, above, are hereby incorporated as enforceable elements of this order.

F. PERMITTED AREA

18. The permitted area is shown on Attachment A. It includes the northern portions of Orange County, including the 26 incorporated cities listed under Finding 6, above. The permittees serve a population of approximately 3.1 million, occupying an area of approximately 789 square miles (including unincorporated areas and the limits of 34 cities, 26 of which are within the jurisdiction of this Regional Board; three of the cities, Laguna Hills, Laguna Woods and Lake Forest, are within both the San Diego and Santa Ana Regional Boards' jurisdictions). The permittees have jurisdiction over and/or maintenance responsibility for storm water conveyance systems within Orange County. The County Flood Control system includes an estimated 740 miles of storm drains. A major portion of the urbanized areas of Orange County drains into waterbodies within this Regional Board's jurisdiction. In certain cases, where a natural streambed is modified to convey storm water flows, the conveyance system becomes both a storm drain and a receiving water. The major storm drain systems and drainage areas in Orange County, which are within this Region, are shown on

Exhibit B

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Public Works

Our Community. Our Commitment.

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February 13, 2009

By E-mail and U.S. Mail

CRWQCB - REGION 8	
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FEB 18 2009

Gerard Thibeault
 Executive Officer
 California Regional Water Quality Control Board, Santa Ana Region
 3737 Main Street, Suite 500
 Riverside, CA 92501-3348

Subject: Comment Letter, Tentative Order No. R8-2008-0030 NPDES No. CAS618030

Jerry
 Dear Mr. Thibeault:

Thank you for the opportunity to comment on *Waste Discharge Requirements for the County of Orange, Orange County Resources and Development Management Department (sic) and the Incorporated Cities of Orange County Within the Santa Ana Region Areawide Urban Storm Water Runoff Orange County* (Tentative Order No. R8-2008-0030). The County as Principal Permittee welcomes the opportunity to provide comments. The Permittees were involved in the development of these comments and the cities of Anaheim, Brea, Costa Mesa, Cypress, Fountain Valley, Fullerton, Garden Grove, Huntington Beach, Irvine, La Habra, La Palma, Laguna Hills, Placentia, Santa Ana, Seal Beach, Stanton, Tustin and Westminster have directed that they be recognized as concurring entities with this letter.

In summary, our comments conclude that the draft Tentative Order must be revised for five key reasons including that the new requirements:

- Are outside the scope of the authority given by the Federal Clean Water Act to the SARWQCB
- Lack sound technical basis
- Increase administrative burdens without scientific justification
- Over-extend the regulatory reach of local agencies
- Create new requirements for new development and re-development projects without justification.

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. This permit was re-issued in 1996 and 2002. In 2006, the Permittees submitted a Report of Waste Discharge (ROWD) in anticipation of permit renewal in 2007. The basis of this document was a comprehensive program assessment undertaken using a multiple lines of evidence approach, including audit findings, facilitated workshops, and the California Stormwater Quality Association (CASQA) Municipal Stormwater Program Effectiveness

Assessment Guidance. The ROWD identified many positive program outcomes and proposed changes and added program development commitments to the Drainage Area Management Plan (DAMP) where the assessments indicated the need for improvement.

In the ROWD and proposed plan (the 2007 DAMP), the Permittees committed to enhancing program implementation, developing BMPs for identified countywide water quality constituents of concern, and establishing a watershed-based approach to water quality planning and protection to complement the countywide management effort. While the Permittees want to commend your staff on both their efforts to incorporate the recommendations made in the ROWD into the Tentative Order and willingness to support the deliberations of the land development stakeholder group, a number of key concerns must be recognized. These concerns, which relate to the proposed new requirements intended to increase Permittee accountability, extend the regulatory reach of local jurisdictions, incorporate additional TMDLs, and create a new basis for the land development requirements of the Order, are now being significantly amplified by the worsening deterioration of the economy. Indeed, a significant number of Permittees have specifically expressed their concern regarding the creation of additional mandates at a time of forced staff reductions and increasingly severe fiscal circumstance.

The substantial body of programmatic performance and environmental quality data that informed the ROWD has since been augmented by two additional annual reports. While the Permittees believe that the additional reports largely affirmed the ROWD commitments, this comprehensive and augmented dataset presents a basis and an opportunity for a cooperative and informed consideration and resolution of the Permittees' concerns. In this regard, the current series of stakeholder meetings to discuss the Tentative Order's land development provisions, as well as the meeting with your staff on January 29, 2009, have been productive. We look forward to continuing to meet with you to discuss the areas of contention and to achieve a timely resolution. In the interim, 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: Legal and policy issues and comments
- Attachment B: Technical comments and suggested revisions
- Attachment C: Monitoring and Reporting Program comments

GENERAL COMMENTS

I. Increasing Administrative Burden

At the inception of the Orange County Program the County of Orange, as Principal Permittee, and the 26 Permittees developed a DAMP to serve as the principal policy and programmatic guidance document. Since 1993, the DAMP has been modified through an adaptive management process to reflect the needs of the Permittees, ensure Permittee accountability, and deliver positive water quality and environmental outcomes. The DAMP now provides definitive guidance to each Permittee in the development of its Local Implementation Plan (LIP), which specifically describes how the Orange County Program will be implemented on a city/jurisdiction basis. Concurrently, the annual progress report has been developed into a rigorous systematic assessment of program effectiveness that is conducted at jurisdictional, watershed and countywide levels of resolution, using the CASQA Municipal Stormwater

Program Effectiveness Guidance, and with identified *headline measures* of programmatic performance. The Tentative Order requires additional reporting to the Regional Board staff. The Permittees believe that adjusting the existing reporting processes, rather than creating additional reporting requirements, is the most effective approach to increasing transparency and accountability. Such an approach also offers the additional potential benefit of identifying opportunities to reduce the administrative burden of the Program for both the Regional Board and for the Permittees.

II. Extending the Regulatory Reach of Local Jurisdictions

In the most recent annual report, the Permittees noted that over 30,000 industrial and commercial facilities in Orange County were subject to inspection for compliance with local water quality ordinances. Nonetheless, the Tentative Order includes new requirements that arbitrarily increase the universe of commercial facilities subject to inspection, mandates the annual inspection of treatment controls in completed land development and re-development projects, and more prescriptively turns the attention of the Permittees toward residences and mobile businesses. Key elements of this overarching concern are the significant resource implication for cities and the absence of technical justification.

The Permittees, in the detailed program assessment that preceded the ROWD, did not discern a rationale for a more inclusive inspection of commercial enterprise nor is one presented in the Findings of the Tentative Order. With land development projects, the installation and subsequent maintenance of treatment controls certainly needs to be verified. However, self certification is already a verification mechanism being used by Permittees and it and other third party verification mechanisms should not be precluded by the Order in exclusive favor of Permittee inspection. The current opportunity to strategically re-consider the use of inspection resources should be used to target and focus these activities rather than simply expand their scope. Furthermore, given the current state of the economy, the Permittees, like all municipalities, are facing shrinking budgets and the Regional Board should give great weight to the best use of limited resources in achieving water quality objectives.

The prescribed creation of a residential program also needs to be carefully considered. The effectiveness of *Project Pollution Prevention*, the public education and outreach initiative of the Orange County Program, has been validated by public opinion surveys that show incremental, but also statistically significant, increases in public awareness of stormwater issues and positive changes in protective behaviors. The new residential program requirements therefore appear duplicative of the current public education and outreach obligations that have already produced and continue to yield positive measurable outcomes. However, there is also a separate concern that prescribed efforts to "require residents to implement pollution prevention measures" (XI. 2) will engender resistance among some segments of the public and be counter-productive to long term efforts to engender stewardship. The justification for this additional program when current requirements have produced positive outcomes has not been provided and we recommend that it be deleted from the Tentative Order.

The last area of prescribed new regulatory oversight is mobile businesses. The Permittees have already produced educational materials for these businesses, cooperatively developed wash water disposal options with Orange County's sewerage agencies, and coordinated on enforcement. The further required regulation of these businesses is a potentially resource intensive undertaking that currently appears to lack a strong technical rationale.

III. Creating a New Basis for the Land Development Requirements of the Order.

The Model Water Quality Management Plan (WQMP) prepared for the Third Term Permit explicitly recognizes the channel stability implications of watershed urbanization and provides for this potential impact to be addressed as a hydrologic condition of concern. It also requires consideration of Site Design Best Management Practices (BMPs), now more commonly referred to as Low Impact Development (LID) BMPs. The commitment made in the ROWD was to adjust the Model WQMP to incorporate work being undertaken on hydromodification by the Southern California Coastal Water Research Project, which is still pending. Since that time, various hydrograph matching requirements have appeared in municipal stormwater permits, including the Tentative Order and an Effective Impervious Area (EIA) of 5% or less has appeared as a performance standard for land development.

The EIA requirement for land development is inappropriately establishing a watershed assessment metric as a site specific performance standard. It is also establishing an unreliable surrogate for flow reduction (see case study discussion in Attachment B) as the basis for conformance with the stormwater mandate. Moreover, there is currently no clear technical consensus on control standards for hydromodification (also noted in Attachment B). In addition, the Permittees believe that the highly urbanized condition of Orange County's watersheds in the Santa Ana Region needs to be carefully considered. Over the period of the next permit, new development will be composed almost entirely of infill or redevelopment projects that will subject to other mandated development standards intended to encourage denser development. These additional mandates will present a significant challenge to developing and implementing effective approaches to both LID and hydromodification for achieving prescribed levels of site performance and meaningful ecological outcomes.

The uncertainties and challenges noted above have been highlighted in the series of stakeholder meetings convened specifically to examine the land development provisions of the Tentative Order. This group's discussions, in which the County actively participates, have been helpful to facilitating broader understanding of the perspectives of key constituencies and productive in identifying a number of early general areas of agreement. While these general areas have already been discussed with you, they are reiterated below and endorsed as the basis for initial adjustments to the current land development provisions of the Tentative Order. The general areas of agreement, which may be "backstop" or "default" requirements until a watershed based standard can be developed either through a watershed specific plan or an updated watershed action plan, are:

1. Performance standards for implementing Low Impact Development BMPs other than an EIA percentage (3-5%) are acceptable if a technically equivalent standard can be identified.
2. Sizing LID BMPs to capture the 85th percentile storm event (current DAMP criteria for water quality volume) is an acceptable alternative to EIA as a performance standard provided that technically-based, strict, and clear feasibility criteria are developed for any project that cannot meet the LID BMP requirements.
3. Prioritized LID/SUSMP BMPs for water quality volume capture are represented by: a) infiltration BMPs; b) harvesting and reuse BMPs; c) vegetated (or evapotranspiration)

BMPs including bioretention and biofiltration. Water quality volume not captured by LID BMPs shall be treated consistent with DAMP requirements

It should also be noted that any new or revised obligations with respect to land development would require a minimum of at least 12 months for the Permittees to develop the technical resources and effectively implement new standards, including training and guidance for the development community.

IV. Using Available Programmatic Performance and Environmental Quality Data

In advance of preparing the ROWD the Permittees undertook a detailed program assessment drawing upon prior annual report findings, a comprehensive environmental quality database, audit findings, facilitated workshops, and the CASQA Municipal Stormwater Program Effectiveness Assessment Guidance. This assessment provided a strong technical basis for improvements to the Orange County Program recommended in the ROWD and which have been subsequently validated in later annual progress reports. These informational resources and, in particular, the environmental quality database, have been compiled at great expense and provide unique and site specific information on the state of Orange County's surface waters and the performance of the Orange County Program. Strong technical justification developed from the information that has been compiled over the last 18 years by the Permittees is needed to support requirements in the Tentative Order supplemental to the ROWD recommendations. New requirements must also be consistent with the federal stormwater regulations and within the scope of the Clean Water Act. The Tentative Order has attempted to step outside the scope of the authority provided by the Clean Water Act by including the regulation of non-point sources. The Permittees believe that these sections of the Tentative Order should be revised to be in compliance with the appropriate federal laws.

We appreciate the effort that you and Regional Board staff have devoted to the development of the fourth term permit for the Orange County Program. We look forward to meeting with you and the staff to quickly resolve the Permittees' concerns regarding the Tentative Order to ensure that it meets our mutual goals.

Thank you for your attention to our comments. If you have any questions or need additional information please contact Richard Boon at (714) 955-0670 or Chris Crompton at (714) 955-0630.

Sincerely,



Mary Anne Skorpanich
Director, OC Watersheds Program

cc: City Permittees

ATTACHMENT A

LEGAL ISSUES AND COMMENTS ON TENTATIVE ORDER NO. R8-2008-0030 NPDES NO. CAS618030

INTRODUCTION

Attachment A contains the principal legal comments of the County of Orange (the “County”) on Tentative Order No. R8-2008-0030 dated November 10, 2008 (“Tentative Order”).

The County has endeavored to provide a complete set of comments on the Tentative Order. However, the County reserves the right to submit additional comments relating to Tentative Order No. R8-2008-0030 and the supporting Fact Sheet/Technical Report to the Regional Board in the future.

COMMENTS

THE TENTATIVE ORDER IMPROPERLY ATTEMPTS TO PRESCRIBE CONDITIONS THAT GO BEYOND THAT REQUIRED BY FEDERAL LAW

The Tentative Order includes new requirements that are more demanding than those mandated by federal law. One specific example is the significant increase in the universe of commercial facilities subject to inspection. Federal Clean Water Regulations governing MS4 systems do not require operators of those systems to have an inspection program for construction, industrial, and commercial sites. For the Regional Board to include these new commercial facilities as part of the Permittees inspection program, the Regional Board must consider the economic effects of this expansion as stated by the California Supreme Court in *City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal. 4th 613. In that case, the Supreme Court stated that:

“The federal Clean Water Act reserves to the states significant aspects of water quality policy (33 U.S.C. § 1251(b)), and it specifically grants the states authority to ‘enforce any effluent limitation’ that is not ‘less stringent’ than the federal standard (33 U.S.C. § 1370). It does not prescribe or restrict the factors that a state may consider when exercising this reserved authority, and thus it does not prohibit a state-when imposing effluent limitations that are more stringent than required by federal law-from taking into account the economic effects of doing so.” (*City of Burbank*, 35 Cal. 4th at 627)

The mere fact that the State has the authority under section 402(p)(B) of the Clean Water Act to prescribe conditions in excess of those specifically enumerated by Congress or the U.S. EPA does not mean that those requirements automatically fall under the umbrella of federal regulation. To the extent that a requirement contained in the Tentative Order is more prescriptive or specific than those outlined in the Clean Water Act and accompanying

regulations, the Regional Board must comply with the statutory requirements set forth in the California Porter-Cologne Water Quality Control Act.¹

Furthermore, Article XIII B, section 6 of the California Constitution requires the State to give funding to reimburse local governments for the costs associated with a new program or higher level of service mandated by the Legislature or any State agency. Cal. Const., art., XIII B, § 6. An exception is made for “mandates of . . . the federal government which, *without discretion*, require an expenditure for additional services or which *unavoidably make the providing of existing services more costly.*” Cal. Const. art., XIII B, § 9(b) (emphasis added); *Sacramento v. California (Sacramento II)*, 50 Cal. 3d 51 (1984). However, this exception applies only where “the State had no ‘true choice’ in the manner of implementation.” *Hayes v. Commission on State Mandates*, 11 Cal. App. 4th 1564, 1593-94 (1992) (citing *Sacramento II*). As discussed above, the Tentative Order’s new inspection requirements go beyond what is required under the Clean Water Act. Thus, to the extent the Regional Board chooses to exercise discretion to impose such requirements on the Permittees, it must comply with the prohibition against unfunded mandates set forth in the California Constitution.

THE TENTATIVE ORDER IMPROPERLY INTRUDES UPON THE PERMITTEES’ LAND USE AUTHORITY IN VIOLATION OF THE TENTH AMENDMENT OF THE U.S. CONSTITUTION AND IMPOSES A PRESCRIPTIVE STANDARD AS TO COMPLIANCE WITH THE TENTATIVE ORDER

To the extent that the Tentative Order relies on federal authority under the Clean Water Act to impose land use regulations and dictate specific methods of compliance, it is in contravention to the separation of powers between the regional board and the local governments. Furthermore, to the extent the Tentative Order requires a Municipal Permittee to include Low Impact Development (LID) principles, specifically the 5% or lower Effective Impervious Area (EIA) standard, in local land use regulations, it also violates the Tenth Amendment of the U.S. Constitution. According to the Tenth Amendment:

“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

Article XI, section 7 of the California Constitution guarantees municipalities the right to “make and enforce within [their] limits all local police, sanitary and other ordinances and regulations not in conflict with general laws.” The United States Supreme Court has held that the ability to enact land use regulations is delegated to municipalities as part of their inherent police powers to protect the public health, safety, and welfare of its residents. See *Berman v. Parker* (1954) 348

¹ The Porter-Cologne Water Quality Control Act requires that all regulations adopted pursuant to State law must be “reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible.” Water Code § 13000. Furthermore, any regulations relating to discharges must be based on water quality objectives that are “reasonably required for that purpose.” Water Code § 13263. All water quality objectives adopted by the Regional Board must be reasonably achievable and take into account a variety of factors including, but not limited to, those factors enumerated in Water Code section 13241.

U.S. 26, 32-33. Because it is a constitutionally conferred power, land use powers cannot be overridden by State or federal statutes.

The requirement that an EIA of 5% or less be incorporated in all new development and significant redevelopment projects is a considerable encroachment upon the inherent police powers specifically delegated to municipalities. The Clean Water Act only grants the Regional Board authority to regulate the discharges of pollutants through the NPDES program. Flow or volume of water is not a pollutant under the Clean Water Act. Although stormwater runoff may contain pollutants, the attempted regulation of the volume and/or flow of stormwater runoff by an EIA of 5% or less through the Tentative Order is prescriptive and effectively a land use control. The Regional Board must stay within the scope of authority provided by the Clean Water Act. Finding A.3 of the Tentative Order requires the Permittees to reduce to the Maximum Extent Practicable (MEP), through the implementation of BMPs, the discharge of pollutants in urban stormwater from the MS4s in order to support attainment of water quality standards. A standard of 5% or less EIA does not give the Permittees flexibility in the methods of achieving the water quality objectives as contemplated by the Clean Water Act and the Findings of the Tentative Order. Moreover, Water Code Section 13360 prohibits the Regional Board from specifying the manner in which Permittees are to comply with the MEP standard. This standard is an impermissible mandate on how the Permittees are to comply with the MEP and the Regional Board needs to consider various methods or approaches to achieving the goal of reduction of pollutants in the stormwater runoff and not rely strictly on a prescriptive standard.

THE TENTATIVE ORDER IMPROPERLY ATTEMPTS TO REGULATE NON-POINT SOURCES IN VIOLATION OF THE CLEAN WATER ACT

A. The Source of Selenium in the MS4 is a Non-Point Source and Should Not Be Subject to the NPDES Permit

Selenium found in the MS4 occurs by way of groundwater seepage or “rising groundwater.” In Part III.3.i.c of the Tentative Order discusses rising groundwater in the context of an illicit discharge/improper disposal aspect of the program in the Federal Regulations. (See 40 C.F.R. 122.26(d)(2)(iv)(B)). The stated expectation for this section is that any problematic pollutant sources would be dealt with by either the removal of the discharge or by requiring the discharger to obtain an individual NPDES permit. The key concept here is discharge. The Clean Water Act defines a discharge as “The term ‘discharge of a pollutant’ and the term ‘discharge of pollutants’ each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.”² For the addition of selenium to be a discharge, it would need to originate from a point source - i.e. there would need to be an individual or entity

² 33 USC 1362 (14) - The term “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, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural storm water discharges and return flows from irrigated agriculture.

that the MS4 Permittees could require to obtain an individual NPDES permit to cease the illicit discharge.

The Clean Water Act regulations define a load allocation (LA) as "the portion of a TMDL's pollution load allocated to a non-point source, stormwater source for which an NPDES permit is not required, atmospheric deposition, groundwater, or background source." (See 40 C.F.R. Section 1302(f)). The seepage of groundwater into surface waters falls within this definition. Additionally, as selenium is a naturally occurring element and accumulated through natural processes, the source is natural background. And, per the State's Non-Point Source Policy, seepage of groundwater into surface water can be classified as a non-point source. Furthermore, Finding C.8 of the Tentative Order specifically states that, "[t]his order is intended to regulate the discharge of pollutants in urban stormwater runoff from anthropogenic sources and/or activities within the jurisdiction and control of the Permittees and is not intended to address background or naturally occurring pollutants or flows." Thus, the selenium attributed to non-point sources cannot be regulated by the Tentative Order. To the extent that the Regional Board believes that selenium can be attributed to a point source, these NPDES-regulated stormwater discharges must be addressed by the wasteload allocation (WLA) component of the TMDL. (See 40 C.F.R. § 130.2(h)).

Part XVIII.B.3 of the Tentative Order states:

"A collaborative watershed approach to implement the nitrogen and selenium TMDLs for San Diego Creek and Newport Bay is expected. As long as the stakeholders are participating in and implementing the collaborative approach, if approved, they will not be in violation of this order with respect to the nitrogen and selenium TMDLs for San Diego Creek and Newport Bay. In the event that any of the stakeholders does not participate, or if the collaborative approach is not approved or fails to achieve the TMDLs, the Regional Board will exercise its option to issue individual waste discharge requirements or waivers of waste discharge requirements."

The collaborative watershed approach is expected to be based on regional BMPs in order to address the diffuse nature of the non-point source rising groundwater as well as point sources where implementation of site-specific treatment controls is infeasible. Permittee participation in any program to address the rising groundwater LA of the TMDL will be on a voluntary basis.

B. Agricultural Sources are Non-Point Sources and are Not Subject to the NPDES Permit

Part III of the Tentative Order requires the Permittees to prohibit illicit/illegal discharges (non-stormwater) from entering into the MS4 unless they are authorized by NPDES permit or not prohibited in accordance with Section III.3 of the Tentative Order. Section III.3.i enumerates the specific discharges that are not prohibited unless they are substantial contributors of pollutants to the MS4 and the receiving waters. The Regional Board has included the discharge of "irrigation water from agricultural sources" in Section III.3.i.c.

The County opposes the inclusion of this phrase as worded. Agricultural sources are specifically excluded from the NPDES program as the definition of point source “does not include agricultural storm water discharges and return flows from irrigated agriculture.” 33 U.S.C. Section 1362(14). The inclusion of irrigation water from “agricultural sources” goes beyond the requirements of federal law. The County requests that the Regional Board rely upon the authority of the Clean Water Act and include the discharges that are enumerated in 40 C.F.R. 122.26(d)(2)(iv)(B)(1) which specifically includes, “irrigation water” but not “irrigation water from agricultural sources.”³

THE TENTATIVE ORDER IMPOSES INSPECTION REQUIREMENTS ON THE PERMITTEES THAT WOULD VIOLATE THE FOURTH AMENDMENT

Part VI.2 states:

“The Permittees shall carry out inspections, surveillance, and monitoring necessary to determine compliance with their ordinances and permits. The Permittees’ ordinance must include adequate legal authority to enter, inspect and gather evidence (pictures, videos, samples, documents, etc.) from industrial, construction and commercial establishments.”

Through this statement, the Regional Board is requiring the Permittees to violate the Fourth Amendment’s prohibition on illegal searches and seizures. The Fourth Amendment to the U.S. Constitution states:

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

The Fourth Amendment is clear in its policy of protecting the security and privacy rights of individuals against unpermitted or unwarranted governmental invasions. The Permittees’ ordinance cannot allow unpermitted entry into private property for the purpose of inspection or collection of evidence to ensure compliance with the Permittees’ Water Quality Ordinance. Any entry into an industrial, construction or commercial establishment must be by permission of the

³ See 40 CFR 122.26(d)(2)(iv)(B)(1).

A description of a program, including inspections, to implement and enforce an ordinance, orders or similar means to prevent illicit discharges to the municipal separate storm sewer system; this program description shall address all types of illicit discharges, however the following category of non-storm water discharges or flows shall be addressed where such discharges are identified by the municipality as sources of pollutants to waters of the United States: water line flushing, landscape irrigation, diverted stream flows, rising ground waters, uncontaminated ground water infiltration (as defined at 40 CFR 35.2005(20)) to separate storm sewers, uncontaminated pumped ground water, discharges from potable water sources, foundation drains, air conditioning condensation, *irrigation water*, springs, water from crawl space pumps, footing drains, lawn watering, individual residential car washing, flows from riparian habitats and wetlands, dechlorinated swimming pool discharges, and street wash water (program descriptions shall address discharges or flows from fire fighting only where such discharges or flows are identified as significant sources of pollutants to waters of the United States); (emphasis added)

owner or through administrative warrant as provided for in the County's existing Water Quality Ordinance. The County requests that Part VI.2 be amended to state:

“The Permittees shall carry out inspections, surveillance, and monitoring necessary to determine compliance with their ordinances and permits. The Permittees' ordinance must include adequate legal authority, to the extent permitted by California and Federal Law and subject to the limitations on municipal action under the constitutions of California and the United States, to enter, inspect and gather evidence (pictures, videos, samples, documents, etc.) from industrial, construction and commercial establishments.”

**THE TENTATIVE ORDER INAPPROPRIATELY IMPLEMENTS TMDLS
DEVELOPED BY U.S. EPA FOR IMPAIRED WATER SEGMENTS IN THE LOS
ANGELES REGION**

Part XVIII.B.4 of the Tentative Order requires Permittees with discharges tributary to Coyote Creek or the San Gabriel River to meet WLAs for Coyote Creek. Part XVIII.B.5 requires the County, as Principal Permittee, to develop a monitoring program to monitor flows in Coyote Creek. The results are to be evaluated against numeric targets for Coyote Creek. (We refer to these two provisions as the “Coyote Creek TMDL provisions.”) The Tentative Order does not indicate how the WLAs or numeric targets were developed. There is a reference in Part XVIII.B.1 to a Coyote Creek TMDL developed by U.S. EPA and the Los Angeles Regional Board. Presumably this refers to the TMDLs for Metals and Selenium for San Gabriel River and Impaired Tributaries established by U.S. EPA for the Los Angeles Region (the “San Gabriel River Metals TMDL”).⁴

The County objects to the Coyote Creek TMDL provisions for several reasons. First, the provisions would essentially implement a TMDL for a segment of Coyote Creek that is not listed as impaired. That is not permissible under the Clean Water Act. Under the Clean Water Act and U.S. EPA’s implementing regulations, states are to identify impaired water segments (“water quality limited segments” or “WQLS”), rank them in order of priority, and then establish TMDLs for those segments according to their ranking. *See, e.g., San Francisco Bay Keeper v. Whitman*, 297 F.3d 877, 880 (9th Cir. 2002). Coyote Creek is in the San Gabriel River watershed. Its upper reach is located in Orange County within the jurisdiction of the Santa Ana Regional Board. Its lower reach is in Los Angeles County within the jurisdiction of the Los Angeles Regional Board. The Los Angeles Regional Board has listed the lower reach as an impaired water segment under section 303(d) of the Clean Water Act.⁵ The Santa Ana Regional Board, however, has not listed the upper reach as an impaired segment, nor has it proposed the

⁴ Neither the Fact Sheet for the Tentative Order nor the Findings in the Tentative Order provide any detail on the Coyote Creek TMDL provisions. The Fact Sheet discusses the San Gabriel River Metals TMDL not in the TMDL section of the document but rather in a section titled “Sub-Watersheds and Major Challenges.” The County agrees that attempting to implement and enforce a TMDL developed for one region by the Regional Board of another region would be a “major challenge.”

⁵ The Los Angles Regional Board's current “2006 CWA Section 303(d) List of Water Quality Limited Segments Requiring TMDLs” identifies 13 miles of Coyote Creek as impaired for various pollutants and stressors.

upper reach for listing as impaired under section 303(d). *See Santa Ana Regional Board, 2006 CWA Section 303(d) List of Water Quality Limited Segments Requiring TMDLs.*

Because the upper reach of Coyote Creek is not listed as an impaired segment (*i.e.*, a WQLS), it is not appropriate to establish a TMDL for that segment.⁶ The fact that the upper reach (nonimpaired) flows into the lower reach (impaired) of the Coyote Creek is irrelevant. If the Regional Board could establish WLAs for nonimpaired water segments simply because they flow into impaired segments, it would render meaningless the mechanism for listing water *segments*, and then developing TMDLs for those *segments*. *See, e.g.*, State Water Resources Control Board, *Water Quality Control Policy for Developing California's Clean Water Act Section 303(d) List*, adopted September 30, 2004. Rather than calling for TMDLs on a segment by segment basis, under the Tentative Order's "tributary discharge" approach the Clean Water Act would simply have required TMDLs on a watershed-wide basis.

The second reason the County objects to the Coyote Creek TMDL provisions is that they effectively implement a TMDL where no implementation plan currently exists. As the Tentative Order acknowledges, there is no implementation plan for the Coyote Creek TMDL.⁷ An implementation plan "describes the approach and required activities required to ensure that the allocations are met." *See State Water Resources Control Board, Total Maximum Daily Loads (TMDL) Questions & Answers*, (April 2001). Until a TMDL, including an implementation plan, is incorporated into the Regional Board's Basin Plan, the TMDL is not enforceable. *Id.*

For other established TMDLs in the Santa Ana Region, where no implementation plan has been adopted, the Tentative Order simply requires that the Permittees continue participating in the development of the implementation plans. *See, e.g.*, Parts XVIII.B.1 and 3. For the Coyote Creek TMDL, however, the Tentative Order requires Permittees to develop and implement source control BMPs designed to meet the Coyote Creek WLAs and to monitor Coyote Creek flows and evaluate the results against Coyote Creek numeric targets for total recoverable metals. In other words, Permittees are required to effectively implement the Coyote Creek TMDL. However, unless a Coyote Creek TMDL is developed and incorporated into the Santa Ana Basin Plan, the Santa Ana Regional Board cannot require Permittees to implement the TMDL.⁸ Accordingly, the County objects to the Coyote Creek TMDL provisions.⁸

Finally, and related to the above grounds, the County objects to the Coyote Creek TMDL provisions to the extent the Regional Board appears to be attempting to adopt and implement a TMDL for the upper reach of Coyote Creek without going through the rigorous public process

⁶ States may adopt "informational" TMDLs for water segments not identified as impaired. These are "estimated" TMDLs, for the purpose of developing information only. *See Clean Water Act Section 303(d)(3).*

⁷ As noted above, the Coyote Creek TMDL referenced in Part XVIII.B.1. of the Tentative Order presumably refers to the TMDLs for Metals and Selenium for San Gabriel River and Impaired Tributaries established by U.S. EPA for the Los Angeles Region.

⁸ The Tentative Order provides that Permittees' source-control BMPs will be required "until a TMDL implementation plan is developed." As noted above, if the Santa Ana Regional Board amends its Basin Plan to incorporate a TMDL (including an implementation plan) for the upper reach of Coyote Creek, Permittees may be required to meet a waste load allocation to implement the TMDL. An implementation plan developed by the Los Angeles Regional Board for the lower reach of Coyote Creek and incorporated into the Los Angeles Basin Plan would be irrelevant to dischargers located in the Santa Ana region tributary to the upper reach of Coyote Creek.

required to establish and implement a TMDL. If the Regional Board intends to establish, implement, and enforce TMDLs for the upper reach of Coyote Creek, it needs to conduct a water body assessment for the segment, develop LAs and WLAs for the segment, develop an implementation plan for meeting the allocations, amend the Santa Ana Basin Plan to incorporate the TMDLs, and allow public participation in the process. See State Water Resources Control Board, **Total Maximum Daily Loads (TMDL) Questions & Answers**, (April 2001). It cannot simply adopt the allocations and implementation plan developed by or for another Regional Board for a downstream waterbody.⁹

An example of how cross-jurisdictional TMDL development could occur is found in the San Francisco Regional Board's mercury TMDL for the San Francisco Bay. In that TMDL, the San Francisco Regional Board included a waste load allocation for sources within the Central Valley Region whose discharges are tributary to San Francisco Bay. However, at the same time, the Central Valley Regional Board was developing its own mercury TMDL for upstream water bodies. The San Francisco Regional Board's WLA for the Central Valley Watershed, in effect, represents the reduction that will be obtained once the Central Valley Regional Board's TMDL is implemented. In other words, the San Francisco Regional Board's allocation is more of an accounting mechanism that assures sources within the jurisdiction of the San Francisco Regional Board are credited with the reductions that will be obtained through the Central Valley Regional Board's TMDL once it is implemented.¹⁰ The San Francisco Board did not attempt to enforce its WLA on Central Valley Region sources, nor did the Central Valley Regional Board simply adopt the San Francisco Board's allocation as its own.¹¹

CONCLUSION

In summary, the Tentative Order has included requirements that are outside the scope of authority given to the Regional Board by the Clean Water Act's NPDES program. The goal of the Tentative Order is to reduce the discharge of pollutants in urban stormwater runoff to waters of the U.S. to the maximum extent practicable to protect water quality standards. The Regional Board must ensure that the requirements in the Tentative Order are not prescriptive and are in compliance with federal law. The County hopes that the Regional Board will consider the numerous methods in which compliance with the MEP standard can be accomplished and that

⁹ Both the Fact Sheet and the Findings state that Permittees are “expected to implement programs and policies consistent with the metals and selenium TMDLs for the San Gabriel River watershed.” In other words, they are “expected” to implement the Coyote Creek TMDLs developed for the Los Angeles region.

¹⁰ San Francisco Regional Board staff refused to assign allocations to individual Central Valley sources, stating that “these sources are outside our jurisdiction, and the Central Valley Water Board is developing mercury TMDLs that will more effectively address these sources . . .” *Staff Report, Proposed Amendment to the Water Quality Control Plan (Basin Plan) for the Sun Francisco Bay Region to Establish San Francisco Bay Mercury Total Maximum Daily Load (TMDL) and Implementation Plan*, Meeting Date: September 15,2004.

¹¹ Perhaps a better example of how to address waters crossing jurisdictional boundaries can be found in the Tennessee E. Coli TMDL approved by U.S. EPA. See, *Total Maximum Daily Load (TMDL) for E. Coli in the South Fork Holston River Watershed* (September 2006). The Tennessee TMDL identifies impaired waters in a portion of the watershed that is located in Virginia. Tennessee did not attempt to adopt a TMDL for the Virginia waters or impose allocations. Rather, it simply acknowledged the issue and indicated that Virginia is addressing it through its own TMDL for fecal coliform.

Legal Issues and Comments – Attachment A

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the Regional Board will not impose requirements that are appropriately handled through other regulatory mechanisms.

ATTACHMENT B

TECHNICAL ISSUES AND COMMENTS ON TENTATIVE ORDER NO. R8-2008-0030 NPDES NO. CAS618030

INTRODUCTION

Attachment B contains the principal technical comments of the County of Orange (the “County”) on Tentative Order NO. R8-2008-0030 dated November 10, 2008 (“Tentative Order”). These comments are divided into three sections: (1) General Comments; (2) Findings; and (3) Sections. At times, the issues and concerns raised will pertain to more than one section of the Tentative Order.

The County has endeavored to provide a complete set of comments on the Tentative Order. However, the County reserves the right to submit additional comments relating to Tentative Order No. R8-2008-0030 and the supporting Fact Sheet/Technical Report to the Regional Board in the future.

GENERAL COMMENTS

TENTATIVE ORDER IS INCONSISTENT REGARDING THE NAMING OF THE PERMITTEES THAT ARE REGULATED

The Tentative Order inconsistently identifies the Permittees in three primary locations, a) the subject line in the Fact Sheet, b) the header in the Tentative Order, and c) the header in the Monitoring and Reporting Program (MRP). All references should consistently identify the Permittees as:

“The County of Orange, Orange County Flood Control District, and the Incorporated Cities of Orange County within the Santa Ana Region”

FINDINGS

TENTATIVE ORDER REQUIREMENTS AND NUMERIC EFFLUENT LIMITS

- **Maximum Extent Practicable (A.3., page 2)**

The Tentative Order includes a definition of Maximum Extent Practicable (MEP) that is inconsistent with current case law, the Fact Sheet and the definition included in the current NPDES permit.

The Fact Sheet States (VI., page 13):

Maximum Extent Practicable (MEP) means to the maximum extent feasible, taking into account equitable considerations of synergistic, additive, and competing factors,

including but not limited to, gravity of the problem, technical feasibility, fiscal feasibility, public health risks, societal concerns, and social benefits.

However, the Tentative Order states (A.3., page 2):

MEP is not defined in the Clean Water Act; it refers to management practices, control techniques, and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of pollutants taking into account considerations of synergistic, additive, and competing factors, including, but not limited to, gravity of the problem, technical feasibility, fiscal feasibility, public health risks, societal concerns, and social benefits.

By modifying the definition of MEP to include “and such other provisions as the Administrator or the State determines appropriate for the control of pollutants...”, the Regional Board appears to have determined, contrary to current case law, that the discretion that the state has to use “such other provisions” is a part of the definition of MEP. However, we would strongly disagree with that interpretation and submit that this discretion is outside of the definition of MEP and, therefore, subject to California law.

Under federal law, municipal stormwater discharges must comply with section 402(p) of the Clean Water Act, which requires that cities reduce stormwater to the maximum extent practicable. (33 U.S.C. Section 1342(p)(3)(B)(iii)) Whenever a Regional Board imposes pollutant restrictions in a wastewater discharge permit more stringent than what federal law requires, California law requires the Board to take into account the public interest factors of Water Code section 13241, which includes economic factors and the cost of compliance. (City of Burbank v. State Water Resources Control Bd. (2005) 35 Cal.4th 613, 627.). Thus, if the Regional Board seeks to impose any requirements that go beyond those set forth in section 402(p), the Regional Board must evaluate the public interest factors in Water Code section 13241 prior to permit adoption.

As such, the County recommends that the Finding be modified as follows to be consistent with the Fact Sheet definition:

MEP is not defined in the Clean Water Act; it refers to management practices, control techniques, and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of pollutants taking into account considerations of synergistic, additive, and competing factors, including, but not limited to, gravity of the problem, technical feasibility, fiscal feasibility, public health risks, societal concerns, and social benefits.

- **Illegal Discharges Definition (N.70., page 22)**

The explanation in Finding N.70, that the first term permit required the Permittees to: ... (2) eliminate illegal and illicit discharges to the MS4s...is incorrect. Section II. 9 of NPDES N. CA 8000180 established a responsibility for the Permittees to *Respond to emergency situations such as illegal discharges/illicit connections*. Further, Section II.1. of this permit required the dischargers to ...*prohibit illegal discharges*. In response

to these obligations, the Permittees developed and adopted local legal authority creating a prohibition on *illicit connections* and *prohibited discharges* (see Sec. 9-1-40. of the Codified Ordinances of the County of Orange for example). The Finding should be revised for consistency with this programmatic history and specific use of the terms *illicit connection* and *prohibited discharge* in Orange County.

- **Illegal Discharges Definition (N.70., page 22)**

Finding N.70, for the first time, defines illegal discharges to include “any discharge (*or seepage*) to the municipal separate storm sewer that is not composed entirely of stormwater and not one of the authorized discharges” [emphasis added]. This is problematic for several reasons.

First, this new definition of illegal discharges will significantly impact the Permittees’ resources and does not fit within the context or intent of the illegal discharges/illicit connections (ID/IC) program. The Permittees have a program to address illegal discharges (Section 10 of the Drainage Area Management Plan and Local Implementation Plan). This comprehensive program includes procedures for detecting, responding to, investigating and eliminating these types of discharges in an efficient and timely manner. Including “seepage” in this definition means that the Permittees may now have to use a series of resource intensive investigations in order to detect these types of discharges within the channels and underground pipes. Further – they would then have to investigate these discharges, but do not have a way to eliminate them given that the discharges are resulting from groundwater seeping into the channels. Short of sealing the channel bottom and walls, which is not technically feasible, these types of discharges can not be eliminated. Thus, it is unclear how the Permittees can be expected to include this whole new category of passive, groundwater seepages into the ID/IC program and remain in compliance with the permit.

Second, the inclusion of a new category of discharges, “seepage”, seems counter to the definition of illicit discharges provided in Finding 11 on page 4. The definition states “Illicit discharge means any *disposal*, either intentionally or unintentionally, of material or waste that can pollute urban runoff or create a nuisance. [emphasis added]”. This definition includes an intent to actively “dispose” of a material or waste. It does not seem to include passive groundwater seepage that enters the storm drain system.

The County recommends that the Finding be modified as follows:

*Illegal discharge means any discharge (*or seepage*) to the municipal separate storm sewer that is not composed entirely of stormwater except for the authorized discharges listed in Section III of this permit. Illegal discharges include the improper disposal of wastes into the storm sewer system.*

NEW DEVELOPMENT/SIGNIFICANT REDEVELOPMENT – WQMP/LIP/LID

- **Effective Impervious Area (L.62., page 19)**

Finding 62 identifies that USEPA has determined that, by limiting the effective impervious area (EIA) of a development site to 5% or less, downstream impacts could be minimized. However, USEPA, in several statements made by Dr. Cindy Lin at the November 14, 2008 CASQA General Meeting, has recently suggested that the 5% EIA metric should only be considered as an example and that USEPA is open to consideration of other metrics for low impact development (LID).

“At EPA Region IX, we’re strongly promoting LID strategies that lead to infiltration, evapotranspiration, capture and re-use of stormwater to maintain or restore natural hydrology and improve water quality.”

“We’re encouraging permitting agencies to, as much as possible, incorporate LID provisions into MS4 permits with clear, measurable, and enforceable requirements.”

“The new MS4 permits should include quantitative requirements to enable all parties to clearly identify performance expectations for LID implementation and permit provisions should include specific enforceable and measurable requirements that will result in water quality improvement.”

“We completely understand that there is still the science going on, but it is now our job also to have some kind of a target goal and so, for us, even with Ventura County having a 5% effective impervious area, we’re not saying that that is what you absolutely have to do. We are saying – here’s an example of a draft permit with something that is specific, that’s concrete, that’s quantitative, that we can understand. That, later when we come back, we can say – did we meet this goal?”

“Given your best judgment, your expert opinion, on what you experience and what you are seeing on the ground, what are those specific requirements you can give back to your Regional Board. We want to make sure that there is something workable. We are asking that you come to us and say – this is what we can do, this is what we can put in a permit.”

Further, at the same November 14, 2008 CASQA General Meeting the principal author of the cited Southern California Coastal Water Research Project (SCCWRP) study effectively refuted the notion that their work constituted advocacy for a 5% EIA performance standard for land development. These comments and observations point to the lack of a technical consensus on a performance standard for land development intended to produce urbanized landscapes that better mimic the hydrological response of undeveloped areas.

The County would submit that, in order to resolve current uncertainty and ensure that the technically valid objectives for the land development program are established, there

needs to be an opportunity to continue to develop a contextual approach for Orange County through a stakeholder driven process that incorporates input from those engaged in design and implementation of LID based practices. In addition to resolving areas of technical uncertainty, such a process would also provide an opportunity to integrate stormwater management into efforts to comply with other mandates such as SB 375, which requires the development of sustainable community strategies, and AB1881, which focuses on water conservation. Alternative language for Finding 62. is provided below.

~~62. The USEPA has determined that by limiting the effective impervious area of a development site to 5% or less, downstream impacts could be minimized (also see the SCCWRP study 20). A limited study conducted by Dr. Richard Horner 21 concluded that a 3% EIA standard for development is feasible in Ventura County. These principles are incorporated into requirements for new developments and redevelopment projects.~~

62. There are many different quantitative metrics and approaches that have been approved and/or are being considered throughout California and the country to ensure that LID-based principles are incorporated into development projects. The variety of metrics and approaches is a result of the fact that this is a newly emerging area for stormwater programs and the uncertainty regarding the technical feasibility of implementation and the nexus to water quality benefits.

Integration of LID into new and redevelopment stormwater standards has taken several forms including (but not limited to) peak flow controls, volume reduction, onsite retention, volume reduction tied to a pollutant load target, and impervious area reduction. Examples of each approach are provided below.

- Peak flow controls - post-project/development is equal to or less than pre-project/development plus treatment control

Contra Costa County: Requires peak flow control (post-development \leq pre-development) plus treatment control. Standards also prioritize the use of BMPs with the first preference being no net increase of impervious cover and second preference being the use of specified infiltration practices. The framework for compliance demonstration makes use of the preferred practices easier than conventional practices, such as detention basins. This requirement applies to both new development and significant redevelopment alike.

Available at: [www.ccleanupwater.org/new-development/c3/stormwater-c3-guidebook/](http://www.cccleanupwater.org/new-development/c3/stormwater-c3-guidebook/).

- Volume reduction – post-project/development stormwater runoff volumes be reduced to levels equal to or less than pre-project/development stormwater runoff volumes

Los Angeles County: Recently adopted an ordinance that requires that post-development stormwater runoff volumes be reduced to levels equal to or less than pre-development stormwater runoff volumes. This requirement applies to

*both new development and redevelopment alike. Available at:
<http://planning.co.la.ca.us/spt/greenBuildingProgram.htm>.*

- Onsite retention - onsite retention of the volume from a specified design storm.

City of Santa Barbara: Requires the onsite retention of the runoff volume from 1-inch/24 hr storm. This requirement applies to both new and redevelopment and does not specify preference for low impact development strategies (e.g., possible that requirement could be met through use of detention basin or on-site retention. Available at:
http://www.santabarbaraca.gov/NR/rdonlyres/91D1FA75-C185-491E-A882-49EE17789DF8/0/Manual_071008_Final.pdf

- Volume reduction tied to a pollutant load target

State of Virginia: Virginia is considering the use of a volume reduction requirement tied to a target phosphorus load reduction. Developers must apply LID strategies to meet the target phosphorus load. If the target load cannot be met solely through the use of LID strategies, additional conventional BMPs (such as wet ponds) can be used to meet the remaining load requirement Available at:
www.cwp.org/Resource_Library/Center_Docs/SW/RRTechMemo.pdf

- Impervious area reduction - significant redevelopment projects reduce existing site imperviousness by some percentage (typically 10-20%).

State of Maryland: Requires that all significant redevelopment projects reduce existing site imperviousness by 20%. Where site conditions prevent the reduction of impervious area, BMPs (preference is stated for LID strategies) shall be implemented to provide treatment control for at least 20% of site imperviousness. A combination of impervious area reduction and treatment controls may be used. The State is in the process of revising the Maryland Stormwater Design Manual to better integrate LID strategies for new development. A summary of the redevelopment policy can be found at:
www.mde.state.md.us/assets/document/Urban_redevelopment%202005.pdf

In order to identify and implement the most appropriate metric and approach for development in the Orange County area, the permittees should utilize a stakeholder driven process and engage those experienced with LID design and implementation, those engaged in LID research, those engaged in review and approval of development projects, as well as other interested stakeholders including the Regional Board, and environmental groups.

- **Existing Model WQMP (L.63., page 20)**

Finding 63 refers to the Model WQMP developed by the Permittees and the requirements for inclusion of site design, source control, and treatment control BMPs for new development and significant re-development projects. However, this discussion does not recognize the inclusion in the Model WQMP of *Section 7.II -3.2.4 Identify Hydrologic Conditions of Concern (HCOC)*. This section identifies the process to determine if a project site's hydrologic regime would be considered a condition that would have a significant impact on downstream natural channels and habitat integrity, alone or in conjunction with impacts of other projects. Where downstream conditions of concern have been identified, the project is required to maintain the pre-project hydrologic conditions affecting downstream conditions of concern by incorporating site design, source control, and treatment controls. Since adoption of the Model WQMP, new development and significant re-development projects are required to perform this assessment and incorporate appropriate BMPs to ensure existing hydrologic conditions are maintained. Certain jurisdictions have employed HCOC mapping efforts to assist developers in identifying areas where HCOC conditions exist. The County proposes a mapping effort to identify HCOC areas in the Santa Ana Region of Orange County while an appropriate LID metric is developed. This effort will provide a tool that project proponents can use to better comply with the existing HCOC requirements of the Model WQMP.

The County recommends that additional language be added to Finding 63. to provide an interim measure and tool to protect susceptible areas while the development standards are being revised.

Incorporated into the Model WQMP and required in the development of a WQMP for new development and significant re-development projects is Section 7.II -3.2.4 "Identify Hydrologic Conditions of Concern (HCOC)". An HCOC exists if a change to a project site's hydrologic regime would be considered a condition of would have a significant impact on downstream natural channels and habitat integrity, alone or in conjunction with impacts of other projects. Currently, new development and significant re-development projects are required to perform this assessment and incorporate appropriate BMPs to ensure existing hydrologic conditions are maintained. Certain jurisdictions have employed HCOC mapping efforts to assist developers in identifying areas where HCOC conditions exist. In the interim, while the development standards are being revised, the permittees will conduct an HCOC mapping effort in the first six months after adoption of the Order to identify HCOC areas in the Santa Ana Region of Orange County.

SECTIONS

DISCHARGE LIMITATIONS/PROHIBITIONS

- **“Presumption” and Public Education Requirements (III. 3. i. Page 30)**

Consistent with the federal regulations and prior permits, Section III.3. of the Tentative Order notes that certain discharges need not be prohibited by the Permittees unless they are identified as a significant source of pollutants. The Tentative Order also notes in Section III.3. that changes to the list of exempted discharges (including changes made by the Regional Board) should be predicated on a finding that a particular type of discharge is a significant source of pollutants. There is no finding in the Tentative Order that justifies the requirement that all of these previously exempted discharges should now be presumed to be significant sources of pollutants until determined otherwise.

The Tentative Order also requires the Permittees to incorporate public education and outreach activities directed at reducing certain categories of discharges even if they are not substantial contributors of pollutants to the MS4s and receiving waters (such as air conditioning condensate, passive footing drains, etc.). In the absence of any supportive finding regarding either of these new requirements, the Discharge Limitations/Prohibitions section of the Tentative Order (Order No. R8-2002-0010) should be retained.

- **Categories of Discharges (III. 3. i. c. Page 31)**

The Tentative Order includes a new category of discharge “irrigation water from agricultural sources”. Although the discharge limitations/prohibitions have typically included a category entitled “landscape irrigation, lawn garden watering and other irrigation waters” the nexus to agriculture sources has never been made in previous permits and is counter to the federal regulations [40 CFR 122.26(d)(2)(iv)(B)(1)].

The proposed inclusion of the new category is also inconsistent with the Findings and Fact Sheet, specifically:

Finding C.13, page 5 – “*Urban* activities also generate non-storm water discharges such as air conditioning condensate, *irrigation runoff*, individual residential car washing, etc., generally referred to as de minimus type of discharges.” [emphasis added]

Finding M.68, page 21 – “The MS4s generally contain non-storm water flows such as *irrigation runoff*, runoff from non-commercial car washes, runoff from miscellaneous washing and cleaning operations, and other nuisance flows generally referred to as *de-minimus discharges*.” [emphasis added]

Finding S. 87, page 27 – “The Coastal Zone Act Reauthorization Amendments of 1990 (CZARA), Section 6217(g), requires coastal states with approved coastal zone management programs to address non-point source pollution impacting or threatening coastal water quality. CZARA addresses five sources of non-point pollution: *agriculture*, *silviculture*, *urban*, marinas, and *hydromodification*. This

order addresses the management measures required for the urban category, with the exception of septic systems. Compliance with requirements specified in this Order relieves the permittees for developing a non-point source plan, for the urban category, under CZARA. The Regional Board addresses septic systems through the administration other programs. [emphasis added]

Fact Sheet IV, page 6 – “In addition, there are storm water discharges from agricultural land uses, including farming and animal operations. However, *the CWA specifically excludes agricultural discharges from regulation under this program.*” [emphasis added]

The category “irrigation water from agricultural sources” needs to be deleted from the Tentative Order and, instead, be addressed through other regulatory mechanisms.

LEGAL AUTHORITY

- **Reporting (VI. 6, page 34)**

The Tentative Order includes a section that requires the Permittees to report threats of potential violations of the Industrial or Construction General Permits. This requirement essentially requires the Permittees to make a determination regarding the compliance status of a regulated entity with these permits. Since the Permittees do not administer or enforce those permits, the only reporting that can be provided is with regard to conformance with local codes and ordinances. The Section should be modified as follows:

6. The Permittees shall continue to provide notification to Regional Board staff regarding stormwater related information gathered during site inspections of industrial and construction sites ~~regulated by the Statewide General Storm Water Permits and at sites that should be regulated under those Statewide General Permits.~~ The notification shall include any significant observed violations, or threat of potential violations of the ~~General Permits~~ local codes and ordinances (e.g., ~~problematic housekeeping issues~~), prior history of violations, any enforcement actions taken by the Permittee, and any other relevant information. (Also see notification requirements under Sections VIII, IX, and X of this Order.)

LITTER, DEBRIS AND TRASH CONTROL

- **Trash Characterization (VII. 5, page 36)**

The Tentative Order requires each Permittee to undertake trash characterizations. The Section should be modified to identify this requirement as solely an obligation of the Principal Permittee.

MUNICIPAL INSPECTIONS OF COMMERCIAL FACILITIES

- **Types of Commercial Facilities (X.1, page 40 and 41)**

The Tentative Order adds 11 new categories of commercial facilities that will be subject to Permittees inspection. This new requirement, which represents a significant investment of resources for the Permittees, is not supported within the Findings or Fact Sheet. Although the Permittees agree that the commercial program and related inspections need to be continued during this permit term, it is critical that any new categories of commercial facilities that are added are documented as significant source of pollutants within this region. The new categories of commercial facilities should be deleted from the Tentative Order until such a time that these types of facilities have been determined to contribute a significant pollutant load to the MS4.

Commercial facilities may include, but may not be limited to:

- a) ~~Transport, storage or transfer of pre-production plastic pellets;~~
- b) ~~Automobile mechanical repair, maintenance, fueling or cleaning;~~
- c) ~~Airplane repair, maintenance, fueling or cleaning;~~
- d) ~~Marinas and boat repair, maintenance, fueling or cleaning;~~
- e) ~~Equipment repair, maintenance, fueling or cleaning;~~
- f) ~~Automobile impound and storage facilities;~~
- g) ~~Pest control service facilities;~~
- h) ~~Eating or drinking establishments, including food markets and restaurants;~~
- i) ~~Automobile and other vehicle body repair or painting;~~
- j) ~~Cement mixing, concrete cutting, masonry facilities;~~
- k) ~~Building materials retail and storage facilities;~~
- l) ~~Portable sanitary service facilities;~~
- m) ~~Painting and coating;~~
- n) ~~Animal facilities such as petting zoos and boarding and training facilities;~~
- o) ~~Nurseries and greenhouses;~~
- p) ~~Landscape and hardscape installation;~~
- q) ~~Pool, lake and fountain cleaning;~~
- r) ~~Golf courses;~~
- s) *Other commercial sites/sources that the permittee determines may contribute a significant pollutant load to the MS4; and,*
- t) *Any commercial sites or sources that are tributary to and within 500 feet of an area defined by the Ocean Plan as an Area of Special Biological Significance.*

- **Types of Commercial Facilities (X.1, page 40 and 41)**

The Tentative Order added the commercial facility category “transport, storage or transfer of pre production plastic pellets”. While the Permittees understand the intent of the Regional Board in wanting to add these facilities to the program so that they are inspected, this category of facilities are better suited for the industrial program instead of the commercial program. In the Los Angeles Region, due to the types of facilities that typically handle pre-production plastic pellets, the stormwater inspection staff has inspected plastic products manufacturing facilities to determine compliance with the Industrial General Storm Water Permit. The County recommends that this category of facility be moved to the industrial program.

- **Inspection Frequencies (X.2, page 41)**

The Tentative Order added a new requirement that, after the Permittees prioritize the commercial facilities for inspection based on the threat to water quality (based upon established criteria such as type of facility, location, potential for discharge, history of discharges, proximity and sensitivity of receiving waters, and materials used and generated at the site), there must be a minimum percentage allocation of the prioritized sites (10% high priority, 40% medium, and remaining % low) within the commercial facility inventory.

There is no justification in the Findings or Fact Sheet for this designation. If the use of the prioritization system and/or criteria are viewed as problematic, then the Permittees would recommend that the Tentative Order address revisiting the existing system to fix potential flaws instead of arbitrarily assigning percentage breakdowns.

The County recommends revising this language as follows:

Each permittee shall conduct inspections of its commercial facilities as indicated below. To establish priorities for inspection, the permittees shall continue to prioritize commercial facilities/businesses within their jurisdiction as a high, medium or low threat to water quality based on such factors as the type, magnitude and location of the commercial activity, potential for discharge of pollutants to the MS4, any history of unauthorized, non-stormwater discharges, proximity and sensitivity of receiving waters, material used and wastes generated at the site. Within 6 months of the adoption of this Order, the permittees shall review their existing prioritization system, criteria, and results based on the inspections, and determine if any modifications are necessary. The modifications shall be completed within 6 months of the determination and reported on in the annual report. The following minimum criteria must be met: 10% of commercial sites (not including restaurants/food markets) must be ranked 'high' and these represent the greatest threat to water quality; 40% of commercial sites (not including restaurants/food markets) must be ranked 'medium'; and, the remainder may be ranked 'low'.

- **Mobile Businesses (X.8, page 42)**

The Tentative Order adds a new requirement to develop and implement a mobile business program for four (4) categories of mobile businesses including a) mobile auto washing/detailing, b) equipment washing/cleaning, c) carpet, drape, and furniture cleaning, and d) mobile high pressure or steam cleaning. The program must include the tracking, identification of BMPs for the mobile businesses, development of an enforcement strategy, a notification effort for all businesses, and the development of an outreach and education program.

If the Tentative Order is going require the development and implementation of a significant new element of the commercial program, the Findings and Fact Sheet must also provide a technical basis for this addition. Mobile businesses present a unique regulatory challenge in stormwater regulation for several reasons including:

- The regular, effective practice of unannounced inspections is difficult to impossible to implement;
- Identifying mobile businesses is difficult because they are often not permitted or licensed; and
- Mobile businesses are transient in nature, advertise a mobile phone number as the only means of contact and may have a geographic scope of several cities or the entire region.

The Tentative Order should include language that limits the scope of the section until the costs and benefits of the program are better understood by allowing the Permittees to identify a mobile business category that may be a significant source of pollutants and develop a pilot regulatory program. The pilot program, to be completed in the first three years of the permit, would allow the Permittees to work together on a regional basis to develop and then implement an appropriate framework for addressing mobile business over the balance of the permit term.

Within 12 months of adoption of this order, the principal permittees shall develop a mobile business pilot program. The pilot program will address one category of mobile business, which may include: mobile auto washing/detailing; equipment washing/cleaning; carpet, drape, furniture cleaning; or mobile high pressure or steam cleaning. The pilot program will include at least two (2) notifications of the all individual mobile businesses operating within the County concerning the minimum source control and pollution prevention measures that they must develop and implement. For purposes of this order, mobile businesses include: mobile auto washing/detailing; equipment washing/cleaning; carpet, drape, furniture cleaning; and mobile high pressure or steam cleaning. The mobile businesses shall be required to implement appropriate control measures within 3 months of being notified by the permittees. Within 12 months of adoption of this order, the principal The pilot program will also include the permittee shall development of an outreach and enforcement strategy to address mobile businesses. Each The permittees shall also develop and distribute the BMP Fact Sheets for the mobile business selected as that has been developed by the permittees. At a minimum, the mobile business BMP Fact Sheets training program should include: laws and regulations dealing with urban runoff and discharges to storm drains; appropriate BMPs and proper procedures for disposing of wastes generated from each mobile business.

RESIDENTIAL PROGRAM

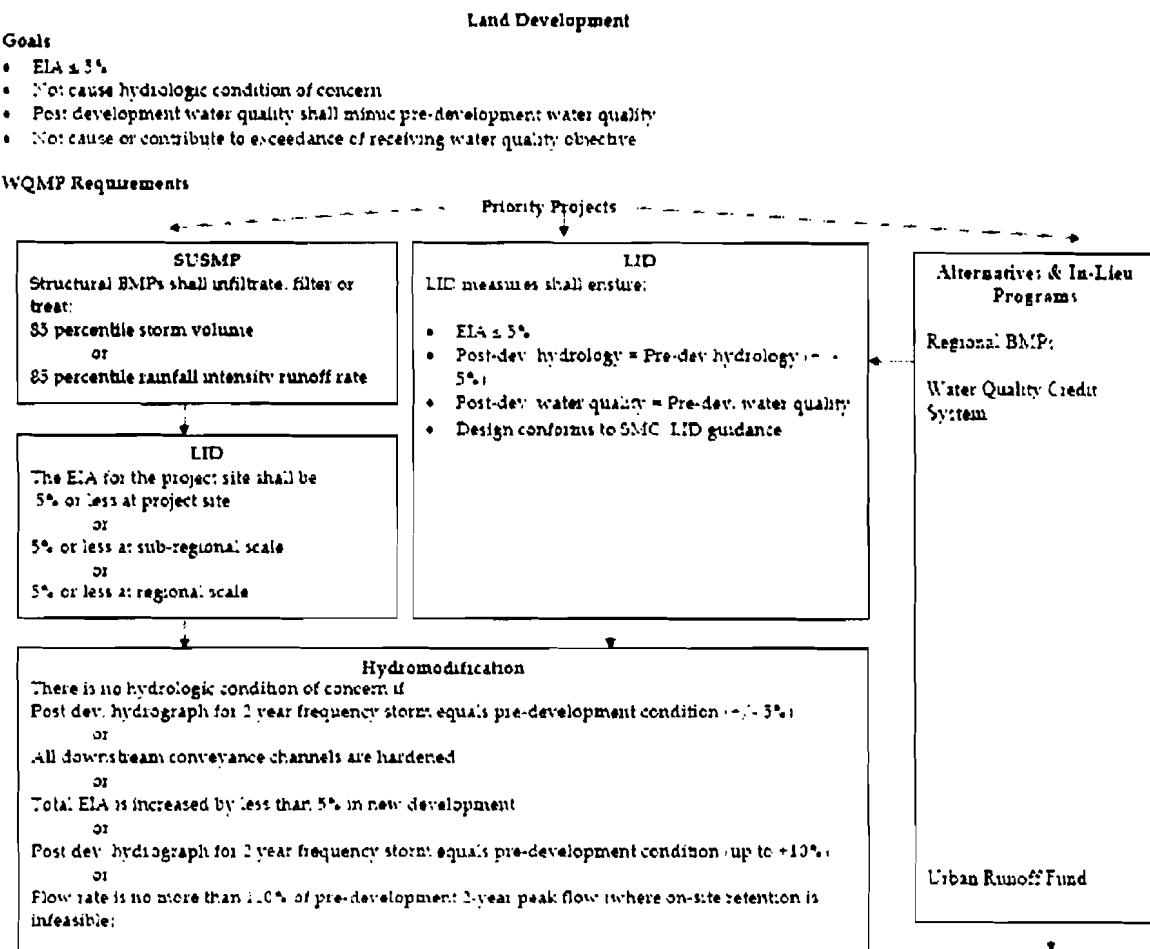
- Pollution Prevention Measures (X.1.2, page 43)
The Tentative Order adds a new requirement for the development and implementation of a residential program to reduce the discharges from residential areas to the maximum extent practicable. Given the success of the Permittees' public education and outreach program – Project Pollution Prevention – which has demonstrably changed residents' awareness and behaviors in Orange County, this requirement appears duplicative of existing education and outreach efforts. However, there is also a concern that the

obligation to “require” residents to implement BMPs is contrary to current educational approaches which are striving to engender a stewardship ethic and may ultimately erode public support. If this section is retained, the County recommends that it be modified as follows:

- 2. The permittees should identify residential areas and activities that are potential sources of pollutants and develop Fact Sheets/BMPs. At a minimum, this should include: residential auto washing and maintenance activities; use and disposal of pesticides, herbicides, fertilizers and household cleaners; and collection and disposal of pet wastes. The permittees shall encourage require residents to implement pollution prevention measures. The permittees should work with sub-watershed groups (e.g., the Serrano Creek Conservancy) to disseminate latest research information, such as the UC Master Gardeners Program³⁶ and USDA's Backyard Conservation Program.*

NEW DEVELOPMENT (INCLUDING SIGNIFICANT RE-DEVELOPMENT)

The New Development provisions include significant new requirements related to SUSMP, LID and Hydromodification. The flow chart provided below is an attempt to graphically represent the County's understanding of and interplay between these provisions as currently written.



For the reasons stated in the comments related to Finding 62, the County believes that there is a vital need to develop a contextual approach to the revised land development provisions of the Tentative Order. Instead of seeking to establish a Countywide performance standard for land development upon permit adoption, these new requirements need to be developed in a stakeholder driven process with the goal of producing a substantially revised Model WQMP within 12-24 months. The elements of the revised Model WQMP would include an integration of SUSMP, LID and hydromodification requirements informed by consideration, on a watershed-by-watershed basis, of the opportunities and constraints presented by the urbanized landscape, water balance within each watershed, the ecological condition of individual stream systems, and other mandates (as previously noted) for more sustainable patterns of urban and sub-urban development. Provided in the sections below are the detailed technical comments that encompass the County's vision for New Development in the Orange County area.

The County is also concerned about the provision relating to pre-approved projects (XII. J, p. 58). Requirements for LID and hydromodification will need to be considered at the earliest stages of project conception and design and so those projects that are in the middle or nearing the end of project design but do not have an approved WQMP at the time of adoption of the

permit will be required to re-design the project, placing an undue burden on project proponents. Consequently, the County strongly recommends that the “grandfathering” provision of the current permit be used to avoid major disruption and undue burden to projects that are close to completion of their design phase.

A. GENERAL REQUIREMENTS

- **WQMP Guidance (XII.A.2., page 44)**

Section XII.A.2. requires that the Permittees, within 6 months of adoption of the Tentative Order, develop a WQMP guidance document to more effectively ensure that water quality protection, including LID principles, are considered in the earliest phases of a project. The schedule for developing this guidance does not allow sufficient time to develop and institutionalize an effective guidance document through the necessary consultative stakeholder process. The Tentative Order should also therefore be modified to allow at least 12 months for each Permittee to revise its LIP at the same time to be consistent with the WQMP guidance.

2. Within 12 months of adoption of this order, the principal permittee, in collaboration with the permittees, shall develop a guidance document utilizing a stakeholder driven process for the preparation of conceptual or preliminary WQMPs to more effectively ensure that water quality protection, including LID principles, is considered in the earliest phases of a project. The appropriate revisions to the DAMP to incorporate this guidance shall be submitted with the first annual report after adoption of this permit. Within 12-18 months of adoption of this order, each permittee shall revise its LIP to be consistent with the guidance. The permittees are encouraged to require submission of a conceptual WQMP as early in the planning process as possible.

- **CEQA Document Preparation Review (XII.A.6, page 45)**

Section XII.A.6 requires the Permittees to perform an annual review of their planning procedures and CEQA document preparation processes. Review of the planning procedures and the CEQA document preparation processes on an annual basis is unnecessary. The Tentative Order should be modified to require that a review of the planning procedures and CEQA document preparation processes should be completed concurrently with finalization of the revised land development provisions of the DAMP.

6. The permittees shall continue to review their planning procedures and CEQA document preparation processes at the time of DAMP finalization and no later than 24 months after the adoption of the Order, on an annual basis, to ensure that urban runoff-related issues are properly considered and addressed. If necessary, these processes shall be revised to consider and mitigate impacts to stormwater quality. Should findings of the review result in changes to the above processes, the permittee shall include these changes in the LIP and submit a revised copy of the LIP to the Regional Board with the next annual report. The permittees shall ensure that the following potential impacts are considered during CEQA reviews:...

**B. WATER QUALITY MANAGEMENT PLAN (WQMP) FOR URBAN RUNOFF
(FOR NEW DEVELOPMENT/SIGNIFICANT REDEVELOPMENT)**

- **Commercial and Industrial Developments (XII.B.2.(c), page 47)**
Section XII.B.2.(c) lowers the threshold criterion for commercial and industrial developments to comply with WQMP requirements from 100,000 square feet to 10,000 square feet. The findings and fact sheet should explain the basis for lowering the threshold criterion.
- **Streets, roads, highways** – This provision especially the proposed LID requirement is particularly difficult for linear projects. In lieu of applying the LID requirement to streets, roads and highway the County suggests that these type of projects be required to incorporate where feasible EPA's *Managing Wet Weather with Green Infrastructure: Green Streets*.
- **Retail Gasoline Outlets (XII.B.2.(j), page 47)**
Section XII.B.2.(j) includes, as a category of priority development projects, Retail Gasoline Outlets of 5,000 or more square feet with a projected average daily traffic of 100 or more vehicles per day. However, the fact sheet does not provide any technical basis for inclusion of RGOs as a priority development project category. It should be noted that the DAMP already prescribes a suite of BMPs specific to RGOs. Subjecting RGOs to WQMP requirements imposes duplicity where it is not needed. Section XII.B.2.(j) should be removed from the Tentative Order.
- **WQMP Goals (XII.B.3., page 48)**
Section XII.B.3. Identifies goals associated with WQMPs. However, these “goals” are currently written as specific requirements in a section that otherwise addresses project thresholds for WQMP preparation and numeric sizing criteria for treatment controls. The placement is confusing regarding how subsections a-d relate to each other and how they are to be addressed in Section XII.B.4 Treatment Control Sizing. Sections XII.B.3 (a), (b), and (c) should be relocated to a separate discussion of overall goals regarding introducing all the land development provisions of the Tentative Order.
- **Structural Infiltration BMPs (XII.B.5., page 49)**
Section XII.B.5.(d) requires the vertical distance from the bottom of the infiltration system to seasonal high groundwater must be at least 10 feet. However, the Fact Sheet does not provide any technical basis for the distance of 10 feet. In fact, studies by NURP and Nightingale (1975; 1987a,b,c; 1989) and F. Napier (2008) have identified that pollutant removal occurs for most pollutants in the first several inches of soil. Furthermore the State Water Board is currently developing proposed regulations and waiver for onsite wastewater treatment plans (OWTS). These regulations may be relevant and provide a more technically based approach to protect groundwater from infiltration BMPs. The technical basis for the distance of 10 feet should be provided or the language should be revised to state that the vertical distance should be based on an adequate protection of groundwater defined as no impact to groundwater quality. Section

XII.B.5.(f) identifies that systems must not be used for areas of industrial or light industrial activity and areas subject to high vehicular traffic (25,000 or more daily traffic). Clarification of a definition of “light industrial” should be specified in the Tentative Order. The Fact Sheet does not provide any technical basis for the exclusion of high vehicular traffic of 25,000 or more daily traffic and thus should be removed.

- **Structural Infiltration BMPs (XII.B.7., page 50)**

Section XII.B.7. appears to require that WQMPs are to be required for all non-priority projects. There are many types of non-priority projects, such as interior re-modeling, which do not meaningfully lend themselves to the preparation of a WQMP. The County requests that Section XII.B.7. be revised to be consistent with DAMP Section 7.6.2 which establishes the scope of project applicability with respect to WQMP requirements.

C. LOW IMPACT DEVELOPMENT TO CONTROL POLLUTANTS IN URBAN RUNOFF FROM NEW DEVELOPMENT/SIGNIFICANT REDEVELOPMENT

- **LID Site Design Principles (XII.C.1., page 50)**

Section XII.C.1. identifies a list of site design BMPs that should be taken under consideration during each phase of priority development projects. However, the list provided is a confusing mix of goals, tasks, and work products which does not provide a clear basis for compliance. The list needs to be revised with thought toward a potential future checklist of required considerations. Reference to accepted or forthcoming LID guidance, such as the USEPA LID Guidance or the future SMC Technical Guidance Manual, respectively, should also be considered.

- **LID Site Design Principles (XII.C.2., page 51)**

It is not clear why the major discussion of LID includes prescribed source control BMPs. For the purposes of clarity, Section XII.C.2 should be deleted.

- **LID & Effective Impervious Area (XII.C.3., page 51)**

Section XII.C.3. requires the EIA for the project site shall be limited to 5% or less. However, consistent with the comments provided regarding Finding 62, the County would submit that EIA is not an appropriate project specific performance metric for LID. The County would submit that in order to ensure feasibility of compliance as well as water quality benefits associated with an LID metric that the Permittees develop an integrated and contextual approach focused on volume retention and reduction through a stakeholder process. This process would incorporate input from LID designers, academia engaged in LID research, municipal stormwater and plan check staff, and environmental groups to develop requirements that more effectively emphasize LID, can be feasibly implemented and is protective of water quality. The development of an appropriate LID metric is anticipated to require 12 months.

The County recommends that Section XII.C.3. be rewritten to provide for the development of a contextual approach for the Orange County permit. Alternative language for Section XII.C.3. is provided below.

Within 12 months from the date of adoption of this Order, the permittees shall identify a quantitative metric for incorporation of LID-based principles, update the new development standards, and adopt the new development standards to be in compliance with the development related requirements within the Order. In order to complete this, the principal permittee shall utilize a stakeholder driven process that includes, to the extent feasible, representatives from the permittees, LID designers, academia engaged in LID research, municipal plan check staff, Regional Board staff, and environmental groups. The development metric and approach, once agreed upon by the stakeholders, will be submitted to the Regional Board Executive Officer for approval.

Section XII.C.3. (a) identifies that pervious areas should have the capacity to percolate excess runoff from a two-year storm event. Percolation is not the only method for reducing the volume of runoff from a site and the Tentative Order should recognize the option for capture and onsite reuse.

Footnote 50 and 51 in sections XII.C.3. (a) and (b) refer to Footnote 38 which refers to the “Metropolitan Water District Evaluation of the Landscape Performance Certification Program” which appears to not be the correct reference.

- **Substitution of Treatment Controls for LID Measures (XII.C.4., page 53)**
The County presumes that the intention of Section XII.C.4. is to allow project proponents to substitute LID measures for treatment controls if certain conditions are met and not the reverse substitution option currently prescribed by this section.

D. HYDROLOGIC CONDITIONS OF CONCERN (HYDROMODIFICATION)

- **Hydrologic Conditions Assessment (XII.D.1., page 54)**
Section XII.D.1. requires each priority development project to ascertain the impact of development on the site's hydrologic regime. This analysis should not be required if a hydrologic condition concern does not exist (i.e. downstream conveyance channels are engineered, hardened, and regularly maintained as identified in Section XII.D.2.).

Each priority development project shall be required to ascertain the impact of the development on the site's hydrologic regime and include the findings in the WQMP, including the following for a two-year frequency storm event, except those projects that do not have a hydrologic condition of concern as identified in Section 2 below:

- **Hydrologic Conditions of Concern (XII.D.2.(c), page 54)**
Section XII.D.2. (c) identifies that a hydrologic condition of concern is not present if the total effective impervious cover on a site is increased less than 5%. With respect to the hydrologic performance of a site, any performance metrics should be expressed in terms of runoff volume reduction.