

C) MALs Are More Restrictive than the Basin Plan and Establish New Water Quality Objectives for a Water Body

Instead of identifying “bad actors,” the MALs as calculated in the Tentative Order may actually establish new water quality objectives for a waterbody or, at the very least, may establish action levels that are more restrictive than applicable water quality objectives for the waterbodies in question. For example, the Tentative Order proposes a MAL for total nickel of 26.34 ug/L that must be compiled with 80% of the time based on a running average. A comparison of the nickel MAL with the Basin Plan water quality objective is shown below in Table 3.

Table 3 - Comparison of MALs v. Basin Plan Water Quality Objective for Nickel¹

Constituent	Units	Municipal Action Levels ²	Basin Plan ³
Nickel	ug/L	26.34	469

1. Measured as total
2. Table 4, as modified in 4/29/09 Tentative Updates.
3. From California Toxic Rule and assuming acute criterion and 100 mg/L as CaCO₃ hardness and default conversion factors.

A review of the table demonstrates that the MAL is considerably more restrictive than the water quality objectives (in the case of nickel, the MAL is nearly 18 times more restrictive than the water quality objective). Thus it is very possible that the County would be held responsible for significantly reducing its lead and nickel concentrations even though the water body receiving the discharge is in compliance with the water quality standard. To demonstrate this point water, quality data were compiled for mass emission stations located on various creeks in Orange County. This compilation is shown in Table 4. A review of the table shows that the creeks are out of compliance with the MAL even though they are in general in compliance with the Basin Plan objective for these same waters.

Table 4. Comparison of Orange County Waterbodies with Nickel MAL and Water Quality Objectives

Waterbody	Percentage of time ¹ > MAL of 26.34 ug/L	Percentage of samples > CTR water quality objective of 469 ug/L
Aliso Creek	58.5	0
Prima Deshecha	100.0	2.1
Segunda Deshecha	93.4	0

Although Orange County does not have land use-specific outfall monitoring data to directly compare with the MALs, the County of Ventura has an extensive outfall monitoring program which has characterized runoff from residential and industrial land uses. The summary statistics of this monitoring effort are shown in Table 5.

Table 5. Characteristics of Ventura County Land Use -Specific Outfalls for Nickel

	Industrial Outfall	Residential Outfall
Number of samples	26	26
Mean, ug/L	28.9	17.6
Range	<5 - 120	<1 - 53
% of time above MAL	42	22

Assuming runoff in Orange County is similar to runoff in Ventura County we would submit that the application of MALs to Orange County will create a situation where our receiving waters will be in compliance with the Basin Plan but that discharges from our outfalls will not be in compliance with the MALs. Furthermore, because the water body (see Table 4) is significantly in compliance with the applicable water quality objective, discharges from residential storm drain outfalls are clearly not causing or contributing to an exceedance of a water quality standard. Thus, the MS4 discharges and the waterbody do not exceed or impact the Basin Plan water quality standards, but due to the application of the MAL, the Permittees without corrective action to lower the discharge level would be out of compliance with the Tentative Order and would potentially be subject to mandatory minimum penalties for failing to comply with an effluent limits. Unnecessary and significant costs will therefore accrue to the Permittees from the obligation to address discharges that present regulatory rather than environmental concerns.

D. Compliance with MALs will prove to be problematic

The Tentative Order (as modified in the 4/29/09 Tentative Updates) provides clarification regarding the follow-up action required should the outfalls exceed the MALs. The Tentative Order requires each Permittee to affirmatively augment and implement all necessary stormwater controls and measures to reduce the discharge of the associated class of pollutants(s) in the affected watershed to the MEP. The definition of MEP (at Attachment C, page C-7) provides a broad definition that primarily focusing on source control BMPs and treatment control BMPs only if source control BMPs prove ineffective¹². Given the current lack of knowledge regarding the effectiveness of source control BMPs and the liability of non compliance with numeric effluent limits (and resulting mandatory minimum fines) the Permittees would be well served to implement treatment control BMPs.

As a result, the Tentative Order is structured to effectively require Permittees to retrofit all outfalls with treatment control BMPs. However, the language in the Tentative Order creates an illusion that the Permittees can comply with the MALs through a traditional stormwater management program. If it is the Regional Water Board's intent to structure compliance through the implementation of treatment control BMPs (see Provision 3.d Retrofitting Existing Development at pg. 65), then the Tentative Order must clearly state that all outfalls are to be retrofitted with treatment control BMPs. Obviously, the costs and ramifications on Permittees for such a requirement are huge and in some cases may not be possible without displacing existing development.

¹² "MEP generally emphasizes pollution prevention and source control BMPs primarily (as the first line of defense) in combination with treatment methods serving as a backup (additional line of defense)." Page C-7

Furthermore, it is unclear to the County that even after retrofitting all of our outfalls that we would comply with the MAL numeric effluent limits. As a case in point, the County reviewed options for lowering the nickel concentrations to the MAL level and were unable to verify that the BMPs purported to be practicable in the national ASCE database could in fact reduce nickel to levels required for compliance. Basically, the ASCE BMP database has no supporting documentation demonstrating the effectiveness of treatment control BMPs to reduce nickel. Similarly, the database did not contain performance data for mercury removal; thus, it's unclear what options are available to the MS4 should the discharge exceed the MAL for mercury.

E. County's Alternative Approach for Use of MALs

The Tentative Order's use of MALs to define MEP is ill conceived as it is inconsistent with state and federal policies, is technically flawed, results in requirements more stringent than federal law, and creates limits that are more restrictive than adopted water quality objectives contained in the Basin Plan.

While the County disagrees with the use of MALs to define MEP as a numeric value to determine compliance, we understand the Regional Water Board is looking for a new mechanism to ensure Orange County's stormwater program is effective and protective of water quality. Thus, instead of using MALs as proposed in the Tentative Order, we propose an alternative method consistent with the approach proposed by the State Water Resources Control Board's "Blue Ribbon Panel of Experts," as expressed in the June 2006 Blue Ribbon Panel Report ("BRP Report"). This approach would meet the Regional Water Board's desire to include performance measures in a municipal stormwater program for Orange County.

To achieve these goals, we support an approach that "would set "an 'upset' value, which is clearly above the normal observed variability, which would allow bad actor catchments to receive additional attention" through creation of an upset value (see BRP Report at p. 8.). The BRP Report termed upset value as "...an Action Level because the water quality discharge from such locations are enough of a concern that most all could agree that some action should be taken..." (Id.) The strikeout/underline language in Attachment B presents the Permittee's proposal for how MALs should be developed and used to achieve the purpose set forth in the BRP Report. The Permittees' proposal is to use locally relevant data to create MALs as a tool which, together with additional investigation and attention, will ensure that water quality is improved in the subject sub-watershed. Such a proposal would also include the deletion of any references of MALs to support the determination of MEP.

To develop MALs for this purpose, the Permittees propose to use the 90th percentile of local, countywide data to develop MALs. Any sub-watershed that exceeds the 90th percentile would be above the normal observed variability and in need of additional attention. In addition, we propose to develop MALs only for those pollutants where there is water quality impairment (based on the section 303(d) list), or have been identified as pollutants of concern and that are present in significant quantities in MS4 discharges. The Permittees' approach would avoid using public resources unwisely and inefficiently and focus on pollutants that are causing water quality concerns.

Where a sub-watershed exceeds a MAL due to the MS4 discharge, the Permittees propose that the responsible Permittee be required to submit an "MAL Action Plan" to the Regional Water Board's Executive Officer. The plan would need to include an assessment of the sources responsible for the abnormal pollutant levels, the existing BMPs that address those sources, an assessment of additional BMPs and actions that could be implemented, and, based on such analyses, the additional BMPs and/or actions the responsible Permittee proposes to implement to achieve the MAL to the MEP. The Executive Officer, in approving the plan, would have the opportunity to identify additional BMPs or actions the Regional Water Board believes necessary to address the constituent of concern.

In summary, Permittees propose that MALs be used to identify poor performing catchments or sub-watersheds for pollutants of concern to implement further practical controls. Where MALs are exceeded, the Permittees, in conjunction and with approval by the Regional Water Board's Executive Officer would be required to implement additional actions deemed necessary to address the high concentration. Thus, MALs are used to elevate municipal responsibility in a manner that is reasonable and practical while improving water quality.

LEGAL AUTHORITY

- **Effectiveness of BMPs** (Section E.1.j, Page 24)

The Tentative Order includes a new provision that requires the Permittees to demonstrate that they have the legal authority to require documentation on the effectiveness of BMPs. This provision is redundant with other requirements in the permit in that it ignores the fact that the New Development/Significant Redevelopment section of the DAMP (Section 7.0) establishes a process for the selection, design, and long-term maintenance of permanent BMPs for new development and significant redevelopment projects and requires developers to select BMPs that have been demonstrated as effective for their project category. In addition, it ignores the fact that the Permittees have already established legal authority for their development standards so that project proponents have to incorporate and implement the required BMPs.

This provision should be deleted from the Order.

JURISDICTIONAL URBAN RUNOFF MANAGEMENT PROGRAM

Development Planning Component

- **LID BMPs** (Section F.1.c.(2), Page 26)

Provision F.1.c.2 identifies that the LID BMPs listed in the provision shall be implemented at all Development Projects where applicable and feasible, however no definition of "applicable and feasible" is identified in the provision or within the fact sheet. The determination of feasibility of implementing the LID BMPs identified in the provision should be the responsibility of the Permittees.

It is recommended that the Provision be modified as follows:

The following LID BMPs listed below shall be implemented at all Development Projects where applicable and feasible as determined by the permittee.

- **Infiltration and Groundwater Protection (Section F.1.c.(6), Page 26)**
The Regional Board Response to Comments dated July 6, 2007 regarding this section makes reference to the Order No. R9-2002-0001 Fact Sheet and recommendations provided by the U.S. EPA Risk Reduction Engineering Laboratory related to restrictions on infiltration of stormwater. The Order No. R9-2002-0001 Fact Sheet references the document *U.S. Environmental Protection Agency. 1994. Potential Groundwater Contamination from Intentional and Nonintentional Stormwater Infiltration. EPA 600 SR-94 051*. This document that is referenced as guidance for infiltration of stormwater is more than 15 years old and does not provide an adequate technical basis for many of the requirements related to infiltration of stormwater. A closer review of this document will show that the study evaluated the impact of industrial stormwater discharges into local groundwater. However, the site soil conditions had a poorly defined soil structure and included gravel. Thus stormwater from the industrial site was discharged in an almost direct conduit to the groundwater. The County would submit that the Tentative Order should require the Permittees to develop criteria for the use of infiltration BMPs that consider land use, runoff quality, groundwater depth, site soil conditions and other information relevant to groundwater protection. The Regional Board Response to Comments dated July 6, 2007 also identifies that language contained in the Tentative Order also allows the Permittees to develop alternative criteria to replace the suggested restrictions. As current drafted the restrictions are more than “suggestions” and are actually more restrictive than requirements for onsite septic systems currently being considered by the State Water Board. If the restrictions are “suggested” then they should not be required as provision but should be identified as suggested or removed from the permit. If the intent is to allow the Permittees to develop criteria for infiltration of stormwater than the provision should be that the Permittees should develop the criteria and the “suggested” criteria should be deleted from the permit.

Since the Fact Sheet, and the Regional Board Response to Comments dated July 6, 2007 does not provide adequate technical basis for the requirements and the Regional Board Response to Comments dated July 6, 2007 identifies the requirements as “suggested”, Section F.1.c.(6) should be deleted from the Tentative Order.

Jurisdictional Runoff Management Program (JRMP) Section F.1.c.(6)(g) restricts the use of infiltration treatment control BMPs in areas of industrial or light industrial activity and areas subject to high vehicular traffic. High vehicular traffic is defined as 25,000 or greater average daily traffic on main roadway or 15,000 or more average daily traffic on any intersecting roadway. There is no specific technical basis for this restriction or the definition of “high vehicular traffic” included within the Fact Sheet and the reference to the EPA Guidance in the Regional Board Response to Comments dated July 6, 2007 does not provide an adequate technical basis. As such, prescriptive requirements should not be included in the Tentative Order unless there is a strong technical basis. Although SWRCB Order WQ 2000-11 provides guidance on some of the restrictions on the use of infiltration treatment control BMPs contained in the Tentative Order, there is no mention of restrictions related to areas subject to high vehicular traffic. Moreover, we are not aware of any demonstrated relationship between traffic counts and frequency of materials deposited on the street.

- **Native/Low Water Landscaping** (Section F.1.c.(7), Page 27)
This new provision identifies that landscaping with native or low water species where feasible shall be preferred in areas that drain to the MS4 or waters of the U.S. It is unclear to the County as to the nexus between the use of native plants and runoff water quality. For what purpose does this provision have to protect water quality and beneficial uses? This provision would appear to be outside the jurisdiction of the Regional Board.
- **Standard Stormwater Mitigation Plans (SSMPs)** (Section F.1.d, Page 27-28)
Section F.1.d. requires each Permittee to implement an updated local SSMP within twelve months of adoption of the Order. The schedule for the update of the SSMP is overly aggressive and does not allow the time necessary for the Permittees to incorporate changes and implement an updated SSMP. This provision adds language that requires the inclusion of the hydromodification requirements in provision F.1.h in an updated local SSMP within one year of the adoption of the Order. The requirements in provision F.1.h include the development of watershed specific HMPs within two years of adoption of the Order. The timeframe to update the local SSMPs in Provision F.1.d should be consistent with the time frame identified to develop the watershed specific HMPs in provision F.1.h.

It is recommended that the Provision be modified as follows:

Each Copermitttee must implement an updated local SSMP, upon completion of the watershed specific HMP(s) in their jurisdiction, which meets the requirements of section F. 1. d. of this Order and (1) reduces Priority Development Project discharges of storm water pollutants from MS4 to the MEP, (2) prevents Priority Development Project runoff discharges from the MS4 from causing or contributing to a violation of water quality standards, (3) manages increases in runoff discharge rates and durations from Priority Development Projects that are likely to cause increased erosion of stream beds and banks, silt pollution generation, or other impacts to beneficial uses and stream habitat due to increased erosive force and (4) implements the hydromodification requirements in section F.1.h.

- **Priority Development Project Categories** (Section F.1.d.(2), Page 29)
The Regional Board Response to Comments dated July 6, 2007 regarding this section does not provide any technical basis for requiring that a new Development project feature requires the entire project footprint being subject to SSMP requirements. The Response to Comments only mentions that the provision is “a particularly important requirement since municipalities have greater latitude during development to require pollution prevention than they have with existing development”, however pollution prevention is not required from land uses that are not Priority Development Project Categories and so the Response to Comments fails to address this potential situation and does not provide any technical basis for the provision. Furthermore, this requirement, Provision F.1.d.(2), appears in direct conflict with Provision F.1.d.(1)(b) which defines the area subject to SUSMP requirements. Given that provision F.1.d.(1)(b) is consistent with Board Order WQ 2000-11, provision F.1.d.(2) should be deleted. Since the previous comments on this issue were not addressed in the Regional Board’s Response to Comments, the comments are being resubmitted.

Section F.1.d.(2) defines Priority Development Project Categories. In an introduction to the listed categories, this section states that, where a new development project feature, such as a parking lot, falls into a Priority Development Project Category, the entire project footprint is subject to SUSMP requirements. As currently written this provision would require a new development that has a 5,000 square foot parking lot feature and 100,000 square feet of other land uses that are not Priority Development Project Categories, to provide treatment for the entire project (105,000 square feet). This requirement would unduly burden the landowner in this case with the cost of treating runoff from 105,000 square feet when only 5,000 square feet should be subject to SUSMP requirements and treatment controls.

The need to treat runoff from a greatly increased land area will require an increase in the size of treatment controls, which will increase the volume of water treated without a likely commensurate increase in pollutant removal. This requirement will unnecessarily increase the cost of treatment control BMPs without commensurate pollutant removal benefits and likely discourage re-development.

The Fact Sheet fails to provide any information showing that development land uses that are not in the Priority Development Project Category contribute pollutants to the MS4 and are a threat to water quality. The Fact Sheet (page 78) states that this provision “is included in the Order because existing development inspections by Orange County municipalities show that facilities included in the Priority Development Project Categories routinely pose threats to water quality. This permit requirement will improve water quality and program efficiency by preventing future problems associated with partially treated runoff from redevelopment sites. This explanation does not demonstrate any connection between development land uses that are not in the Priority Development Project Category and the observed “threats to water quality.” In addition, although the explanation focuses on the water quality benefits for redevelopment projects, the Section is for “new development” projects”.

Since the Fact Sheet does not provide any technical information showing that land uses that are not Priority Development Project Categories are a significant source of pollutants and a threat to water quality, the introductory paragraph of Section F.1.d.(2) subjecting the entire project footprint to SUSMP requirements should be removed from the permit.

- **Commercial Developments** (Section F.1.d.(2)(b), Page 29)
Section F.1.d.(2)(b) lowers the threshold criterion for commercial developments required to comply with SUSMP requirements from 100,000 square feet (2.3 acres) to one acre. The Fact Sheet states that this provision has been modified to be consistent with US EPA Phase II Guidance. However, EPA Phase II guidance is not relevant to a Phase I permit.

The Fact Sheet also states that this Provision is based on Permittee findings that smaller commercial facilities pose high threats to water quality. This is not the case. The Permittees indicated that commercial facilities of 100,000 square feet or less receive a score of 3 out of 5 (a medium threat) in Table 9-8 in the 2007 DAMP. Since the Fact Sheet does not provide any technical basis for lowering the threshold criterion for commercial developments required to comply with SUSMP requirements from 100,000 (2.3 acres)

square feet to one acre, the category should be described as, "Commercial developments greater than 100,000 square feet."

- **Industrial Developments** (Section F.1.d.(2)(c), Page 29)
Section D.1.d.(2)(c) requires industrial developments of greater than one acre to comply with SUSMP requirements. The Fact Sheet states that this provision has been modified to be consistent with US EPA Phase II Guidance. Again, EPA Phase II guidance is not relevant to a Phase I permit. In addition, the Fact Sheet does not provide a technical basis for adding industrial sites to the Priority Development Project Categories and consequently Section D.1.d.(2)(c) should be deleted from the permit.
- **Streets, Roads, Highways, and Freeways** (Section F.1.d.(2)(i), Page 30)
Section F.1.d.(2)(i) includes as a Priority Development Project Category streets, roads, highways, and freeways including any paved surface of 5,000 square feet or greater that is used for transportation. Highways and freeways are not the jurisdiction of Permittees and fall under the jurisdiction of the California Department of Transportation, which is regulated by its own statewide stormwater permit.

It is recommended that the Provision be modified as follows:

(i) Streets and roads, highways, and freeways. This category includes streets and roads any paved surface that is are 5,000 square feet or greater used for the transportation of automobiles, trucks, motorcycles, and other vehicles.

- **Retail Gasoline Outlets** (Section F.1.d.(2)(j), Page 30)
Section F.1.d.(2)(j) includes as a Priority Development Project Category Retail Gasoline Outlets (RGOs) that meet the criteria of 5,000 square feet or more or have a projected Average Daily Traffic (ADT) of 100 or more vehicles per day. SWRCB Order WQ 2000-11 provides guidance on whether RGOs are subject to SUSMP requirements. The State Board states in this Order that "In considering this issue, we conclude that construction of RGOs is already heavily regulated and that owners may be limited in their ability to construct infiltration facilities. Moreover, in light of the small size of many RGOs and the proximity to underground tanks, treatment may not always be feasible, or safe." Although the State Board does not prohibit subjecting RGOs to SUSMP requirements, the State Board provides a number of reasons for not doing so, including that fact that RGOs are already heavily regulated. It should also be noted that the DAMP already prescribe a suite of BMPs specific to RGOs. Subjecting RGOs to SUSMP requirements imposes duplicity where it is not needed. Section F.1.d.(2)(j) should be removed from the permit.
- **LID Site Design BMP Requirements** (Section F.1.d.(4), Page 30-33)
This provision identifies that each Permittee must require LID stormwater practices or make a finding of infeasibility for each Priority Development Project (PDP) for inclusion of LID. This provision effectively requires each PDP to perform an analysis of the applicability of LID BMPs for a given project and either incorporate LID BMPs into the project or provide documentation that supports a finding that LID BMPs cannot be incorporated, which presents a significant change in the way development projects are planned and designed and presents an additional burden on developers and municipal plan checkers.

The Tentative Updates and Errata document released on May 5th changes this language by specifying that each Permittee must require a project to include LID stormwater practices or, alternatively, participate in the LID substitution program described in Section F.1.d.(8). The analysis of the feasibility of LID BMPs is most appropriate to be included under this provision as the LID Site Design Substitution Program, as discussed later, is confusing and an unnecessary provision.

It is recommended that Section F.1.d.(4)(a)(i) not be changed per the Tentative Updates and Errata document release on May 5th and remain as worded in the March 13th Tentative Order as follows:

Each Copermitttee must require LID storm water practices or make a finding of infeasibility for each Priority Development Project.

Section F.1.d.(4)(a)(iii) requires each PDP to perform an assessment of the potential for collection of stormwater for beneficial use on-site or off-site prior to discharging from the MS4. The language “discharging from the MS4” is confusing and the meaning should be defined or the language should be changed to “discharging to the MS4”. There is no language in the Tentative Order that identifies how extensive the analysis should be and there is no supporting language in the Fact Sheet as to why this analysis should be done. The requirement to perform this assessment for off-site use, which is not defined, puts an undue burden on developers to identify potential uses beyond the area and control of the PDP. This provision likely goes beyond the authority of the Regional Boards per Water Code § 13360, which prohibits the Regional Board from specifying the manner of compliance with its regulations.

It is recommended that Section (a)(iii) of this provision be modified as follows:

The review of each Priority Development Project shall consider potential collection of storm water for beneficial use on-site prior to discharging to the MS4.

Section F.1.d.(4)(a)(vi) requires that within 365 days of adoption of the Order that each Permittee review its local codes and ordinances and identify barriers therein to implementation of LID stormwater practices. One year, however is not adequate time for each Permittee to identify barriers to LID in its local codes and ordinances as similar projects to identify barriers to LID have taken multiple years. A minimum of two (2) years should be provided for the Permittees to identify these barriers which would allow a thorough understanding of the types of barriers present in local codes and ordinances, and the time to create ordinances that are compatible and support the other stormwater program elements.

It is recommended that Section F.1.d.(4)(a)(vi) be modified as follows:

Within 365 days two (2) years after adoption of this Order, each Copermitttee must review its local codes and ordinances and identify barriers therein to implementation of LID storm water practices. Following the identification of these barriers to LID implementation, where feasible the Copermitttee must take appropriate actions to remove barriers directly under Copermitttee control by the end of the permit cycle.

Section F.1.d.(4)(b)(i) requires PDPs to maintain or restore natural storage reservoirs and drainage corridors in drainage networks in preference to pipes, culverts, and engineered ditches. The intent of the provision appears to be to assist in maintaining the pre-development hydrology, however this provision specifies how a PDP is to maintain the pre-development hydrology which may go beyond the limitations in Water Code § 13360.

It is recommended that Section F.1.d.(4)(b)(i) be modified as follows:

Consider maintaining or restoring natural storage reservoirs and drainage corridors (including depressions, areas of permeable soils, swales, and ephemeral and intermittent streams) in drainage networks in preference to pipes, culverts, and engineered ditches.

Section F.1.d.(4)(b)(ii) of this provision requires draining a portion of the impervious area to pervious areas before discharge to the MS4, specifying that the amount of runoff shall correspond to the total capacity of the pervious areas. Section (b)(iii) of this provision identifies that pervious or landscaped areas should be properly designed and constructed to effectively receive and infiltrate or treat runoff. The effect of these provisions requires that all landscaped and pervious areas are sized and designed as stormwater treatment devices, such as bioretention or vegetated swales. Using landscaped and pervious areas as stormwater treatment devices is not always feasible and is dependant on site specific constraints.

It is recommended that Section F.1.d.(4)(b)(ii) and Section F.1.d.(4)(b)(iii) of this provision be modified as follows:

Section F.1.d.(4)(b)(ii) - Projects with landscaped or other pervious areas shall, where feasible, drain a portion of impervious areas (rooftops, parking lots, sidewalks, walkways, patios, etc) into pervious areas prior to discharge to the MS4. The amount of runoff from impervious areas that is to drain to pervious areas shall correspond with the total capacity of the project's pervious areas to infiltrate or treat runoff, taking into consideration the pervious areas' soil conditions, slope, and other pertinent factors.

Section F.1.d.(4)(b)(iii) - Projects with landscaped or other pervious areas shall, where feasible, properly design and construct the pervious areas to effectively receive and infiltrate or treat runoff from impervious areas, prior to discharge to the MS4. Soil compaction for these areas shall be minimized. The amount of the impervious areas that are to drain to pervious areas must be based upon the total size, soil conditions, slope, and other pertinent factors.

- **LID Site Design BMPs Sizing and Design** (Section F.1.d.(4)(c), Page 33)
The Tentative Updates and Errata document released on May 5th (page 7) contains a new section which requires that LID structural site design BMPs to be sized and designed to ensure capture of the 85th percentile storm event for all flows from the development in accordance with Section F.1.d.(6)(a)(i) and Section F.1.h. The objective of Low Impact Development is for a development site to maintain pre-development site hydrology by implementing site-design techniques that function similar to natural processes. LID BMPs should therefore not be designed to capture the 85th percentile storm event but rather to capture the difference in volume between the 85th percentile

storm event for the pre-development condition and the 85th percentile storm event for the post-development condition (delta volume). By sizing and designing LID BMPs to the delta volume this will help to ensure that the pre-development hydrology is maintained which is the objective of the Low Impact Development stormwater approach. This new section also requires that any volume over and above the design capture volume, that is not captured by the LID BMPs shall be treated using conventional treatment control BMPs in accordance with Section F.1.d.(6). This language appears to require treatment beyond the 85th percentile storm event which unnecessary as most pollutants are removed through treatment or capture of the 85th percentile storm event, it is likely infeasible in many locations, and it would but an unnecessary burden on PDPs without much added pollutant removal benefit.

It is recommended that the Provision be modified as follows:

LID structural site design BMPs shall be sized and designed to ensure capture of the difference between 85th percentile storm event ("design capture volume") for the pre-development condition and the 85th percentile storm event ("design capture volume") for the post-development condition for all flows from the development or redevelopment project in accordance with Section F.1.d.(6)(a)i. and Section F.1.h below. Any volume, over and above the design capture volume, that is not captured by the LID BMPs shall be treated using conventional treatment control BMPs in accordance with Section F.1.d.(6) below.

Alternatively the term "capture" as used in the Tentative Updates and Errata document released on May 5th should be defined as capturing water for treatment using LID BMPs and should not be defined as retention of the 85th percentile storm event. Retention of the 85th percentile storm event is an artificial metric that does not meet the objective of Low Impact Development which is to maintain pre-development site hydrology. If retention is used as the definition of capture there will be many development site locations where this will be infeasible due to site constraints. Capture should be defined as treatment of the 85th percentile storm event which is likely feasible at almost all development site locations. The benefits of LID are realized with the definition of capture as treatment, as retention will still occur on sites where it is feasible through infiltration and evapotranspiration, and on sites where retention is not feasible, vegetated LID BMPs will still provide treatment and volume reduction will occur through some infiltration and evapotranspiration.

Alternatively it is recommended that the Provision be modified as follows:

LID structural site design BMPs shall be sized and designed to ensure capture treatment of the 85th percentile storm event ("design capture volume") for all flows from the development or redevelopment project in accordance with Section F.1.d.(6)(a)i. and Section F.1.h below.

- **Treatment Control BMP Requirements** (Section F.1.d.(6)(f) and (g), Page 34)
The Regional Board Response to Comments dated July 6, 2007 regarding this section does not provide any technical basis for these provisions and it does not adequately address the comments provided stating that "the concerns are addressed within the Tentative Order". Since the previous comments on this issue were not adequately

addressed in the Regional Board's Response to Comments, the comments are being resubmitted.

Section F.1.d.(6)(f) require treatment control BMPs be implemented prior to discharging into waters of the U.S. and provision F.1.d.(6)(g) requires that treatment controls not be constructed within waters of the U.S. or waters of the State. These provisions of the Tentative Order greatly limit the use of regional BMP and watershed-based approaches. The provisions demand a lot-by-lot approach in implementing BMPs that is analogous to the site-by-site septic tank approach that has been discredited as an effective strategy for sewage treatment in urban areas. Similarly, the Permittees submit that such an approach is also ineffective for stormwater and will lead to a diversion of limited resources to managing thousands of site-by-site treatment controls, which are managed by parties that have limited or no experience, instead of hundreds of regional controls, that are managed by parties and governmental agencies that have expertise in BMP management.

The Tentative Order encourages a renewed focus on the 'watershed approach' but the proposed restriction on regional BMPs is antithetical to a watershed approach. The USEPA in its *National Management Measures Guidance to Control Nonpoint Source Pollution from Urban Areas, Management Measure 5: New Development Runoff Treatment* dated November 2005 (page 5-38) states that "regional ponds are an important component of a runoff management program." and that the costs and benefits of regional, or off-site, practices compared to on-site practices should be considered as part of a comprehensive management program. The EPA guidance acknowledges that a regional approach can effectively be used for BMPs.

In addition, the Fact Sheet does not provide any technical justification for these provisions. Since neither the Findings nor the Fact Sheet provide any technical basis for precluding regional BMPs and EPA guidance recommends the use of regional BMPs, these provisions should be deleted from the permit.

- **LID Site Design BMP Substitution Program** (Section F.1.d.(8)(d), Page 36)
In the March 13th Tentative Order the provision has been modified to require that for PDPs participating in the Substitution Program that all LID site design BMPs meet the requirements in Section F.1.d.(4). As LID BMPs are now required in every PDP the Substitution Program essentially becomes a moot provision since if it is feasible to incorporate LID BMPs a PDP would most likely not need to include treatment control BMPs. The May 5th Tentative Updates and Errata document modifies this provision to include a feasibility analysis for PDPs where LID BMPs are not feasible. This new language effectively changes the meaning of Provision F.1.d.(8) from a LID Site Design BMP Substitution Program to a Treatment Control BMP Substitution Program as the Tentative Order requires LID site design BMPs unless they are demonstrated to be infeasible, which then Treatment BMPs appear to be able to be substituted.

It is recommended that the Provision be deleted and that the LID feasibility provisions under Section F.1.d.(8)(d) from the May 5th Tentative Updates and Errata document be moved under Section F.1.d.4.(a)(i).

- **Treatment Control BMP Maintenance Tracking** (Section F.1.f, Page 38)
The Regional Board Response to Comments dated July 6, 2007 regarding this section identifies that the provision has been modified to “allow the Permittees more latitude with verifying treatment control BMP operations through self-certification, third party inspection and/or verification by the Copermittee,” however the self-certification program is required to comply with the same very prescriptive provisions. The Provision should be amended to properly allow the Permittees to develop a self-certification inspection program that will meet the intent of the provision without having pre-determined requirements which undermine the benefits of a self-certification inspection program.

It is recommended that the Provision be modified as follows:

(c) Verify implementation, operation, and maintenance of treatment BMPs by inspection, through the development of a self-certification BMP inspection program within 12 months of the adoption of this Order.

- **Requirements for Hydromodification and Downstream Erosion** (Section F.1.h, Page 39)

Section F.1.h. discusses the hydromodification requirements for Priority Development Projects. The hydromodification provisions are of concern to the Permittees 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 F.1.h.(3) (Page 40) requires each Permittee 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 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 F.1.h.3.(b) (Page 40) 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 F.1.h.(3)(b)(i) (Page 40) 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.

- **Hydromodification & Engineered Channels** (Section F.1.h.3.(c)(ii), Page 41)
Provision F.1.h.3.(c)(ii) has been deleted, which removes the waiver of hydromodification requirements for those PDPs that discharges to concrete-lined or significantly hardened channels downstream to their outfall in bays or the ocean. The waiver for PDPs that discharge to concrete-lined or significantly hardened channels should be included as hydromodification requirements are not appropriate for channels that are designed to accept increased flows from upstream development as the potential for erosion is minimal or not present. The fact sheet does not provide any discussion under this provision of why the waiver was removed and the discussion under Finding D.2.g does not adequately address hydromodification requirements related to concrete-lined or significantly hardened channels.

It is recommended that the Provision providing conditional waivers for hydromodification requirements for concrete-lined or significantly hardened channels be added back into the Tentative Order.

- **Hydromodification Management Plans** (Section F.1.h.(4) & (5), Page 41-43)
Provisions F.1.h.(4) & (5) have been modified to require the development of watershed-specific Hydromodification Management Plans that include specific criteria for minimizing and mitigating hydrologic modification at all development and redevelopment projects within two years of adoption of the Order. The timeframe for development of HMPs for each watershed is too short to ensure an optimized program. Interim criteria assures that there will not be unregulated construction in the interim. A minimum of three years, which was the length of time to develop criteria identified in the previous Tentative Order, should be allowed for their development.

It is recommended that the Provisions be modified as follows:

Section F.1.h.(4) - Each Copermittee must revise its SSMP/WQMP to implement a watershed specific Hydromodification Management Plan (HMP) to include specific criteria for minimizing and mitigating hydrologic modification at all development and redevelopment projects, unless hydromodification requirements have already been developed for a watershed which can be integrated into the SSMP/WQMP.

Section F.1.h.(5) (a) - *Within 2 3 years of adoption of the Order, the Permittees shall submit to the Regional Board a draft HMP that has been reviewed by the public, including the analysis that identifies the appropriate limiting range of flow rates.*

- **Interim Hydromodification & Effective Impervious Area** (Section F.1.h.(6)(i), Page 43)

Section F.1.h.(6)(i) has been modified to require, as an interim measure that each PDP, not just projects disturbing 20 acres or more, disconnect impervious areas by reducing the percentage of Effective Impervious Area to less than five percent of total project area. EIA is not an adequate metric for hydromodification as there is a lack of a technical consensus on a performance standard relating the disconnection of impervious area and either water quality or hydromodification. This performance standard will ultimately be a very land intensive requirement which may promote sprawl and not conserve natural areas. The 5% EIA number was originally identified in the context of watershed imperviousness and not for a specific development site. The fact sheet identifies that the 5% EIA number was added in direct response to comments from the USEPA on Tentative Order R9-2008-001, however USEPA, in several statements made by Dr. Cindy Lin at the November 14, 2008 CASQA General Meeting, suggested that the 5% EIA metric should only be considered as an example and that USEPA is open to consideration of other metrics for LID. It is unclear whether the language in the Tentative Updates and Errata document released on May 5th replaces and removes the 5% EIA metric from the Tentative Order or if the language is in addition to the 5% EIA metric. In addition the new language from the Tentative Updates and Errata document released on May 5th should be based on the 85th percentile storm event runoff volume.

It is recommended that the current language of the Draft North Orange County permit be substituted.

Construction Component

- **Permit Fees**

Since the previous comments on this issue were not addressed in the Regional Board's two Response to Comments documents, the comments are being resubmitted.

Although not directly addressed within the Tentative Order, the Permittees 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 Permittees 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.

- **BMP Implementation** (Section F.2.d, Page 46-47)

The previous comments on this issue made by the Permittees were not addressed in the Regional Board's two Response to Comments documents, and are therefore resubmitted.

Section F.2.d.(1)(a)(ii) requires the development and implementation of a site-specific stormwater management plan. To make the language consistent with the changes made to Section F.2.c.2 (Page 46), the County suggests the following change:

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

Section F.2.d.(1)(c)(i) (Page 48) states that the Permittees 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 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 recently released (April 2009) Draft Construction General Stormwater Permit does not require use of ATS but identifies it as an available BMP. However, that permit acknowledges that the ATS is a newly emerging technology in California.

The provisions requiring the use of ATS should be deleted from this permit, and the selection of BMPs for construction operations, especially an ATS, should be done under the aegis of the Statewide Construction General Stormwater Permit.

- **Construction Reporting of Non-compliant Sites** (Section F.2.g.(2), Page 50)
This new provision requires that each Permittee must annually notify the Regional Board of all construction sites with potential violations prior to the commencement of the wet season. This reporting requirement should be limited to the sites meeting the criteria specified in F.2.e.1 that are required to be inspected in August and September of each year.

The County recommends the following modifications.

Each Copermittee shall annual notify the Regional Board, prior to the commencement of the wet season, of all construction sites inspected in accordance with F.2.e.4 that meet the criteria specified in F.2.e.1, with potential violations. ...”

Municipal

- **Flood Control Structures** (Section F.3.a.(4)(c), Page 53)
Section F.3.a.(4)(c) requires the Permittees 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 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.

• **Infiltration from Sanitary Sewer to MS4** (Section F.3.a.(7), Page 54)

Although the first portion of the Tentative Order provision (7)(a) is consistent with the current permit (Order No. R9-2002-0001), the Permittees submit that the provisions regarding sanitary sewer maintenance are more applicable to sanitary sewer agencies, not stormwater agencies. It is inappropriate to include sanitary sewer maintenance requirements in a stormwater permit even where the two systems may be operated by the Permittee. Where similar maintenance requirements are included in the wastewater treatment plant or collection system permit¹³, these provisions are an unnecessary duplication of other regulatory programs. On a similar issue, the State Board stayed a provision in the existing permit finding that "the regulation of sanitary sewer overflows by municipal storm water entities, while other public entities are already charged with that responsibility in separate NPDES permits, may result in significant confusion and unnecessary control activities." [emphasis added] (WQ 2002-0014 at p.8). Therefore we submit that part (a) of the provision (7) should be deleted from the Tentative Order.

While the Permittees agree that stormwater agencies must also address aspects of sanitary sewer incursions into the MS4s, 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.

¹³ 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 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 F.3.b.(1)(a)(i), Page 57)

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. While we agree that sites/sources that are identified by the Permittees as contributing a significant pollutant load to the MS4 should be incorporated into the inventory, we disagree with adding them to the list in the Tentative Order unless universally identified, by all the Permittees as a significant source.

The determinations of significance need to be made at a local level and incorporated into the local JURMP. As noted in the Regional Board's first response to comments document in discussing the balance of flexibility and enforceable criteria:

"... the Tentative Order sets numeric criteria regarding commercial inspections, but relies on each Copermittee to select inspection targets based on its local knowledge."

It is important that these determinations be made at a local level and if identified as a common problem, then apply the requirement applied countywide, otherwise the Board staff may inadvertently be diverting resources from high priority issues to lower priority issues in some areas.

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 F.3.b(3)(a), Page 59)

The Tentative Order adds 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.

In our previous comment letter we noted the difficulties associated with initiating this program, concerns which were mirrored in the Fact Sheet. For the reasons previously noted and acknowledged by the Regional Board, we request that the requirement for this program be changed to the development of a pilot program for the mobile business category. The pilot program would allow the Permittees 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.

- **Inspection of Industrial and Commercial Sites/Sources** (Section F.3.b(4)(b), Page 60)

This new provision requires that each Permittee must annually notify the Regional Board of all commercial and industrial sites/sources with potential violations prior to the commencement of the wet season. Similar to the new requirement for inspecting and reporting non-compliant construction sites, this requirement is ambiguous and subject to potential misinterpretation because Permittees do not inspect all commercial and industrial sites/sources each year.

This reporting requirement should be revised so that it does not imply an expansion of the inspection frequency or change in inspection timing than that identified in the subsequent findings and JURMPs.

Each Permittee shall annual notify the Regional Board, prior to the commencement of the wet season, of ~~all~~ the Industrial Sites and Industrial Facilities subject to the General Industrial Permit or other individual NPDES permit with potential violations that were inspected within the preceding 6 months.”

- **Food Facility Inspections** (Section F.3.b.(4)(d), Page 61)

The Permittees appreciate the elimination of the proposed expanded requirement to address maintenance of greasy roof vents. As noted in our April 2007 comments, the existing Food Facility Inspection program, which 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 has been shown to be effective. The Permittees submit that the additional expanded requirement, (c)(iv) identification of outdoor sewer and MS4 connections, either be deleted from the Tentative Order or the subject of further technical justification of its need for this successful program element.

- **Third Party Inspections** (Section F.3.b(4)(e), Page 61)

The previous comment on this issue was not addressed in the Regional Board's two Response to Comments documents, and is therefore resubmitted. 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 Permittees 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 Permittees 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 Permittees in inspecting 10,000 restaurants countywide on an annual basis. The Permittees 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 Permittees.

Since the Permittees 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.

- **Retrofit Existing Development** (Section F.3.d, Pages 65-66)

This new provision requires that each Permittee must implement a retrofitting program for existing developments (i.e. municipal, industrial, commercial, residential). These new requirements present a significant change and present a substantial burden to the municipal stormwater program.

Currently, new development requirements are imposed as conditions of approval for new projects and projects that are voluntarily undergoing redevelopment. A thorough legal review is required to determine whether municipalities have the authority to compel land development requirements absent a voluntary land development application and if such authorities can be developed given other legal constraints.

The Permittees do not concur with the statement of the Regional Board in the supplemental fact sheet that "Retrofitting existing development is practicable for a municipality..." The Permittees request that the Regional Board provide a technical justification for this statement. A systematic evaluation of the technical and legal opportunities and constraints of a requirement to require retrofitting, especially of private landowners, is necessary to determine whether or not such a requirement is practicable. The evaluation must precede the permit provision to mandate MS4s require retrofitting of existing development.

These provisions of the permit represents an entire new approach to existing development that places an unknown significant burden on the Permittees and ultimately to property owners in the south Orange County area. The Permittees therefore request that this unprecedented requirement be eliminated from the permit.

ID/IC Program

- **Investigation/Inspection and Follow Up** (Section D.4.e(2)(b) and (c), Page 68-69)

The County appreciates the acknowledgement of the concern in the Regional Board's first Response to Comments document regarding the intent of the permit language.

However the language of the Tentative Order was not altered to match the Regional Board's stated intent that the investigation must be initiated within the specified timeframe. The requirements in the Tentative Order are that the Permittees must conduct the investigation within the specified time frame.

The following language changes are requested within the Tentative Order to better meet the intent of this requirement as stated by the Regional Board.

- (b) Field screen data: Within two business days of receiving dry weather field screening results that exceed action levels, the Permittees 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 Permittees 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.

Watershed Urban Runoff Management Program (Section G, Page 70)

The Tentative Order includes increasingly prescriptive requirements for the Watershed Urban Runoff Management Program (WURMP). 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 programs¹⁴.”

Not only do the Permittees 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 Permittee 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.

¹⁴ Fact Sheet/Technical report for Tentative Order No. R9-2007-0002, page 10

The Permittees 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 Permittees 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 G.1.a, Page 71)
The Tentative Order has designated which entity within the watershed should be the default lead Permittee and what those responsibilities entail. The Permittees 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 Permittees propose that the language be modified as follows:

- a. **Lead Watershed Permittee Identification**
Watershed Permittees ~~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 Permittees, 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 Permittees~~ must will serve as liaisons between the Permittees and Regional Board, where appropriate.

- **BMP Implementation and Assessment** (Section G.1.e, Page 74)
The Tentative Order requires an arbitrary minimum number of watershed activities to occur in each year. The Fact Sheet states that the Permittees have completed the assessments, prioritization, and collaboration and now need to implement the activities identified.

While the Permittees agree that there are activities that will be undertaken in conformance with the WURMP, the Tentative Order should not presuppose that the Permittees 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 H, Page 78)

Section F of the Tentative Order requires the Permittees to secure the resources necessary to implement the permit, conduct a fiscal analysis of the stormwater program, and develop a long-term funding strategy and business plan. While the Permittees 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 Permittees take exception to the requirement to develop a long-term funding strategy and business plan. The concerns for these new requirements are discussed in further detail below.

- **Long Term Funding Strategy and Business Plan (Section H.3, Page 78)**

The Tentative Order requires that each Permittee 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 Permittees 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 Permittees are dedicated to the program, plan their budgets accordingly, and have adequately funded the program for the past 16 years. In our previous comments we provided a historical review of the shared and individual costs of program implementation that demonstrates the commitment of the Permittees to funding the program. It is an unnecessary diversion of the Permittees resources to invest in the development of a new tool for a program component that has been successfully met for 16 years.

The Regional Board staff relies on the 2006 NAFSMA *Guidance for Municipal Stormwater Funding* to justify this new requirement. We note that 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, such guidance is not a one size fits all approach, and in light of the history of the Orange County Program it is not warranted and should be removed from the permit.

- **TMDLs (Section I, Page 79)**

This new provision supports Finding E.12 and identifies that adopted TMDL WLAs will be incorporated as numeric effluent limits for specific pollutants and watersheds.

As noted previously in these comments (see comments on Finding E12), the County has significant reservations about the use of either Clean Up and Abatement Orders (as indicated in the TO) or Cease and Desist Orders (as indicated in the supplemental Tentative Fact Sheet) as the means by which to incorporate forthcoming TMDL WLAs into the MS4 permit. The Permittees request an explanation as to why the Regional Water Board plans to use these two types of enforcement tools to specify TMDL requirements.

Also as noted previously, the Permittees are concerned that it appears the Regional Board plans to incorporate WLAs as numeric effluent limits in the stormwater permit without consideration of other options or as to how the TMDL may be written, which might include:

- Requiring implementation of specific BMPs in the permit;
- Providing a recommended menu of potential BMPs in the TMDL, implementation plan, or the permit for sources to evaluate and select;
- Referencing BMP performance standards in the TMDL, implementation plan, or the permit;
- Recommending the selection of BMPs and developing benchmark values or performance measures; and
- Requiring the review of existing BMPs and selecting additional BMPs to achieve progress.

The USEPA draft handbook *TMDLs to Stormwater Permit* lists the above options and notes that:

“There are no guidelines for determining which approach is most appropriate to use. It is likely that a variety of factors, including type of source, type of permit, and availability of resources, will influence which approach makes the most sense.”

It does not appear that the Regional Board has consider the variety of factors in determining that numeric effluent limitations are most appropriate method of incorporating the WLAs for all pollutants in all watersheds into the MS4 stormwater permit.

Program Effectiveness Assessment (Section J, Page 79)

The previous comments on this issue made by the Permittees were not addressed in the Regional Board's two Response to Comments documents, and are therefore resubmitted.

Section J. of the Tentative Order requires the Permittees to assess the effectiveness of their JURMP, identify necessary program modifications, and report that information to the Regional Water Board on annual basis. Section J.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 Permittees, 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 Permittee 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 Permittees 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 Permittees 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 Permittees to functionally update their long-term effectiveness assessment approach. The updated approach 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, May 2007, 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 J.1. and J.2. of the Tentative Order and is based on the current permit requirements.

The proposed language is:

- a. As part of its individual JURMP, each Permittee shall update 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.
- c. Long-term strategy for assessing the effectiveness of the Watershed URMP. As part of the WURMPs, the watershed Permittees 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 K, Pages 83-85, and Section G, Page 76)

The previous comments on this issue made by the Permittees were not addressed in the Regional Board's two Response to Comments documents, and are therefore resubmitted. Section H of the Tentative Order requires the Permittees 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 Permittees understand that the Tentative Order included these changes to allow for a longer time period between the two sets of submittals, the Permittees 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 of each year. This will allow the Permittees to assess their stormwater program and water quality monitoring program and conduct an integrated assessment to identify water quality improvements.

Section G.4. requires that the Permittees 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:

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

ATTACHMENT C

ORANGE COUNTY ENVIRONMENTAL MONITORING & REPORTING PROGRAM COMMENTS ON CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD SAN DIEGO REGION TENTATIVE ORDER No. R9-2009-0002 NPDES NO. CAS0108740

INTRODUCTION

Attachment C contains the principal technical comments of the County of Orange (the "County") regarding the monitoring and reporting requirements in Attachment E of Tentative Order No. R9-2009-0002 dated March 13, 2009 ("Tentative Order").

The County has endeavored to provide a complete set of comments on the Tentative Order. However, the County reserves the right to submit additional comments relating to Tentative Order No. R9-2009-0002 and the supporting Fact Sheet/Technical Report to the Regional Board in the future.

GENERAL COMMENT

"monitoring is most useful when it results in more effective management decisions, specifically management decisions that protect or rehabilitate the environment." (NAS, 1991)

In 2002 and 2003, the Permittees completed development of the San Diego Region Receiving Waters Monitoring and Reporting Program and the San Diego Region Dry-Weather Monitoring Program for wet and dry weather, respectively. Compared to prior monitoring efforts (pre NPDES, First and Second Permit Term Programs), the Third Permit Term monitoring program comprised a wider array of methods and a broader range of locations intended to effectively support the development and implementation of the Drainage Area Management Plan (DAMP). The specific comments provided below are intended to ensure that any changes to environmental monitoring requirements are based on careful strategic assessments of the current effort to ensure that revisions ultimately continue to most effectively support DAMP implementation. Also, at a time of unprecedented fiscal challenge there can be no required commitment of additional resources to environmental monitoring. Any new monitoring requirements will require offsetting and compensatory reductions in existing monitoring obligations.

SPECIFIC COMMENTS

II.A.1. Analytical Testing Requirements for Mass Loading, Urban Stream Bioassessment, and Ambient Coastal Receiving Water Stations (Table 1)

The 6-hour holding time for samples of indicator bacteria limit the length of time that sampling teams can spend in the field and do not allow sampling of some episodic events. A typical day of Bioassessment monitoring at three locations requires 8 hours in

the field for PHAB assessment, and collection of benthic macroinvertebrate, water quality, and toxicity testing samples. Mass Emissions monitoring of stormwater runoff can occur on weekends and holidays when contract laboratory services are not available. Most importantly, monitoring bacteriological quality of stormwater at Mass Emissions site will not produce useful information since access to flood control channels is prohibited during periods of stormwater runoff and the Mass Emissions monitoring sites are generally great distances upstream of the coastal receiving waters.

Proposed Modification:

Exempt monitoring of bacteriological quality at Bioassessment sites and during stormwater events at Mass Emissions sites.

Monitoring for oil and grease concentration will not detect lighter petroleum fractions such as gasoline and diesel. Oil and grease has rarely been detected in 5 years of monitoring in the Dry Weather Reconnaissance Monitoring Program.

Proposed modification:

Collect a grab sample for oil and grease during stormwater runoff monitoring at Mass Emissions and Ambient Coastal Receiving Water sites. Collect a grab sample for total petroleum hydrocarbons whenever a sheen is observed.

II.A.2.b. Urban Stream Bioassessment Monitoring Frequency [page 7]

A Stormwater Monitoring Coalition (SMC) review of Bioassessment data collected in Southern California has shown that at sites where flow is year-round there is no statistical difference in IBI scores between the spring and fall seasons.

Proposed Modification:

Modify the sampling frequency for Bioassessment to once a year.

II.A.2.b(1) Urban Stream Bioassessment Monitoring - Alternative Frequency Plan/Special Studies [page 8]

The waiver of a single, annual Bioassessment monitoring event to alternatively conduct a study on the effects of PHAB modification on WARM, WILD, and/or COLD beneficial uses of inland receiving waters would not constitute a quid quo pro exchange of resources. The special study would be much more costly

Proposed modification:

The Regional Board should offer a more equitable option for alternative monitoring. One option could be reallocation of saved resources from a once-per-year sampling frequency (proposed above) to a collaborative SMC study on the effects of PHAB modification.

**II.A.5.c(2) Coastal Stormdrain Monitoring – Special Investigation Stations
[page 13]**

It is unclear why the Pearl Street drain is included in the list of priority drains for special investigations. In the latest PEA submittal, Figures C-11.16b and C-11.16c show that none of the 51 samples collected from the surfzone near the drain outlet contained concentrations of indicator bacteria above the AB-411 single sample standards.

Proposed Modification:

Remove special study requirement for the PEARL street drain.

The requirement that all special investigations be concluded by June 30, 2011 does not provide adequate time for determining if conditions in receiving waters are protective, or likely to be protective, of beneficial uses (I.B, Question 1). In order to answer Question 1 sufficiently, an epidemiological study must be conducted. The Doheny State Beach epidemiology study has shown that these methods are quite expensive and require a significant commitment of resources. Question 4 will be best answered when the methods of Microbial Source Tracking are more refined. Extending the reporting period for the special investigations will provide a better basis to address the Regional Board's concern about sources of bacteria and impacts on beneficial uses.

Proposed modification:

Modify the reporting requirements to allow for a phased reporting schedule such as:

- Annual Reports
 - Assess quality of receiving waters relative to AB-411 criteria (Q1)
 - Evaluate spatial extent of runoff influence on surfzone (Q2)
 - Trend Analysis (Q5)
 - Evaluate runoff contribution to bacterial concentrations in the surfzone (Q3)
- Report of Waste Discharge
 - Results of MST studies if methods have been adopted by the SMC (Q4)
 - Results of epidemiological studies if significant impacts have persisted beyond year 3 and natural uncontrollable sources have not been identified.

II.A.6.b High Priority Inland Aquatic Habitats [page 14]

The requirement that the new Inland Aquatic Habitat monitoring program be implemented by the beginning of the rainy season 2010 does not provide adequate time to develop this new monitoring program nor reallocate staff resources from the existing monitoring program. Furthermore, Regional Board staff must recognize that any increase in any specific element of the monitoring effort will need to be offset by strategically considered compensatory reductions in other elements.

Proposed modification:

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

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

See comment above with respect to implementation schedule.

Proposed modification:

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

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

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

Proposed modification:

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

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

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

Proposed modification:

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

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

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

Proposed modification:

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

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

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

Proposed modification:

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





COUNTY OF ORANGE

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January 24, 2008

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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 Copermitees for attempting to improve water quality.

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

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

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

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

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

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

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

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

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

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

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

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

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