

targeting identified or problem BMPs based on past reporting and investigations of water quality problems downstream.

- **Requirements for Hydromodification and Downstream Erosion (Section D.1.h. Page 33)**

~~Section D.1.h. discusses the hydromodification requirements for Priority Development Projects. The hydromodification provisions are of concern to the Copermittees for several reasons.~~

As a general matter, the hydromodification provisions may actually discourage smart growth and sustainable development and encourage urban sprawl. High density urban development generally does not have the space to allocate to onsite hydromodification controls. However, urban development has other water quality benefits such as incorporating subterranean parking garages, retail and office workspace, and residential space into a single impervious footprint. As a result, these types of developments have a much smaller impervious footprint than suburban developments that accommodate the same features. This Provision should be amended to include an exception for urban development based on impervious footprint.

Section D.1.h.(3) (Page 34) requires each Copermittee to implement, or require implementation of, a suite of management measures within each Priority Development Project to protect downstream beneficial uses and prevent adverse physical changes to downstream stream channels. This section should not apply to development where the project discharges in locations where the potential for erosion is minimal or not present. This would include those channels that are significantly hardened and engineered to accept flows from large impervious areas and discharges directly to water bodies not susceptible to erosion.

In addition, this section should not apply to watersheds or watershed plans that already include sufficient hydromodification measures. For example, the County of Orange and major landowners, such as Rancho Mission Viejo have put in place a comprehensive watershed land use/open space strategy for the San Juan Creek Watershed/Western San Mateo Watershed which includes water quality/quantity management as an integral component. The Tentative Order should be amended to provide an exception to this section for those watersheds where a watershed plan that contains sufficient hydromodification measures has been developed.

This section should also recognize that the common hydromodification management measures for complying with the hydromodification requirements don't necessarily apply directly to flood control projects.

Section D.1.h.3.(b) (Page 34) requires that management measures must be based on a sequenced consideration of site design measures, on-site management controls, and then in-stream controls. The provision does not

include an option to address hydromodification on a regional or watershed basis. This provision should be amended to include an option to address hydromodification on a regional or watershed basis.

Section D.1.h.(3)(b)(i) (Page 34) requires that site design measures for hydromodification must be implemented on all Priority Development Projects. It is neither necessary nor prudent to require hydromodification controls on all priority projects. Some priority projects may be too small to have hydromodification effects and some may discharge into engineered channels, which makes these measures unnecessary. The receiving channel must always be part of the assessment of whether hydromodification controls will be required. This Provision should be amended to include language that the controls are required unless a waiver per paragraph (c) of this section is granted.

Section D.1.h.(3)(c) (Page 35) defines the on-site hydromodification control waivers. This provision does not address channels that have been engineered to accept the discharge from the urbanized landscape. Much of the lower part of the San Juan Creek watershed falls into this category. For example, San Juan Creek from its confluence with Trabuco Creek Channel is an example. The channel has been improved with soil cement side slopes, and drop structures, all specifically designed to accept the master plan development flows. It is also possible that future channels will be engineered with natural design concepts to accept master planned discharges. There are very few 'natural' channels in areas where development has yet to occur, and the hydromodification provisions of the Tentative Order must accommodate this fact. It is suggested that the provisions be amended to include an exception as part of the on-site hydromodification control waivers criteria, for channels that have been engineered to accept the discharge and flows of the Priority Development Project

Section D.1.h.(3)(c)(ii)(b) requires hardened channels to include in-stream measures to improve the beneficial uses adversely affected by hydromodification. However, this section seems contradictory to the waiver concept since, in order to qualify for the waiver, the development must provide improvements to the channel to improve the beneficial uses. It is unclear how one would improve the beneficial uses of a severely altered or significantly hardened channel without removing the channel armoring. Therefore, it seems that this section does not provide an effective waiver option, and, thus this section should be deleted from the Tentative Order.

Section D.1.h.(4) (Page 35) requires the development and implementation of hydromodification criteria within two years of adoption of this order. This section is problematic for several reasons. First, the development of this criteria will likely take longer than two years since criteria must be established for specific projects and receiving waters. In addition, the criteria must be based on findings from the Hydromodification publications produced by the Stormwater Monitoring Coalition (SMC) and Southern California Coastal Water Research Project

(SCCWRP), however, if there are any delays with these publications, the permit section does not provide an alternative to the two year timeframe. Due to these concerns, the language should be modified to state that, until the completion of the SMC Hydromodification Control Study, the Copermittees should implement interim hydromodification criteria.

Section D.1.h.(5) requires that within 180 days of adoption of the Order, each municipality must ensure that projects disturbing 20 acres or more include and implement the interim hydromodification management measures identified. Section D.1.d. of the Tentative Order allows the Copermittees 12 months (suggested amendment to 24 months) from permit adoption to update their Local WQMPs. In order to prevent confusion with regard to changes in the Local WQMPs, it is suggested that the requirement to place interim hydromodification requirements on large projects be extended so that it is in line with the Local WQMP update (as suggested by the Copermittees). It is also suggested that this section be amended to provide an exception to those watersheds where a watershed plan that contains sufficient hydromodification measures to meet the requirements of the section, has been incorporated into the JURMP and to those projects that have already designed BMPs to address hydromodification issues, received approval for the but have not started construction.

Section D.1.h.(5)(a)(iii) (Page 36) requires control of runoff through hydrograph matching for a range of return periods from 1 year to 10 years. An exception to this requirement should be Priority Development Projects that discharge to hardened channels or engineered channels. It is suggested that the provision be amended to include an exception for Priority Development Projects that discharge to hardened channels or engineered channels.

- **Reporting (Section D.1.j Page 37)**

Section D.1.j. details the reporting requirements of the development Planning Component. This provision substantially increases the Copermittees' reporting obligations. This level of effort will divert program resources from pollution reduction projects. This provision should be amended to reflect the level of reporting requirements included in the current permit Order No. R9-2002-01.

## **Construction Component**

- **Permit Fees**

Although not directly addressed within the Tentative Order, the Copermittees take issue with the requirement that they must pay a significant fee for the municipal stormwater permit, which covers their construction responsibilities and are also required to pay an additional fee when they submit an NOI to obtain coverage under the Statewide Construction General Permit. Since there is some discretion in how the Regional Water Board addresses these fees, the Copermittees request that their municipal stormwater fees cover all municipal

activities including construction and that they not be held liable for additional fees when submitting NOIs.

- **Site Planning and Project Approval Process (Section D.2.c.(2) Page 39)**

The Tentative Order requires that, prior to permit issuance, the Copermittees require and review a project proponent's stormwater management plan to verify compliance with local grading ordinances and other applicable ordinances. We interpret this to refer to the stormwater pollution prevention plan (SWPPP) required by the Statewide General Construction Stormwater Permit.

The Fact Sheet (Page 92) discussion provided as technical justification for this new requirement is inaccurate and/or misapplied. The Fact Sheet cites USEPA guidance as stating that Copermittees should review site plans submitted by the construction site operator to ensure that the appropriate erosion and sediment controls are implemented before ground is broken. While the Copermittees agree with this, the requirement is to review site plans submitted in conformance with local requirements, not state requirements.

The Fact Sheet goes on to state that audits of Orange County Copermittee stormwater programs found that the "site plan and SWPPP reviews were inadequate". While there may be issues related to the site plans, the Copermittees are not responsible for enforcement of the Statewide Construction General Permit and, therefore, do not review SWPPPs for conformance with local codes and ordinances prior to issuing local permits, they only review locally required plans such as erosion and grading control plans.

The Copermittees take exception to this language and recommend that the language be modified as follows:

(2) Prior to permit issuance, the project proponent's ~~stormwater management plan~~ locally required plans such as grading plans and erosion and sediment control plans must be reviewed to verify compliance with the local grading ordinance, other applicable local ordinances, and this Order.

- **BMP Implementation (Section D.2.d Page 40-41)**

Section D.2.d.(1)(a)(ii) requires the development and implementation of a site-specific stormwater management plan. For the same reasons discussed above, the Copermittees recommend that this section be modified as follows:

(ii) Development and implementation of a site-specific ~~stormwater management plan~~ erosion and sediment control plan;

Section D.2.d.(1)(c)(i) (Page 41) states that the Copermittees must require implementation of advanced treatment for sediment at construction sites that are determined to be an exceptional threat to water quality.

The Fact Sheet provides no justification for this requirement. The newly released preliminary draft Statewide Construction General Stormwater Permit identifies the Active Treatment System (ATS ) as an advanced sediment treatment technology. The ATS prevents or reduces the release of fine particles from construction sites by employing chemical coagulation, chemical flocculation, or electrocoagulation to aid in the reduction of turbidity caused by fine suspended sediment. The preliminary draft permit, requires the use of ATS *or source controls* where the project soils exceed 10% medium silt.

Since advanced sediment treatment is a newly emerging statewide issue that needs to be fully vetted to address a host of issues including potential byproducts and application of limitations and other options, this provision should be deleted until the costs and benefits of this particular BMP are better understood.

## Municipal

- **Flood Control Structures (Section D.3.a.(4)(c) Page 47)**

Section D.3.a.(4)(c) requires the Copermitees to evaluate existing flood control devices to identify those that are causing or contributing to a condition of pollution, identify measures to reduce or eliminate the structure's effect on pollution, and evaluate the feasibility of retrofitting the structure. This provision is problematic for several reasons as described below.

The current Order (Order No. R9-2002-0001) requires that the Copermitees "evaluate the feasibility of retrofitting existing structural flood control devices and retrofit where needed" [(F.3.a.(4)(b)i)]. The Copermitees completed this in November 2003 with the submittal of a technical memorandum *Identification of Retrofitting Opportunities – Existing Channel Assessment*. The purpose of the flood control channel assessment was to identify locations within the flood control channel system that, based on a qualitative assessment, appear to have potential for modification to enhance beneficial uses or provide a water quality (pollution control) function.

Based on an identification and field review of channel segment locations throughout the County, approximately 20 locations were identified as having the potential for reconfiguration, four (4) of which were in the San Diego Region. However, before final selection and implementation of these identified potential retrofit locations can occur, quantitative analyses must be conducted to ensure that the flood control/drainage function of the channels is not compromised, and project specific design, cost estimate, and environmental permitting/coordination work must be conducted. Thus, the provision is duplicative of work that has already been completed under the existing permit and, therefore, unnecessary.

The federal regulations [40 CFR, Part 122.26(d)(2)(vi)(A)(4)] focus on evaluating flood control devices and determining if retrofitting the device is feasible. The regulations state:

(4) A description of procedures to assure that flood management projects assess the impacts on the water quality of receiving water bodies and that existing structural flood control devices have been evaluated to determine if retrofitting the device to provide additional pollutant removal from stormwater is feasible.

The language should be modified so that it is aligned with the current stormwater permit, recognizes the work that has been completed, is consistent with the intent of the federal regulations, and is consistent with the justification within the Fact Sheet. The proposed language modification is as follows:

(4). BMP Implementation for Flood Control Structures

(c) Each Permittee who owns or operates flood control devices/facilities must continue to evaluate its existing flood control devices/facilities, identify devices causing or contributing to a condition of pollution, identify measures to reduce or eliminate the structure's effect on pollution, as needed and identify opportunities and the feasibility of configuring and/or reconfiguring channel segments/structural devices to function as pollution control devices to protect beneficial uses. The inventory and updated evaluation must be completed by July 1, 2008~~10~~ and submitted to the Regional Board with the Fall 2008~~10~~ annual report.

- **Street Sweeping (Section D.3.a.(5) Page 48)**

Section D.3.a.(5) requires the Copermitees to design and implement the street-sweeping program based on two new criteria including traffic counts and trash and debris. This provision is problematic for several reasons as described below.

First, the Copermitees are supportive of designing and implementing a street sweeping program that maximizes water quality benefits, and, in fact, have developed their existing program with this objective in mind. The Tentative Order should propose language that provides objectives for the program instead of strictly defining the criteria, especially since the criteria should be determined based on local needs and experience.

For example, if the street sweeping program has to “optimize the pickup of toxic automotive byproducts based on traffic counts”, there needs to be a strong technical basis for this requirement and for the relationship between traffic counts and frequency of materials deposited on the street. Although “toxic automotive byproducts” broadly includes oil, gasoline, transmission fluid, brake fluid, brake dust (specifically copper), radiator fluids and tire wear (specifically zinc), the street sweeping program is only effective at removing those byproducts which adhere to sediment particles or other large debris. Once the liquid byproducts absorb into the asphalt, the street sweeper will be ineffective at removing the material.

Second, if the Tentative Order is going to include new prescriptive street sweeping requirements, the findings must indicate why the existing street sweeping program is ineffective and the Fact Sheet must identify the technical basis for the finding and as well as demonstrate the correlation between the traffic counts and need for street sweeping.

All Copermitees maintain street sweeping programs in residential, commercial and/or industrial areas and, in 1993, the Copermitees compiled information regarding their existing street sweeping schedules and practices and subsequently changed elements of their programs such as the types of sweepers purchased, the frequency of sweeping, and the use of parking restrictions in order for the street sweeping program to more effectively aid in water quality improvements. In fact, the Copermitees have observed an 87% increase in the weight of material collected from 2001-2002 to 2004-2005 indicating a marked increase in effort and diversion of materials that would have otherwise ended up in the receiving waters<sup>4</sup>.

Since the findings and Fact Sheet do not currently support the new prescriptive requirements for street sweeping and the Copermitees have a program that has already been optimized for water quality benefits, Section D.3.a.(5) should be deleted. The Tentative Order should, instead, focus on the objectives for the program, the review/revision of model maintenance procedures as needed, and training to ensure that the program is consistently implemented.

- **Infiltration from Sanitary Sewer to MS4 (Section D.3.a.(7) Page 49)**

Although the first portion of the Tentative Order provision (7)(a) is consistent with the current permit (Order No. R9-2002-0001), the Copermitees submit that this provision is more applicable to sanitary sewer agencies, not stormwater agencies, and is an unnecessary duplication of other regulatory programs. The State Board stayed a similar provision in the existing permit as leading "significant confusion and unnecessary control activities." WQ 2002-0014 at p.8. Since that time, the State Water Resources Control Board has adopted the Statewide General Waste Discharge Requirements (WDRs) for Sanitary Sewer Systems, Water Quality Order No. 2006-0003 (Sanitary Sewer Order) on May 2, 2006 and the Regional Water Board adopted Order No. R9-2007-0005 on February 14, 2007 (which is more stringent and prescriptive than the Statewide General WDRs).

The Statewide General WDRs require public agencies that own or operate sanitary sewer systems to develop and implement sewer system management plans which, among other things, requires that the agencies describe and implement routine preventative operation and maintenance activities as well as a rehabilitation and replacement plan. The Regional Board requires that all

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<sup>4</sup> Report of Waste Discharge, July 21, 2006, Section 5.0 Municipal Activities.

sewage collection agencies within the San Diego Region comply with Order No. R9-2007-0005 as well as the Statewide General WDRs.

Since there are now two regulatory mechanisms in place to address sanitary sewer exfiltration-related issues, part (a) of the provision (7) should be deleted from the Tentative Order.

While the Copermittees agree that stormwater agencies must also address various aspects of sanitary sewer overflows and connections, the provisions in (7)(b) are aspects of other portions of the stormwater program and should be moved to those sections of the Tentative Order. The proposed changes include:

- i. *Adequate plan checking for construction and new development* – incorporate in the Construction and New Development programs
- ii. *Incident response training for municipal employees that identify sanitary sewer spills* – incorporate in the Illegal Discharges/Illicit Connections (ID/IC) program.
- iii. *Code enforcement inspections* – delete, this is covered by other programs
- iv. *MS4 maintenance and inspections* – incorporate in the Municipal program, provision D.3.a(6).
- v. *Interagency coordination with sewer agencies* – incorporate in the ID/IC program
- vi. *Proper education of municipal staff and contractors conducting field operations on the MS4 or municipal sanitary sewer (if applicable)* – incorporate in the Municipal program

### **Commercial/Industrial**

- **Commercial Sites/Sources (Section D.3.b.(1)(a) Page 53)**

The Tentative Order added four new categories of commercial sites/sources: food markets, building material retailers and storage, animal facilities, and power washing services. The Fact Sheet notes that these facilities were added because these activities were identified as potentially significant sources of pollutants in annual reports.

Although we agree that those sites/sources that are identified by the Copermittees as contributing a significant pollutant load to the MS4 should be added to the list of sites/sources and incorporated into the inventory, unless universally identified as a significant source, those determinations made at a local level should only be incorporated into the local JURMP and not universally within the Tentative Order. If these determinations are made at a local level and then the requirement applied countywide, the Board staff may inadvertently be diverting resources from high priority issues to lower priority issues.

The new categories should be deleted from the Tentative Order and, instead, recognize that those sites/sources have been locally determined to contribute a

significant pollutant load to the MS4 be should be incorporated into the local JURMP(s).

- **Mobile Businesses (Section D.3.b(3)(a) Page 55)**

The Tentative Order has added a new requirement to develop and implement a program to address discharges from mobile businesses. The program must include the identification of BMPs for the mobile business, development of an enforcement strategy, a notification effort, the development of an outreach and education program, and inspection as needed. This provision is problematic for several reasons as described below.

If the Tentative Order is going require the development and implementation of a significant new element of the commercial program, the Findings must adequately support the new requirement. The Findings do not currently address this provision.

The Fact Sheet must also provide a technical basis for the addition of the mobile business program to the commercial program, identify the basis for applying the requirement to all MS4s in their region, and ensure the water quality benefit will be commensurate to the resources necessary to develop and implement such a program.

The Fact Sheet indicates that this provision is not significantly different than the existing requirements, but then acknowledges that “mobile businesses present a unique difficulty in stormwater regulation” for several reasons including:

- The regular, effective practice of unannounced inspections is difficult to implement;
- Tracking these mobile businesses is difficult because they are often not permitted or licensed; and
- Mobile businesses are transient in nature and may have a geographic scope of several cities or the entire region.

The Copermittees agree that the development and management of a mobile business program will be very difficult and resource intensive. For all the inherent difficulties listed above, the development and implementation of a mobile business program is, in fact, significantly different from the existing commercial/ industrial program, which largely focuses on fixed facilities.

While the Copermittees understand the intent of the provision, the Tentative Order should include language that limits the scope of the provision until the costs and benefits of the program are better understood. As such, the Tentative Order should include language that allows the Copermittees to identify a mobile business category that may be a significant source of pollutants and to develop a pilot program for that category. The pilot program would allow the Copermittees to work together on a regional basis to develop an appropriate framework for addressing mobile business and determine whether the program is effective prior

to expending a significant amount of resources on multiple categories of mobile businesses.

- **Food Facility Inspections (Section D.3.b.(4)(c) Page 56)**

The Tentative Order includes new, prescriptive requirements for food facility inspections and requires that the scope of the inspections be expanded to address maintenance of greasy roof vents (c)(iv) and identification of outdoor sewer and MS4 connections (c)(v). While the issue of grease on roof vents has been discussed at the Aliso Creek meetings, the Findings and Fact Sheet do not provide any justification for the additional requirements, any clarification as to how the Copermittees would inspect for these issues, or any rationale as to how this would make the inspection program more effective or improve water quality.

In fact, the annual food facility inspection program that has been conducted over the past few years has been focused on the critical stormwater-related issues typically found at a food facility and has been effective. The existing food facility inspection program focuses on the major water-quality related issues associated with restaurants including disposal methods for food wastes, fats, oils and greases, wash water, dumpster management and floor mat cleaning. In 2004-2005 over 25,000 food facility inspections were conducted and over 1,400 were identified as having stormwater-related issues. In 2003-2004, over 12,000 inspections were conducted and about 1,300 were identified as having stormwater-related issues.

This comparison suggests that the inspections and related outreach efforts are having a positive impact since the incidence of issues is decreasing from 1 in 10 inspections to 1 in 17 inspections.

Since the food facility inspection program is focused on the major concerns that need to be addressed at a food facility and has been successful, provisions (c)(iv) and (c)(v) should either be deleted from the Tentative Order or the subject of further technical justification.

- **Third Party Inspections (Section D.3.b(4)(d) Page 57)**

The Tentative Order includes new, prescriptive requirements for third party inspections that provide a significant amount of detail as to how the inspection program must be managed. However, the Findings and the Fact Sheet do not address the need for these expanded requirements or provide any rationale as to how these new requirements would make the third-party inspection program more effective.

In fact, this level of detail should be determined locally and should be included as a part of the program within the model DAMP and local JURMPs. After the inclusion of the industrial and commercial inspection programs in the third term permit, the Copermittees determined that they could leverage their resources by utilizing and expanding upon existing inspection programs to assist them in

complying with the permit instead of creating duplicative inspection programs. The ability to utilize third-party inspections as an effective part of the program, has allowed the Copermitees to maximize their resources. An example of a third party inspection program that has been developed and implemented is the use of the Orange County Health Care Agency (OCHCA) inspectors to assist the Copermitees in inspecting 10,000 restaurants countywide on an annual basis. The Copermitees have developed this program in conjunction with OCHCA so that it is only an incremental burden on their limited resources, effective, and allows for clear communication between the inspectors and the Copermitees.

Since the Copermitees have already developed an effective framework for a third-party inspection program, provisions (i)(a) through (i)(d) are unnecessary and should be deleted from the Tentative Order.

### **ID/IC Program**

- **Investigation/Inspection and Follow Up (Section D.4.e(2)(b) and (c) Page 63)**

The Tentative Order requires that the Copermitees conduct an investigation or document why the discharge does not require an investigation within two days of receiving dry weather field screening or analytical laboratory results. Although the Copermitees understand and agree with the intent of the permit language, the existing language is onerous and does not recognize the resources that are necessary to conduct an investigation or the variability of the types of investigations that may be warranted.

It is suggested that the language be modified to preserve the intent of the requirement as follows:

(b) Field screen data: Within two business days of receiving dry weather field screening results that exceed action levels, the Copermitees must either conduct initiate an investigation to identify the source of the discharge or document the rationale for why the discharge does not pose a threat to water quality and does not need further investigation.

(c) Analytical data: Within two business days of receiving analytical laboratory results the exceed action levels, the Copermitees must either conduct initiate an investigation to identify the source of the discharge or document the rationale for why the discharge does not pose a threat to water quality and does not need further investigation.

- **Elimination of Illicit Discharges and Connections (Section D.4.f Page 64)**

The Tentative Order requires that the Copermitees “take immediate action to eliminate all detected illicit discharges....” And that illicit discharges that pose a serious threat....”must be eliminated immediately”. Although the Copermitees understand and agree with the intent of the permit language, the existing language is onerous and does not recognize the time and/or resources that are

necessary to respond. It is suggested that the language be modified to preserve the intent of the requirement as follows:

f. Elimination of Illicit Discharges and Connections

Each Permittee must take immediate action to eliminate all detected illicit discharges, illicit discharge sources, and illicit connections as soon as practicable after detection. Elimination measures may include an escalating series of enforcement actions for those illicit discharges that are not a serious threat to public health or the environment. Illicit discharges that pose a serious threat to the public's health or the environment must be eliminated immediately in a timely manner.

**Watershed Urban Runoff Management Program (Section E. page 66)**

The Tentative Order includes increasingly prescriptive requirements for the Watershed Urban Runoff Management Program (WURMP) including the designation of default Copermittee leads for each of the watershed management areas, the specific role of the Lead Permittee, the number of water quality and watershed activities that need to be implemented on an annual basis within each WMA, and a requirement for the description and assessment of each structural and non-structural management practice implemented.

The Fact Sheet states that the increased prescriptiveness for the WURMP provision was necessary because enforceability of the permit has been a critical aspect. The Fact Sheet further states that:

“For example, the watershed requirements of Order No. R9-2002-01 were some of the Order's most flexible requirements. This lack of specificity in the watershed requirements resulted in inefficient watershed compliance efforts. This situation reflects a common outcome of flexible permit language. Such language can be unclear and unenforceable, and it can lead to implementation of inadequate programs<sup>5</sup>.”

Not only do the Copermittees take strong exception to this statement, but the Fact Sheet is inconsistent with the Findings, which simply state that the WURMPs need to focus on the high priority water quality issues. In addition, the Fact Sheet does not acknowledge any of the notable Copermittee successes including 1) the development of a South Orange County Integrated Regional Watershed Management Plan (IRWMP), which resulted in a \$25 million IRWMP competitive grant award, (2) the 303(d) de-listing efforts that are ongoing and have been submitted for consideration; and 3) the efforts of the County of Orange and major landowners, such as Rancho Mission Viejo to put in place a comprehensive watershed land use/open space strategy for the San Juan Creek Watershed/Western San Mateo Watershed through the approved Southern Subregion Habitat Conservation Plan (HCP) and Special Area Management Plan (SAMP) both of which include water quality/quantity management as an integral component.

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<sup>5</sup> Fact Sheet/Technical report for Tentative Order No. R9-2007-0002, page 10

The Copermittees submit that the increased prescriptiveness of the Tentative Order is unwarranted and antithetical to a watershed management approach, which should be founded on a stakeholder driven process. Successful watershed-based programs follow a stakeholder driven process and are developed from the “bottom-up” not from the “top-down”. The Copermittees must be given latitude in how the watershed-based programs are developed and implemented, especially since many of the pollutants of concern (Cu, Zn, pesticides, pathogen indicators, etc.) and issues are the same within and among watersheds.

The language must be modified to provide the flexibility that is necessary within a watershed management program (similar to the language in Order No. R9-2002-0001) and, instead, focus on the major objectives for the program. Some language changes that would assist the Board in making these changes are provided below.

- **Lead Watershed Permittee (Section E.1.a. page 67)**

The Tentative Order has designated which entity within the watershed should be the default lead Permittee and what those responsibilities entail. The Copermittees contend that this level of detail is inappropriate for a permit provision and should, instead, be a collaborative decision that is made among the various watershed stakeholders based on locally determined criteria and needs.

The Copermittees propose that the language be modified as follows:

- a. **Lead Watershed Permittee Identification**

Watershed Copermittees may must identify the Lead Watershed Permittee for their WMA. ~~In the event that a Lead Watershed Permittee is not selected and identified by the Watershed Copermittees, by default the Permittee identified in Table 3 as the Lead Watershed Permittee for that WMA must be responsible for implementing the requirements of the Lead Watershed Permittee in that WMA.~~ The Lead Watershed Copermittees must will serve as liaisons between the Copermittees and Regional Board, where appropriate.

- **BMP Implementation and Assessment (Section E.1.e. page 70)**

The Tentative Order requires an arbitrary minimum number of “watershed program activities” to occur in each year (during each reporting period the Copermittees must implement no less than 2 “watershed water quality activities” and 1 “watershed education activity”). The Fact Sheet states that the Copermittees have completed the assessments, prioritization, and collaboration and now need to implement the activities identified.

While the Copermittees agree that there are activities that will be undertaken in conformance with the WURMP, the Tentative Order should not presuppose that the Copermittees will not follow through with implementation of the WUMRPs now they have been developed. Since this requirement is unfounded, onerous,

arbitrary, and dictates a top-down approach for managing the watersheds, the language should be modified to incorporate the flexibility necessary for the stakeholders to identify the BMPs to be implemented and the details of that implementation. The Tentative Order language should be modified to remove the prescriptive detail and incorporate more flexible language that will ensure that the WURMPs contain performance standards, timeframes for implementation, responsible parties and methods for measuring the effectiveness of their programs.

#### **Fiscal Analysis (Section F. Page 74)**

Section F of the Tentative Order requires the Copermittees to secure the resources necessary to implement the permit, conduct a fiscal analysis of the stormwater program including the expenditures and fiscal benefits realized from the program, and develop a long-term funding strategy and business plan. While the Copermittees agree with Board staff that there is an identified need to prepare a fiscal reporting strategy to better define the expenditure and budget line items and to reduce the variability in the reported program costs and have committed to do such in the ROWD, the Copermittees take exception to the requirement to develop a long-term funding strategy and business plan and identify the fiscal benefits realized from the program. The concerns for both of these new requirements are discussed in further detail below.

#### *Long Term Funding Strategy and Business Plan*

The Tentative Order requires that each Copermittee submit a funding business plan that identifies the long-term strategy for program funding decisions. The Fact Sheet states that this requirement is based on the need to improve the long-term viability of the program and is based on the 2006 *Guidance for Municipal Stormwater Funding* from the National Association of Flood and Stormwater Management Agencies (NAFSMA). The Fact Sheet further indicates that, without a clear plan, that the Board has uncertainty regarding the implementation of the program.

The Copermittees submit that this requirement, which is, perhaps, more reasonable for a newly developing stormwater program, is an unnecessary and burdensome requirement for the Copermittees that will yield no commensurate benefit to water quality and divert precious resources away from the implementation of the program. In addition, the rationale for this provision is taken out of context and unnecessary for the Orange County Program for two reasons.

First, while Board staff rely heavily on the 2006 NAFSMA *Guidance for Municipal Stormwater Funding* to justify this new requirement, this national guidance document was developed to provide a resource to local governments as they address stormwater program financing challenges and primarily focuses on the considerations and requirements for developing a service/user/utility fee. While the guidance document states that the most “successful” programs have developed a business plan to guide the program evolution and funding decisions, it is not a one

size fits all approach that should be applied to every program, nor is it warranted for the Orange County Program.

Second, the Copermitees have a demonstrated history of compliance and leadership in developing, implementing and adequately funding the stormwater program. Regardless of the source of funds, a historical review of the expenditures to date provide undisputable evidence that the Copermitees are dedicated to the program, plan their budgets accordingly, and have adequately funded the program for the past 16 years (**Figures 1 and 2**).

The Copermitees have two types of costs: shared costs and individual costs.

- Shared Costs – Over the last three permit terms the shared costs have increased from just under \$300,000 to almost \$6 million. The shared costs are those costs that fund the activities performed by the County of Orange as Principal Permittee
- Individual Costs - Over the last three permit terms the individual costs have increased from just over \$30 million to a projected amount of almost \$102 million for 2006-2007. Individual costs are those costs incurred by the Copermitees for the implementation of their local program (including capital and operation and maintenance costs).

**Figure 1. Historical Review of Shared Costs (1990-2006)**

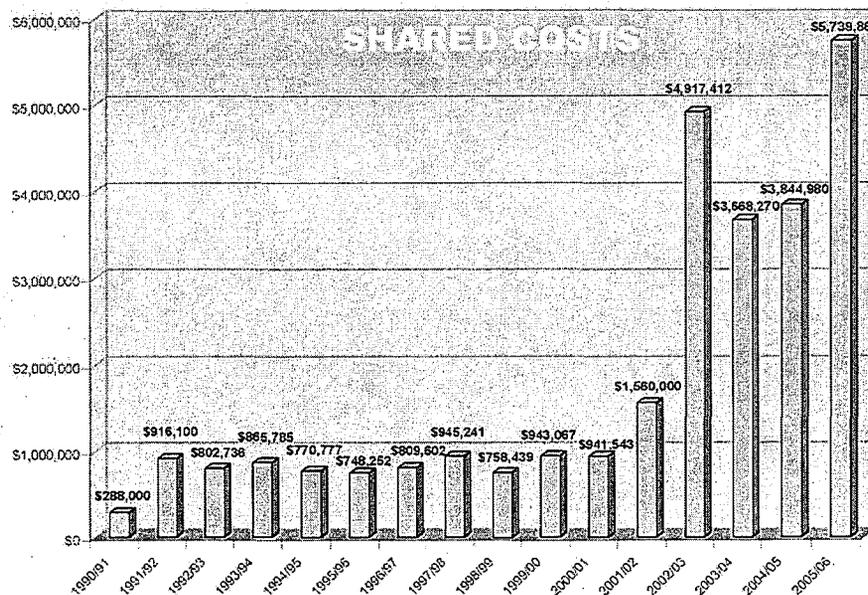
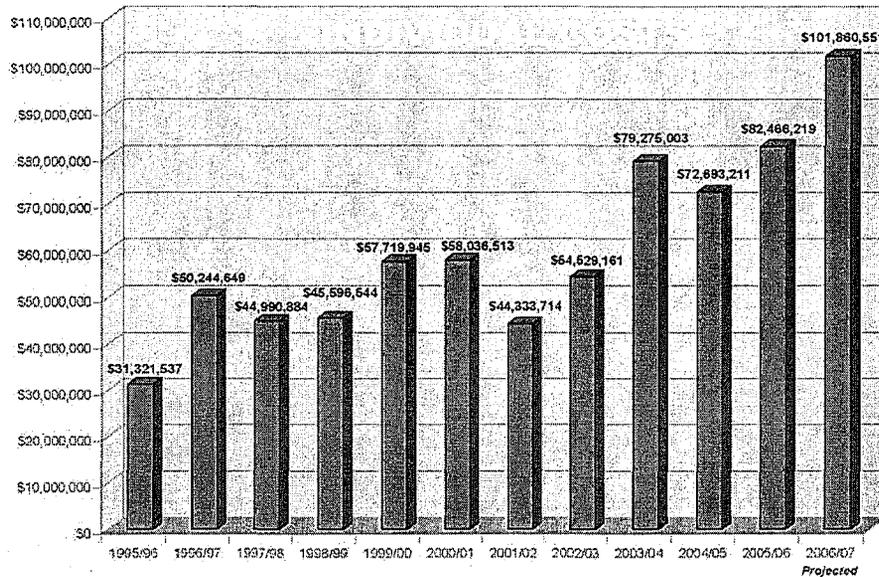


Figure 2. Historical Review of Individual Costs (1995-2007)



While the Copermitees are committed to providing increased standardization for their reporting, they have a demonstrated history of adequately funding the program and committing additional resources as needed. As a result, this provision (F.3.) is unnecessary and should be deleted from the Tentative Order.

### *Fiscal Benefits*

The Tentative Order requires the Copermitees to include a qualitative or quantitative description of fiscal benefits realized from the implementation of the stormwater program. This requirement is problematic for three reasons. First, the requirement goes beyond the federal mandate to provide a fiscal analysis of the necessary capital and operation and maintenance expenditures to implement the program, second, the Board staff rely heavily on the 2006 NAFSMA *Guidance for Municipal Stormwater Funding* for justifying this new requirement.

The federal regulations [40 CFR, Part 122.26(d)(2)(vi)] require the following:  
(vi) *Fiscal Analysis*. For each fiscal year to be covered by the permit, a fiscal analysis of the necessary capital and operation and maintenance expenditures necessary to accomplish the activities of the program under

paragraphs (d)(2) (iii) and (iv) of this section. Such analysis shall include a description of the source of funds that are proposed to meet the necessary expenditures, including legal restrictions on the use of such funds.

Not only do the federal regulations not require a qualitative or quantitative description of the fiscal benefits realized from the implementation of the program, it is unclear as to how one would do this and the level of analysis that would be required.

While the Fact Sheet indicates that this new requirement is based on the 2006 NAFSMA *Guidance for Municipal Stormwater Funding*, the concept is taken out of context and misapplied within the Tentative Order. The national guidance document does not suggest that stormwater programs should unilaterally identify the benefits realized from the implementation of the program as a part of the annual fiscal reporting, rather it discusses the need to identify benefits of a program if one is establishing a utility/user fee so that there is a nexus between the fee and the services or benefits provided to ensure that the fee is commensurate with such services.

Since the Copermittees have already committed to preparing a fiscal reporting strategy to better define the expenditure and budget line items included in the fiscal report, which will enhance the reporting that is required pursuant to the federal regulations, Section (F.2.c.) should be deleted from the Tentative Order.

#### **Program Effectiveness Assessment (Section G. Page 75)**

Section G. of the Tentative Order requires the Copermittees to assess the effectiveness of their JURMP, identify necessary program modifications, and report that information to the Regional Water Board on annual basis. Section G.1.A. identifies specific water quality-based objectives for 303(d) listed water bodies, environmentally sensitive areas (ESAs), and the major program components.

Although the concept and intent of the provision is understood and supported by the Copermittees, the specificity and inclusion of the required water quality-based objectives and focus on the 303(d) listed water bodies and ESAs is misplaced and has not been developed within the context of the California Stormwater Quality Association (CASQA) Guidance, the existing Orange County program effectiveness assessment framework and metrics, or the recommendations within the ROWD (Section 1.2.2). In addition, the Tentative Order also requires that each Copermittee conduct their own assessments including integrated assessments, which are more effective on a regional scale and over a longer timeframe. As written, this section of the Tentative Order does not provide flexibility for the Copermittees to develop objectives and an overall strategy for the effectiveness assessment and will result in resources being expended without achieving the intended goal.

Since the Copermittees have already developed and implemented a program effectiveness assessment framework and programmatic and environmental

performance metrics and have committed to developing metric definitions and guidance to improve the efficacy of the assessments in the ROWD, the provision should be modified to allow the Copermitees to functionally update their long-term effectiveness assessment (LTEA). The updated LTEA would build on the existing framework that has been utilized within the County for the past four years as well as the CASQA Municipal Stormwater Program Effectiveness Assessment Guidance Document, which is due for release in early April, and would assess the jurisdictional, countywide, and watershed-based elements of the stormwater program. The long-term strategy would include the purpose, objectives, and methods for the assessments and achieve the Regional Water Board staff objectives.

The proposed language, which is provided below, would replace G.1. and G.2. of the Tentative Order and is based on the current permit requirements.

The proposed language is:

a. As part of its individual Jurisdictional URMP, each Permittee shall develop update a their long-term strategy for assessing the effectiveness of its individual Jurisdictional URMP based on lessons learned from the existing program framework and available guidance. The long-term assessment strategy shall identify the purpose, objectives, methods and specific direct and indirect measurements that each Permittee will use to track the long-term progress of its individual Jurisdictional URMP towards achieving improvements in receiving water quality. Methods used for assessing effectiveness shall include the following or their equivalent: surveys, pollutant loading estimations, and receiving water quality monitoring. The long-term strategy shall also discuss the role of monitoring data in substantiating or refining the assessment.

b. As part of its individual Jurisdictional URMP Annual Report, each Permittee shall include an assessment of the effectiveness of its Jurisdictional URMP using the direct and indirect assessment measurements and methods developed in its long-term assessment strategy. The updated long-term strategy shall be submitted within 365 days after adoption of the permit.

i. Long-term strategy for assessing the effectiveness of the Watershed URMP. As part of the WURMPs, the watershed Copermitees shall update their long-term strategy for assessing the effectiveness of the WURMPs based on lessons learned from the existing program framework and available guidance. The long-term assessment strategy shall identify the purpose, objectives, methods and specific direct and indirect performance measurements that will track the long-term progress of Watershed URMP towards achieving improvements in receiving water quality impacted by urban runoff discharges. Methods used for assessing effectiveness shall include the following or their equivalent: surveys, pollutant loading estimations, and receiving water quality monitoring. The long-term strategy shall also discuss the role of monitoring data in substantiating or refining the assessment. The updated long-term strategy shall be submitted within 365 days after adoption of the permit.

**Reporting (Section H. Pages 77-80 and Section E. Page72)**

Section H of the Tentative Order requires the Copermittees to submit the following reports:

- Individual and Unified JURMP annual reports - September 30 of each year (July 1 – June 30)
- Individual and Unified WURMP annual reports - January 31 of each year (July 1 – June 30)

Although the Copermittees understand that the Tentative Order included these changes to allow for a longer time period between the two sets of submittals, the Copermittees would receive more benefit from keeping the two timelines for the submittals aligned. As such, the language should be revised so that the JURMPs and WURMPs are submitted January 31<sup>6</sup> of each year. This will allow the Copermittees to assess their stormwater program and water quality monitoring program and conduct an integrated assessment to identify water quality improvements.

Section E.3. requires that the Copermittees submit the Aliso Creek WURMP annual report by March 1 of each year for the period January – December of the previous year. Since the Watershed Action Plan Annual Report for the Aliso Creek Watershed has historically been submitted in November of each year and has been based on the fiscal year like the other WURMP reports, it is unclear why Board staff are requiring this change. As such, the Aliso Creek WURMP submittal is now inconsistent with the other WURMP submittals both in the date for submittal and the time period for which the report covers.

The submittal date for the Aliso Creek WURMP annual report should be modified to be aligned with the other WURMP submittals. The proposed language modification is as follows:

3. Aliso Creek Watershed URMP Provisions
  - b. Each Permittee must provide annual reports by ~~March 1~~ January 31 of each year beginning in 2008~~9~~ for the preceeding annual period of ~~January~~ July 1 through ~~December~~ June 30.....

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<sup>6</sup> Reporting schedules will need to be aligned with the Santa Ana Permit reporting schedules.

## ATTACHMENT C

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

#### INTRODUCTION

Attachment C contains the principal technical comments of the County of Orange (the "County") regarding the monitoring and reporting requirements of Tentative Order No. R9-2007-0002 dated February 9, 2007 ("Tentative Order").

These comments are divided into two sections: (1) General Comments, and (2) Specific Comments. The first section discusses the County's strategic concern with the Tentative Order's requirement, whereas the latter section addresses issues relating to specific requirements.

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. R9-2007-0002 and the supporting Fact Sheet/Technical Report to the Regional Board in the future.

#### GENERAL COMMENTS

The principal goal of the Copermitees' environmental monitoring program is to support the Drainage Area Management Plan. This goal is entirely consistent with other observations on the role of monitoring. For example, "monitoring is most useful when it results in more effective management decisions, specifically management decisions that protect or rehabilitate the environment." (NAS, 1991<sup>1</sup>). A number of the proposed modifications to the monitoring program do not appear to be supportive of this goal. Further, as changes in protocols and procedures are mandated there is a significant risk that they start to compromise the integrity and value of what is increasingly being recognized as one of the most comprehensive urban stormwater quality data sets in the United States. Finally, while the Board's interest in moving toward greater regional consistency is recognized, the Permitees are concerned that requirements are being prescribed without due consideration of the needs of south Orange County.

#### SPECIFIC COMMENTS

##### **E.II.A.1.c. Timing of Mass Loading Station (MLS) Monitoring**

The requirement to sample the first wet weather event of the year at each MLS needs to be considered in the context of the entire Orange County effort. Including the six MLSS

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<sup>1</sup> Managing Troubled Waters, National Academy of Sciences, 1991

in the tentative order, there would in future be eighteen MLSs in Orange County requiring “first flush” sampling.

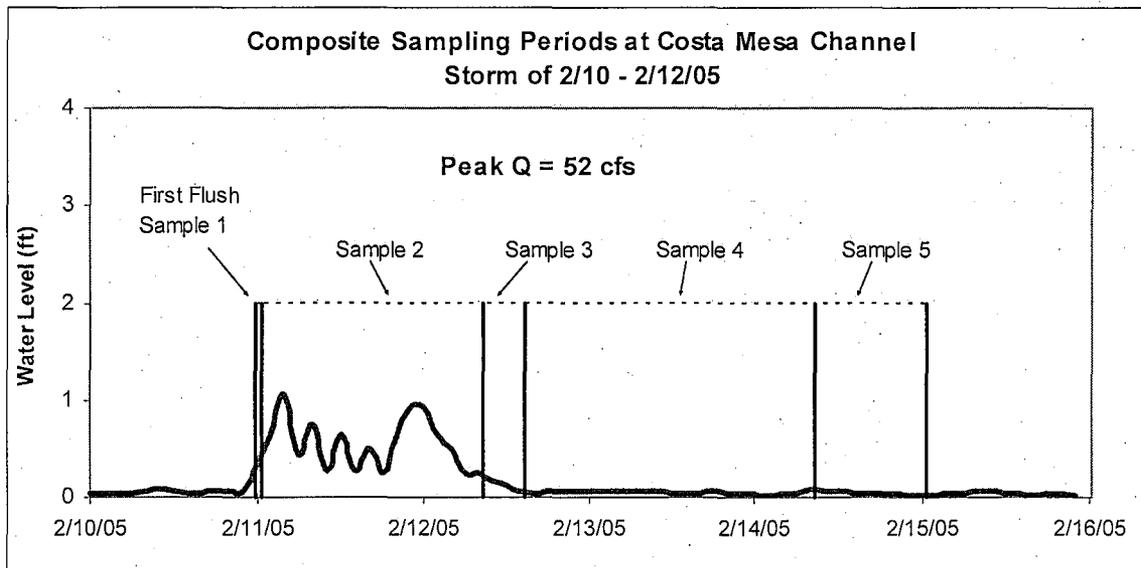
Proposed modification:

The requirement to increase the “first flush” sampling effort needs to be predicated on an assessment and finding of need.

#### E.II.A1.d. Flow-weighting of Wet Weather Samples

The requirement to collect flow-weighted composite stormwater samples will not allow accurate comparisons to CTR criteria for chronic toxicity due to dissolved metals. The County’s present method provides a more thorough and reliable characterization of a storm with respect to comparison to water quality standards. 3-5 time-weighted composite samples are collected during a 4-day period to characterize a storm and its subsequent effects (see example below). The first flush sample is collected over an hour period and is comprised of six discrete samplings 12 minutes apart. The subsequent composite samples are prepared from bi-hourly samples.

The analyte concentrations from each of the composite samples are combined with the respective discharge volumes during the composite samplings to calculate the individual and total stormwater loads. The dissolved metals concentrations from each of the samples are compared to the CTR acute criteria. The time-weighted average dissolved metals concentrations for the 4-day sampling period are compared to the CTR chronic criteria.



Flow-weighted compositing by field instrumentation (automatic sampler linked to portable flowmeter) has many disadvantages including:

- Since the components are linked, if one component fails the system fails.

- When programming the autosampler the operator must have a fairly accurate prediction of the size of the storm. If the magnitude is over predicted the sampler will not collect enough volume for all of the required analyses. If the magnitude is under predicted the autosampler will collect too frequently and the latter part of the storm will be missed unless the autosampler is serviced before or immediately after the time of the last sampling. Since the County will be required to monitor 18 MLSs during the first measurable rain event of the season this type of maintenance is not possible.
- The channel rating must be accurate at the time of sampling. Flow rates are calculated from the water level records using the channel rating (stage-discharge relationship). Presently, water level records are processed at the end of monitoring year (quarterly for Santa Ana Region TMDL programs). The water level records are adjusted (with shifts) to reflect changes in the stage-discharge relationship arising from sediment deposition/scouring or new instantaneous discharge measurements. These adjustments can result in significant differences in the calculated discharge rates.

If the County were required to modify its current automatic sampling procedure for stormwater, manpower limitations would dictate that the process be conducted by flow-weighted compositing in the laboratory as described in EPA 833-B-92-001 Exhibit 3-20 (constant time – volume proportional to flow rate). Aliquots from each bottle, proportional to flow rate at the time of collection would be composited into a single large container. Aliquots from the container would be submitted for the required analyses.

Advantages:

- The autosampler and the flowmeter are not linked, reducing the likelihood of sampling failure.
- Unscheduled autosampler servicing (to reprogram the collection frequency due to changes in storm magnitude) would not be required.

Disadvantages:

- The volume of a composite sample may not be great enough to accommodate all of the chemical and toxicity testing analyses. For short duration storms the volume of the composite sample would be much smaller. Presently Orange County analyzes chronic toxicity in mass emissions samples with multiple dilution tests. Some of these tests require substantial volume. Approximately 4 gallons of sample are required for toxicity tests currently conducted on stormwater samples under the third term permit.
- The space limitations of the County's laboratory would severely hinder expeditious processing of all of the samples from the first measurable event of each year.

Two automatic samplers, operating simultaneously, would be used to collect bi-hourly samples. Each sampler contains eight 1.8-liter glass bottles and the site would have to be serviced at least every 16 hours to change bottles and power supplies. The maximum volume collected in each bi-hourly sampling is  $2 \times 1.8 = 3.6$  liters. The volume from each bi-hourly sampling used in the composite sample is calculated as:

$$V_i = V_L[(V_{imax}Q_i/Q_{imax}) / (V_{imax}Q_i/Q_{imax})] \text{ where}$$

$V_i$  = volume from each bi-hourly sampling

$V_L$  = volume required for all analyses

$V_{imax}$  = volume of the bi-hourly sample corresponding to the greatest discharge rate

$Q_i$  = flow rate for sample  $i$

$Q_{imax}$  = maximum flow rate recorded for any bi-hourly sampling

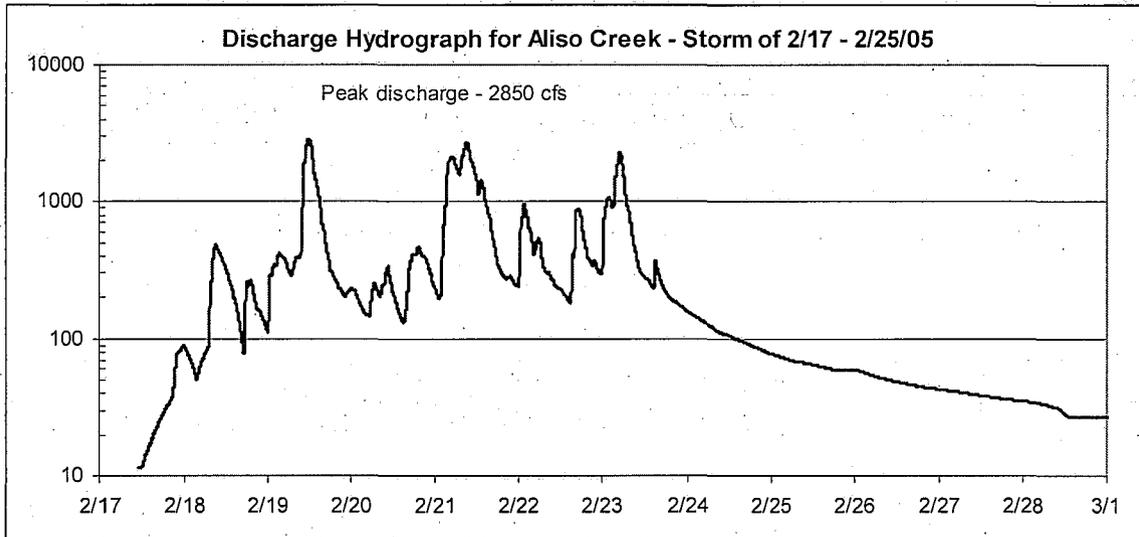
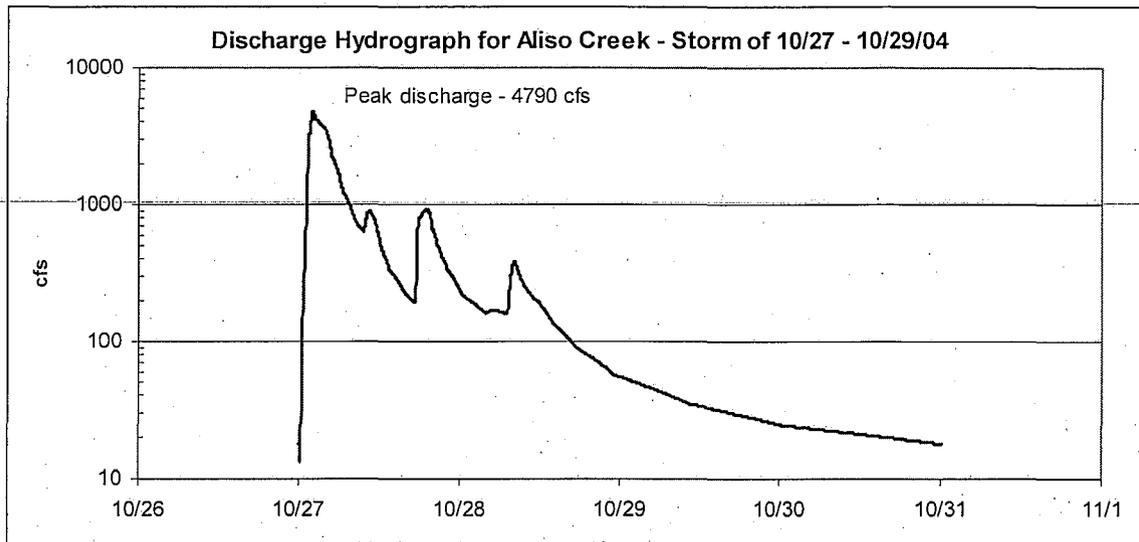
$(V_{imax}Q_i/Q_{imax})$  must first be calculated to ensure that it is greater than  $V_L$ . If it is not, the equation becomes:

$$V_i = V_{imax}Q_i/Q_{imax}$$

The following two discharge hydrographs illustrate the disadvantages of flow-composite sampling using automatic sampling and laboratory compositing. The first storm spans approximately two days and has a significant peak discharge. Assuming a maximum sample bi-hourly sample volume of 3.6 liters, the total volume of the composite sample would be just 12.9 liters. The sample volumes required for chemical and toxicity tests used in the program are tabulated below.

	Analysis	Req. Vol. (L)	
		0-1 dilutions	5 dilutions
	Nutrients incl. TSS	1.5	
	Trace Metals (total)	0.25	
	Trace Metals (diss)	0.25	
	OP + Pyrethroid Pesticides	2.0	
	Carbamate Pesticides	1.0	
	DOC	0.25	
	TOC	0.25	
	TDS	0.25	
	<b>Toxicity Tests</b>	0-1 dilutions	5 dilutions
1	Ceriodaphnia survival/reproduction	6	10
2	Hyaella survival	1.5	3
3	Selenastrum growth	1.5	3
	<b>Total Chem + Tox 1-3</b>	<b>14.75</b>	<b>21.75</b>
4	Mysid survival/growth	10	14
5	Sea Urchin fertilization	1	1
6	Fathead Minnow survival	10	14
	<b>Total Chem + Tox 1,5,6</b>	<b>22.75</b>	<b>30.75</b>
	<b>Total Chem + Tox 1,4,5,6</b>	<b>32.75</b>	<b>44.75</b>

Storm 2 spans more than seven days and would generate enough volume in the composite to accommodate all analyses. However, these seven days of sampling would yield approximately 90 bi-hourly samples (90 1.8-liter bottles) which would have to be stored and refrigerated until the sampling was completed and the maximum discharge rate determined.



**Proposed Modification:**

Clearly the choice of automatic sampling options is not an easy one. The present method and the constant time – volume proportional to flow rate method each have advantages and disadvantages. The choice should not be solely based on costs or logistics. The County recommends that a pilot study be conducted to determine the differences between the two methods rather than making such a significant change to the direction of the monitoring program through the permit process.

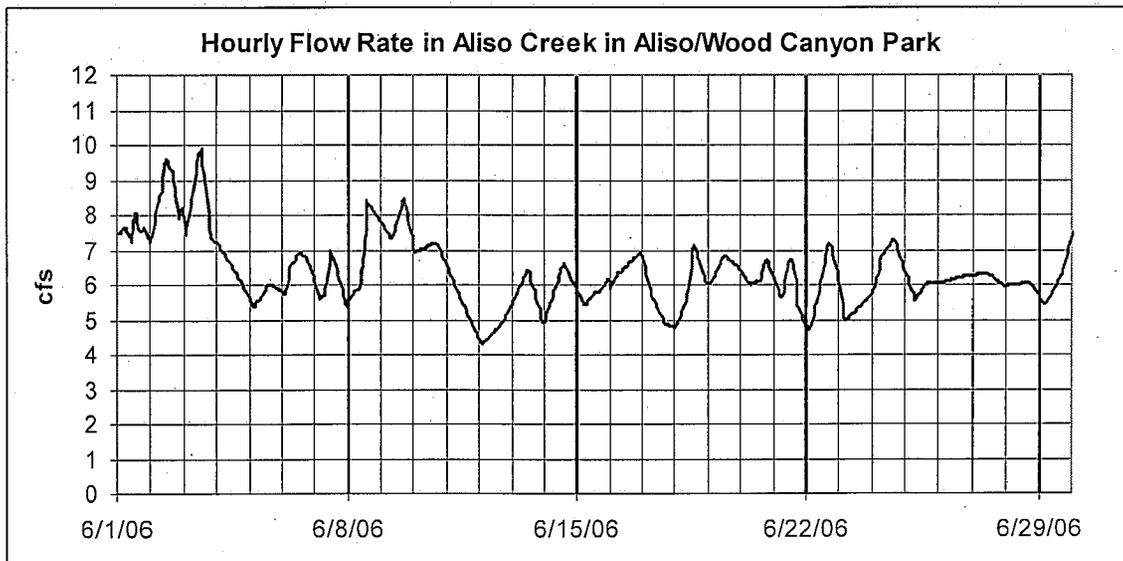
Until the study is completed, the monitoring protocols would remain the same as in the third permit.

### E.II.A.1.d. Dry Weather Composite Sampling

The proposed frequency of sample collection (minimum 3 samples / hour) during dry weather monitoring at MLSs does not support the objective of identifying illegal discharges and illicit connections and presents significant technical challenges. During a "typical" 24-hour period, flow rate at an MLS does not vary significantly and the changes in water chemistry at an MLS would be muted because of the large size of the watershed and the number of stormdrain inputs.

In order to comply with this requirement these composite samples would have to be prepared using the constant time – volume proportional to flow increment method (EPA 833-B-92-001 Exhibit 3-19) or constant time – volume proportional to flow rate method (Exhibit 3-20). Either method would require that 72 discrete samples be collected during a 24-hour period and that the samples be flow-composited in the laboratory. Automatic samplers linked to flowmeters will not accommodate both constant time collection and and flow-compositing during the same sampling period. To collect 3 samples/hour and produce a flow-composite sample, three automatic samplers would be required at each site for each event.

The flow rate at an MLS, as noted above, does not vary significantly during a typical 24-hour day. Below is a graphic showing the hourly flow rate in Aliso Creek at the streamgauge in Aliso/Wood Canyon Wilderness Park during June of 2006. As can be seen from the graph, the greatest difference between the maximum and minimum hourly flow rates during any 24-hour period is less than 35% of the maximum value (9.9 cfs at 13:00 on 6/3 and 6.5 cfs at 12:00 on 6/4). To produce a flow-composite sample, aliquots from each of the 72 samples collected during the 24-hour period would be combined in a single container. The volume of each of the aliquots would be proportional to the flow rate ( $q_i/q_t$ ) at the time of sample collection and the volume of the sample collected at the maximum flowrate. Unless the pollutant discharge occurred over several hours or if the concentration of the pollutant was several orders of magnitude above the baseline concentration, it would be difficult to detect intermittent illegal discharges from the composite sample concentration.



Proposed Modification:

Conduct dry-weather monitoring at MLSs with time-weighted composite samples composed of 24 discrete hourly samples. Compute the mass loads of pollutants as the product of the composite sample concentration and the total volume of water discharged past the monitoring point during the time of sample collection.

**E.II.A.1.g. Analytical Testing for Mass Loading, Bioassessment, and Ambient Coastal Receiving Waters**

Nitrite is readily oxidized to nitrate in the natural aquatic environment. Analysis of this form of nitrogen would not provide any added benefit and would significantly increase program costs. Presently and in prior permit monitoring programs, the concentrations of nitrite + nitrate has been determined and reported as  $\text{NO}_3$ .

Proposed Modification:

Analyze nitrite + nitrate together as in prior monitoring programs.

**Pyrethroid Pesticides**

Pyrethroid pesticides are very insoluble and tend to bind to sediment. They would not be detected in an aqueous sample unless the sample had a very high concentration of suspended solids.

Proposed Modification:

Analyze Pyrethroid pesticides in sediments at Bioassessment sites and in Dana Point Harbor.

**E.II.A.1.h.(1) DDE Monitoring at the San Juan Creek MLS**

Assuming that the requirement to add DDE monitoring was a product of the 303(d) listing of San Juan Creek for DDE, the MLS is not within the water quality limited segment defined by the 303(d) list. The listing was based on samplings conducted at SWAMP station San Juan Creek 9. The 2006 303(d) list states that the estimated size affected is 1 mile. The San Juan Creek MLS is two miles upstream of San Juan Creek 9.

Proposed Modification:

Do not add DDE monitoring at the San Juan Creek MLS.

**E.II.A1.i. Toxicity Testing at MLSs**

The proposed requirement would result in a change in toxicity testing organisms at MLSs. Presently toxicity of stormwater discharges is measured using multiple dilution tests with marine organisms to assess the impact of stormwater on the coastal

environment. In the Santa Ana Region monitoring program, testing with marine and freshwater organisms is used.

The TDS concentration in at least two (Prima and Segunda Deschecha Channels) of the six MLSs is great enough to negatively affect the toxicity test using *Ceriodaphnia dubia*. The seepage of local saline groundwater into these channels causes these high TDS concentrations.

Proposed Modification:

For dry-weather samples conduct toxicity testing with:

1. Chronic (7-day) survival test with *Ceriodaphnia dubia*. Measure the specific conductance of the sample first. If the conductance exceeds 2500 mhos/cm, substitute *Daphnia magna* and conduct chronic toxicity test (EPA/600/D-87/080, March 1987).
2. Chronic (96-hour) growth test with *Selenastrum capricornutum*
3. Acute survival test with *Hyalella azteca*.

For stormwater samples conduct toxicity testing with:

1. Chronic (7-day) survival test with *Ceriodaphnia dubia*. Measure the specific conductance of the sample first. If the conductance exceeds 2500 mhos/cm, substitute *Daphnia magna* and conduct chronic toxicity test (EPA/600/D-87/080, March 1987).
2. Chronic (96-hr) survival/growth test with *Americamysis bahia*.
3. Chronic (40-min exposure) fertilization test with *Stronglyocentrotus purpuratus*.
4. Chronic (96-hr) survival/growth with larval *Pimphales promelas*.

#### **E.II.A.4.b. Toxicity Testing at ACRW Sites**

The Tentative Order proposes the use of freshwater organisms for toxicity testing. Historically, the aqueous toxicity tests have been conducted with marine organisms since the intent of the program is to evaluate the impact of urban runoff on the coastal receiving waters.

Proposed Modification:

Continue to use marine organisms for toxicity testing at the ACRW sites.

#### **E.II.A.5.c.(1) Continue Baseline Monitoring at CSDO Sites**

The list of sites to continue baseline monitoring (weekly sampling of indicator bacteria in the stormdrain and the surfzone) includes four stormdrains (MAINBC, LINDAL, BLULGN and PEARL) which are diverted during the AB-411 season. There should be no requirement to sample while drains are being diverted.

#### **E.II.A.5.c.(2) Special Investigations**

The Permittees have conducted numerous bacterial source investigations in the Region including:

1. Aliso Creek 13225 Directive Monitoring Plan and J03P02 Cleanup and Abatement Order Monitoring Plan. 2001-2005. Quarterly Progress Reports can be found on the Watershed and Coastal Resources Website at:  
[http://www.ocwatersheds.com/watersheds/Aliso\\_reports\\_studies.asp](http://www.ocwatersheds.com/watersheds/Aliso_reports_studies.asp)
2. San Juan Creek Microbial Source Tracking Study conducted by the Orange County Health Care Agency and the University of South Florida, 2002. The Report can be found on the Watershed and Coastal Resources Website at:  
[http://www.ocwatersheds.com/watersheds/sanjuan\\_reports\\_studies\\_Qtr1\\_section1.asp](http://www.ocwatersheds.com/watersheds/sanjuan_reports_studies_Qtr1_section1.asp)
3. Bacterial Source Tracking Study on Prima Deshecha Channel conducted by MEC/Weston Solutions on behalf of the County and San Clemente, 2006.

These studies need to be explicitly recognized in the Tentative Order and duplicative efforts not required.

Proposed Modification:

Requirements for bacterial source investigations should be stayed pending development of emerging source tracking methodologies.

#### **E.II.B.1 MS4 Outfall Monitoring During Wet Weather**

The requirement to monitor MS4 outfalls during wet weather does not support source investigations.

Proposed Modification:

Continue to use the Dry-weather Reconnaissance data as the primary monitoring effort to identify potential sources within the watershed.

**County of Orange Comment Letter**  
**Dated August 22, 2007**



# COUNTY OF ORANGE

RESOURCES & DEVELOPMENT MANAGEMENT DEPARTMENT

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August 22, 2007

By E-mail and U.S. Mail

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

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

Dear Mr. Robertus:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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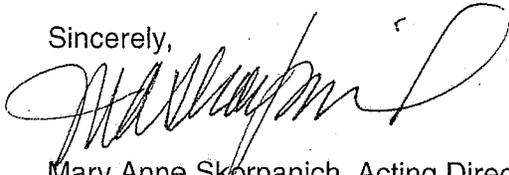
Thank you for your attention to the County's concerns with the Revised Tentative Order. We appreciate the effort you and your staff have devoted to the development of the fourth-term MS4 permit for the Orange County Program. While we believe the Revised Tentative Order is deficient in several significant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

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

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

Sincerely,



Mary Anne Skorpanich, Acting Director  
Watershed & Coastal Resources Division

Attachment: Initial Comments

cc: Regional Board Members  
Technical Advisory Committee  
Copermittees

**County of Orange Comment Letter  
Dated January 24, 2008**



**COUNTY OF ORANGE**  
**RESOURCES & DEVELOPMENT MANAGEMENT DEPARTMENT**

*Bryan Specgle, Director*

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January 24, 2008

By E-mail and U.S. Mail

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

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

Dear Mr. Robertus:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Moreover, Copermittees do not necessarily have the authority to levy service fees to pay for the State mandate. The December 2007 Fact Sheet presumes, but makes no specific findings, that Copermittees have the authority to levy such service fees. In fact, to the extent such service fees are "property-related," Copermittees can only levy them once approved by the affected property owners or electorate. See California Constitution, Article XIII D, Section 6(c); *Howard Jarvis Taxpayers Ass'n, v. City of Salinas*, 98 Cal. App. 4th 1351 (2002). The *City of Salinas* case dealt precisely with this issue. The City of Salinas established a fee to recover costs related to compliance with its MS4 Permit. The fee was based largely on the amount of impervious area on a developed parcel. The Court held that this fee was property-related and, thus, subject to voter-approval requirements. 98 Cal. App. 4th at 1356. Only if the fee was a use-based charge, directly based on use of city services (such as the metered use of water), could the fee avoid the voter-approval requirements of Article XIII D. The City of Salinas' method to allocate the fee based on the amount of impervious area so as to assure that the fee charged would be proportional to the burden being placed on the city's storm drain system was not sufficiently direct to qualify as a use-based fee exempt from the requirements of Article XIII D. 98 Cal. App. 4th at 1355.<sup>6</sup>

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

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

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

**D. Copermittees Do Not Have a Real Choice.**

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

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

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

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

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

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