

ATTACHMENT B

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

INTRODUCTION

Attachment B contains the principal technical comments of the County of Orange (the “County”) on Tentative Order No. R9-2007-0002 dated February 9, 2007 (“Tentative Order”). Although the supporting Fact Sheet/Technical Report dated February 9, 2007 (“Fact Sheet”) is referenced occasionally in this attachment, the County has not attempted to provide detailed comments on the Fact Sheet.

These comments are divided into three sections: (1) General Comments, (2) Findings, and (3) Permit Provisions. The first section discusses the County’s global concerns with the Tentative Order, whereas the latter two sections address issues relating to specific parts of the Tentative Order. At times, the issues and concerns raised will pertain to more than one section of the Tentative Order.

The County has endeavored to provide a complete set of comments on the Tentative Order. However, the County reserves the right to submit additional comments relating to Tentative Order No. R9-2007-0002 and the supporting Fact Sheet/Technical Report to the Regional Board up to the close of the public comment period.

GENERAL COMMENTS

TENTATIVE ORDER INAPPROPRIATELY USES THE TERM “VIOLATION” INSTEAD OF “EXCEEDANCE”

In several instances the language in the Tentative Order has been changed from the prior Order (R9-2002-0001) to replace the term “exceedance” with the term “violation”. For example, “exceedances of water quality objectives” has been replaced with “violations of water quality objectives” (emphasis added). In some cases, the change is inappropriate.

The Tentative Order should use the term “exceedance” where it refers to a comparison of data with criteria such as water quality objectives that are relevant to evaluation of the data. The Tentative Order should use the term “violation” when it is referring to a failure to comply with a prohibition or other requirement of the Tentative Order. Careful use of these terms is important, because an “exceedance” does not equate with a “violation.” For example, while it may be useful to compare water quality monitoring data to receiving water quality objectives and use identified “exceedances” to target potential

problems areas and pollutants, it is inappropriate to make this same comparison and determine that there is a “violation”.

The use of the term “violation” to refer to any exceedance detected would, in effect, be using the water quality objectives or other relevant reference criteria as de-facto numeric effluent limitations.

The County requests modification of the Tentative Order language to use the word “exceedance” instead of “violation” when referring to the comparison of water quality monitoring data to reference criteria. The locations in the permit where these changes should be made are:

- Page 5, Finding C.7.
- Page 7, Finding D.1.b.
- Page 11, Finding D.3.d.
- Page 12, Finding E.1.
- Page 15, A.3.

The term “violation” in this section is inconsistent with SWRCB Order WQ 99-05 and needs to be modified to “exceedance “. The iterative language in the receiving water limitations speaks to exceedances of water quality standards, not violations.

- For Monitoring and Reporting Program Page 12.B.1., we recommend the following alternative language:

“The wet weather program must, at a minimum, include collection of samples for those pollutants on the 303(d) list and/or are Permittee pollutants of concern ~~–causing or contributing to violations of water quality standards within the watershed.~~”

TENTATIVE ORDER IS OVERLY PRESCRIPTIVE AND DISMISSES THE IMPORTANCE OF THE DRAINAGE AREA MANAGEMENT PLAN

The Fact Sheet states that the Tentative Order includes sufficient detailed requirements to ensure compliance and seemingly dismisses the DAMP as “procedural correspondence” which guides implementation and is not a substantive component of the Order.

This permitting approach fundamentally shifts the level of program detail to the permit instead of the Drainage Area Management Plan (DAMP). The increasingly prescriptive and detailed permits provisions continue to erode the flexibility and local responsibility of Copermittees for continued development and improvement of the MS4 program based upon their extensive and collective experience in managing the program. This shift runs counter to the purpose and intent of the federal stormwater management program and as set forth in the federal CWA regulations and USEPA guidance.

The CWA regulations speak to the necessity and importance of the stormwater management plan in the permitting process. The management program “shall include a comprehensive planning process.....to reduce the discharge of pollutants to the

maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate.....Proposed management program shall describe priorities for implementing controls”. 40 CFR 122.16(d)(2)(iv).

A more flexible permitting approach sets the foundation for the Orange County Program and places upon the Copermittees the continuing responsibility of weighing economic, societal, and equity issues as they define the policies, standards and priorities to be employed in implementing the program.

In fact the DAMP and local JURMPs are fundamental and necessary elements of the MS4 program since they serve as the primary policy and guidance documents for the program and describe the methods and procedures that will be implemented to reduce the discharge of pollutants to the maximum extent practicable and achieve compliance with the MS4 permit performance standards. While the management plans must effectively address and be in compliance with the permit requirements, the necessary detail and prioritization of efforts in doing so must remain at the local level and be described within the Drainage Area Management Plan, not the permit.

The increasingly top down approach reflected in the Tentative Order also inadvertently reduces the ability of the Copermittees to adaptively manage their programs to meet the MEP standard. This seems contrary to the discussion of MEP in the Fact Sheet, which stresses the dynamic aspects the MEP standard and the need for continuous response to assessments of the program. “This Order specifies requirements necessary for the Copermittees to reduce the discharge of pollutants in urban runoff to the maximum extent practicable (MEP). However, since MEP is a dynamic performance standard which evolves over time as urban runoff management knowledge increases, the Copermittees’ urban runoff management programs must continually be assessed and modified to incorporate improved programs, control measures, best management practices (BMPs), etc. in order to achieve the evolving MEP standard.”¹ and “Reducing the discharge of stormwater pollutants to the MEP requires Copermittees to assess each program component and revise activities, control measures, best management practices (BMPs), and measurable goals, as necessary to meet MEP”². Finally, “....the Copermittees’ urban runoff management programs to be developed under the Order are the Copermittees’ proposals of MEP.....The Order provides a minimum framework to guide the Copermittees in meeting the MEP standard.”³

These statements acknowledge that it is incumbent upon the Copermittees to ensure that the program is effective and adaptively managed to meet the ever-evolving MEP standard. The ability of the Copermittees to adaptively manage and develop their programs is undermined by the statement within the Fact Sheet that the DAMP is “procedural correspondence” and not a substantive component of the Order. In the

¹ Fact Sheet/Technical Report for Tentative Order No. R9-2007-0002, Page 34

² Fact Sheet/Technical Report for Tentative Order No. R9-2007-0002, Page 34

³ Fact Sheet/Technical Report for Tentative Order No. R9-2007-0002, Page 35

comments below the Copermitees request a number of language changes so that the necessary programmatic detail is developed within the DAMP instead of the permit.

FINDINGS

DISCHARGE CHARACTERISTICS

- **Categories of Pollutants (Finding C.2. Page 3)**
Finding C.2. identifies common categories of pollutants in urban runoff. For some, but not all pollutants, the finding identifies sources [total suspended solids, sediment (due to anthropogenic activities)]. Since the Copermitees are not responsible for pollutants from all types of sources (atmospheric deposition, etc.), this Finding should be modified to identify the pollutants commonly found in urban runoff without specifying sources unless a more thorough discussion of sources is provided.
- **Clean Water Act 303(d) Impaired Waters (Finding C.6. Page 4)**
Finding C.6. includes Table 2a. which is titled “Common Watersheds and CWA Section 303(d) Impaired Waters”. By paraphrasing the 303(d) list Table 2a unfortunately connotes systemic water quality issues that are, in fact, limited to specific water quality segments. In addition, a number of contaminants are incorrectly identified as causes of impairment. For example, Aliso Creek is not listed for benzo[b]flouranthene, dieldrin, and sediment toxicity. The table needs to present the 303(d) list exactly in accordance with the 303(d) list approved by the State Board on 10/25/06 or be deleted.
- **Water Quality Monitoring Data (Finding C.7. Page 5)**
Finding C.7. states in part that “. . . water quality data submitted to date documents persistent violations . . .”. For the reasons discussed above and to be consistent with the Fact Sheet (page 8), the term “violation” should be changed to “exceedances.”

In addition, the Finding states that the water quality monitoring data collected to date indicates that there are exceedances of Basin Plan water quality objectives for a number of pollutants and that the data indicates that urban runoff discharges are the leading cause of impairment. While the receiving water quality may exceed Basin Plan objectives for constituents identified by the municipalities as pollutants of concern, there is inadequate data to make such a definitive statement that the urban discharges are the leading cause of impairment in Orange County. This statement does not take into account the other sources within the watershed or the uncertainty within many of the studies that have been conducted. Accordingly, the last sentence of that paragraph should be modified to read,

~~“In sum, the above findings indicate that urban runoff discharges are may be causing or contributing to water quality impairments, and are a warrant leading cause of such impairments in Orange County special attention.”~~

URBAN RUNOFF MANAGEMENT PROGRAMS

- **New or Modified Requirements (Finding D.1.c. Page 7)**

Finding D.1.c. states that the Tentative Order “contains new or modified requirements that are necessary to improve the Copermittees’ efforts to reduce the discharge of pollutants to the MEP and achieve water quality standards”. The Finding further states some of these new or modified requirements “address program deficiencies that have been noted in audits, report reviews, and other Regional Board compliance assessment activities.” In fact, in many cases the new or modified requirements do not have adequate findings of fact and technical justification.

In many instances the Fact Sheet not only provides little or no justification of the need for the new requirement, it also does not identify the “program deficiency” that warrants the modification. In many cases the Fact Sheet also ignores the thorough program analysis that the Copermittees conducted as a part of their preparation of the ROWD and the deficiencies and program modifications that Copermittees themselves identified as necessary for the program. The Permit Provisions comments in the next section of these comments identify many of the areas where new or modified provisions of the Tentative Order lack factual or technical support in the Fact Sheet.

- **Development Planning - Treatment Control BMPs (Finding D.2.b. Page 9)**

Finding D.2.b. states that end-of-pipe BMPs are more effective when used as polishing BMPs. Treatment BMPs are not particularly effective as polishing BMPs and work best when the pollutant load is high. The finding should be modified to remove the statement that end-of-pipe BMPs are more effective when used as polishing BMPs.

- **Heavy Industrial Sites (Finding D.2.e. Page 9)**

Finding D.2.e. states that the one-acre threshold for heavy industrial sites is appropriate “since it is consistent with the requirements in the Phase II NPDES stormwater regulations that apply to small municipalities”. The Phase II stormwater regulations do not apply to the Phase I communities. 40 CFR 122.32. The reference to Phase II NPDES regulations and, as discussed below, the corresponding change in the permit provisions should be deleted.

- **Discharges “Into” the MS4 (Finding D.3.e Page 11)**

Finding D.3.e. states that pollutants discharged “into” an MS4 must be reduced to the MEP. This appears to be an error. The corresponding Tentative Order Section A.2 prohibits only discharges “from” an MS4 that contain pollutants which have not been reduced to the MEP. Finding D.3.e should be revised accordingly.

STATUTE AND REGULATORY CONSIDERATIONS

- **Treatment and Waters of the U.S. (Finding E.7. Page 14)**

Finding E.7. states that, “[u]rban runoff treatment and/or mitigation must occur prior to the discharge of urban runoff into a receiving water.” We believe that Finding E.7. is based on a misinterpretation of CWA regulations and misconstrues USEPA guidance on storm water treatment BMPs. This is discussed in detail in Attachment A (Pages 1-7). We wish to comment here on the implications it has for watershed restoration activities.

Prohibiting treatment and mitigation in receiving waters severely limits the potential locations for installation of treatment control BMPs and will adversely affect many watershed restoration projects. For example, this Finding may have unintended adverse effects for the Aliso Creek Water Quality SUPER Project.

The Aliso Creek Water Quality SUPER Project proposes a multi-objective approach to Aliso Creek watershed development and enhancement, accommodating channel stabilization, flood hazard reduction, economic uses, aesthetic and recreational opportunities, water quality improvements, and habitat concerns. The project is aimed at water supply efficiency and system reliability through reclamation, along with benefits for flood control and overall watershed management and protection. The ecosystem restoration and stabilization component of the project will include:

- Construction of a series of low grade control structures and reestablishment of aquatic habitat connectivity;
- Shaving of slide slopes to reduce vertical banks; and
- Invasive species removal and riparian revegetation and restoration of floodplain moisture.

The Copermittees are concerned that some of these activities may be deemed “urban runoff treatment and/or mitigation” in a receiving water and, thus, may not be allowed, compromising the project objectives.

In addition, this Finding seems to conflict with Section 3.a.(4) of the Tentative Order, which requires the Copermittees to evaluate their flood control devices and identify the feasibility of retrofitting the devices to provide for more water quality benefits.

Given the lack of any proper legal or factual basis for these limitations as well as the adverse impacts on watershed restoration efforts, the Finding should be deleted from the Tentative Order.

PERMIT PROVISIONS

LEGAL AUTHORITY

- **Effectiveness of BMPs (Section C.1.j. Page 19)**

The Tentative Order includes a new provision that requires the Copermitees to demonstrate that they have the legal authority to require documentation on the effectiveness of BMPs. This provision is inappropriate. 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 development to select BMPs that have been demonstrated as effective for their project category. In addition, it ignores the fact that the Copermitees have already established legal authority for their development standards so that project proponents have to incorporate and implement the required BMPs. This Section C.1.j. should be deleted from the Order.

JURISDICTIONAL URBAN RUNOFF MANAGEMENT PROGRAM

Development Planning Component

- **Infiltration and Groundwater Protection (Section D.1.c.(6) Page 22)**

Section D.1.c.(6)(a) requires urban runoff to undergo pretreatment prior to infiltration. This is problematic for several reasons. First, this requirement unnecessarily constrains the use of infiltration devices, which should be at the discretion of the designer, and diminishes the beneficial aspects of infiltration devices. At the same time, the volume of stormwater that can be treated will be reduced since the volume will be limited to the sizing of the pretreatment device and not the sizing of the infiltration device. Besides, pollution prevention and source control BMPs are required prior to infiltration.

Second, the Fact Sheet provides no technical basis for the requirement to provide pretreatment before infiltration. This restriction on the use of infiltration technology should not be included in the Tentative Order without a strong technical basis for the requirement that details the necessity of pretreatment before infiltration and the concerns related to infiltrating stormwater.

Since the Fact Sheet does not currently provide a any technical basis for the requirement, Section D.1.c.(6)(a) should be deleted from the Tentative Order.

Section D.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 technical basis for this restriction or the definition of “high vehicular traffic” included within the Fact Sheet. 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.

Since the Fact Sheet does not currently provide a technical basis for restricting the use of infiltration treatment control BMPs in areas of industrial or light industrial activity and areas subject to high vehicular traffic, Sections D.1.c.(6)(a) and D.1.c.(6)(g) should be deleted from the Tentative Order.

- **Standard Urban Storm Water Mitigation Plans (SUSMPs) (Section D.1.d. Page 23)**

Section D.1.d. requires each Copermittee to implement an updated local SUSMP within twelve months of adoption of the Order. The schedule for the update of the SUSMP is overly aggressive and does not allow the time necessary for the Copermittees to incorporate changes and implement an updated SUSMP. Since the modifications for the SUSMP will take longer than the 12-month period identified in the Tentative Order, the provision should be modified to require each Copermittee to implement an updated local SUSMP within 24 months of adoption of the Order.

- **Definition of Priority Development Project (Section D.1.d.(1)(b) Page 23)**

Section D.1.d.(1)(b) defines Priority Development Projects as “redevelopment projects that create, add, or replace at least 5,000 square feet of impervious surfaces on an already developed site that falls under the project categories or locations listed in section D.1.d.(2)”. This Section is not clear on whether the “already developed site” or the redevelopment project must fall under one of the categories in section D.1.d.(2) in order for the project to be considered a Priority Development Project. The Copermittees request clarification regarding this Section.

The project categories listed in section D.1.d.(2) includes “single-family homes”. Requiring SUSMP requirements for re-development projects of single-family homeowners presents an unnecessary burden in terms of cost and complexity and likely minimal water quality benefit. This provision should be modified to exclude single-family homes from SUSMP requirements.

- **Priority Development Project Categories (Section D.1.d.(2) Page 24)**

Section D.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 D.1.d.(2) subjecting the entire project footprint to SUSMP requirements should be removed from the permit.

- **Commercial Developments (Section D.1.d.(2)(b) Page 24)**

Section D.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 Copermittee findings that smaller commercial facilities pose high threats to water quality. This is not the case. The Copermittees indicated that commercial facilities of 100,000 square feet or less receive a score of 3 out 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 D.1.d.(2)(c) Page 24)**
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 D.1.d.(2)(i) Page 25)**
Section D.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. It is unclear whether a project such as the addition of a right turn pocket to a roadway would subject the entire roadway to SUSMP requirements and treatment controls. This provision should be revised to include language clarifying that only the subdrainage area where the roadway improvements are occurring is subject to SUSMP requirements and required to include BMPs, not the entire roadway.
- **Retail Gasoline Outlets (Section D.1.d.(2)(j) Page 25)**
Section D.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 D.1.d.(2)(j) should be removed from the permit.
- **Treatment Control BMP Requirements (Section D.1.d.(6)(ii)(f) and (g) Page 28)**
Section D.1.d.(6)(ii)(f) require treatment control BMPs be implemented prior to discharging into waters of the U.S. and provision D.1.d.(6)(ii)(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 Copermittees 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.

- **Low Impact Development (LID) Site Design BMP Substitution Program (Section D.1.d (8) Page 30)**

Section D.1.d.(8)(e) states that the LID Site Design BMP Substitution Program must not apply to automotive repair shops or streets, roads, highways, or freeways that have high levels of average daily traffic. The Copermittees do not design, construct or operate freeways. It is suggested that the word “freeways” be removed from this provision.

- **Treatment Control BMP Maintenance Tracking (Section D.1.f Page 32)**

Section D.1.f.(2)(c) requires a very prescriptive and resource intensive inspection program for the treatment controls. For example, (iii) requires Copermittees to annually inspect of 100% of projects with treatment control BMPs that are high priority. Annual inspection of structural BMPs will create a burgeoning and resource intensive inspection program that is not warranted. The Provision should be amended to reduce the prescriptive nature of the inspection program and allow the Copermittees to develop an inspection program that will meet the intent of the provision while balancing the need for a variety of approaches to complete this element of the program in a cost effective manner. This is important because such approaches include not only inspections but also

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Construction Component

- **Permit Fees**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Municipal

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

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

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

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

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

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

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

(4). BMP Implementation for Flood Control Structures

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

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

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

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

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

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

All Copermittes maintain street sweeping programs in residential, commercial and/or industrial areas and, in 1993, the Copermittes compiled information regarding their existing street sweeping schedules and practices and subsequently changed elements of their programs such as the types of sweepers purchased, the frequency of sweeping, and the use of parking restrictions in order for the street sweeping program to more effectively aid in water quality improvements. In fact, the Copermittes have observed an 87% increase in the weight of material collected from 2001-2002 to 2004-2005 indicating a marked increase in effort and diversion of materials that would have otherwise ended up in the receiving waters⁴.

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

- **Infiltration from Sanitary Sewer to MS4 (Section D.3.a.(7) Page 49)**
Although the first portion of the Tentative Order provision (7)(a) is consistent with the current permit (Order No. R9-2002-0001), the Copermittes submit that this provision is more applicable to sanitary sewer agencies, not stormwater agencies, and is an unnecessary duplication of other regulatory programs. The State Board stayed a similar provision in the existing permit as leading “significant confusion and unnecessary control activities.” WQ 2002-0014 at p.8. Since that time, the State Water Resources Control Board has adopted the Statewide General Waste Discharge Requirements (WDRs) for Sanitary Sewer Systems, Water Quality Order No. 2006-0003 (Sanitary Sewer Order) on May 2, 2006 and the Regional Water Board adopted Order No. R9-2007-0005 on February 14, 2007 (which is more stringent and prescriptive than the Statewide General WDRs).

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

⁴ Report of Waste Discharge, July 21, 2006, Section 5.0 Municipal Activities.

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

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

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

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

Commercial/Industrial

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

complying with the permit instead of creating duplicative inspection programs. The ability to utilize third-party inspections as an effective part of the program, has allowed the Copermittees 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 Copermittees in inspecting 10,000 restaurants countywide on an annual basis. The Copermittees 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 Copermittees.

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

ID/IC Program

- **Investigation/Inspection and Follow Up (Section D.4.e(2)(b) and (c) Page 63)**
The Tentative Order requires that the Copermittees conduct an investigation or document why the discharge does not require an investigation within two days of receiving dry weather field screening or analytical laboratory results. Although the Copermittees understand and agree with the intent of the permit language, the existing language is onerous and does not recognize the resources that are necessary to conduct an investigation or the variability of the types of investigations that may be warranted.

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

- (b) Field screen data: Within two business days of receiving dry weather field screening results that exceed action levels, the Copermittees 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 Copermittees must either ~~conduct~~ initiate an investigation to identify the source of the discharge or document the rationale for why the discharge does not pose a threat to water quality and does not need further investigation.
- **Elimination of Illicit Discharges and Connections (Section D.4.f Page 64)**
The Tentative Order requires that the Copermittees “take immediate action to eliminate all detected illicit discharges....” And that illicit discharges that pose a serious threat....”must be eliminated immediately”. Although the Copermittees understand and agree with the intent of the permit language, the existing language is onerous and does not recognize the time and/or resources that are

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

f. Elimination of Illicit Discharges and Connections

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

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

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

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

“For example, the watershed requirements of Order No. R9-2002-01 were some of the Order’s most flexible requirements. This lack of specificity in the watershed requirements resulted in inefficient watershed compliance efforts. This situation reflects a common outcome of flexible permit language. Such language can be unclear and unenforceable, and it can lead to implementation of inadequate programs⁵.”

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

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

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

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

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

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

The Copermittees propose that the language be modified as follows:

- a. Lead Watershed Permittee Identification

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

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

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

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

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

Fiscal Analysis (Section F. Page 74)

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

Long Term Funding Strategy and Business Plan

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

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

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

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

Second, the Copermittees 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 Copermittees are dedicated to the program, plan their budgets accordingly, and have adequately funded the program for the past 16 years (**Figures 1 and 2**).

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

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

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

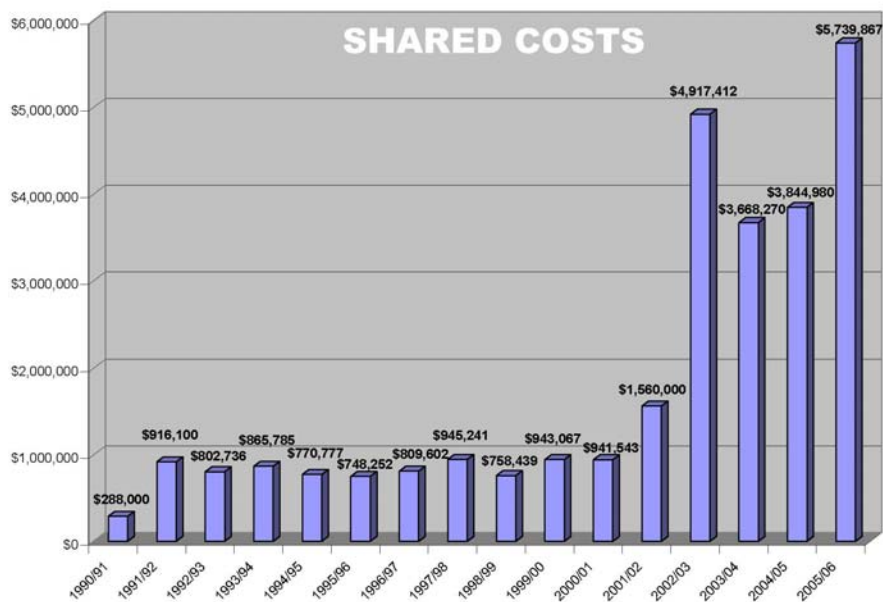
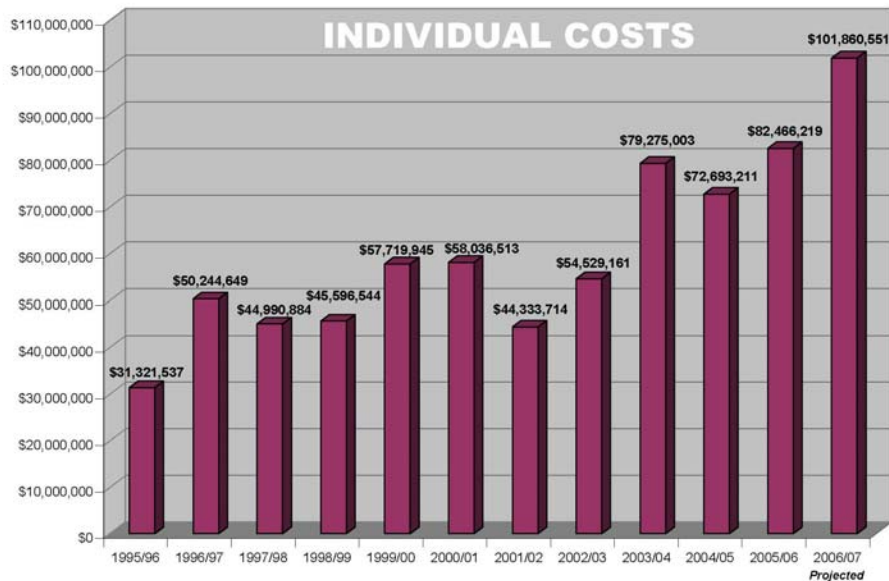


Figure 2. Historical Review of Individual Costs (1995-2007)



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

Fiscal Benefits

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

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

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

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

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

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

Program Effectiveness Assessment (Section G. Page 75)

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

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

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

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

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

The proposed language is:

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

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

Section H of the Tentative Order requires the Copermitees 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 Copermitees understand that the Tentative Order included these changes to allow for a longer time period between the two sets of submittals, the Copermitees 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 31⁶ of each year. This will allow the Copermitees to assess their stormwater program and water quality monitoring program and conduct an integrated assessment to identify water quality improvements.

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

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

3. Aliso Creek Watershed URMP Provisions
 - b. Each Permittee must provide annual reports by ~~March 1~~ January 31 of each year beginning in 20089 for the preceeding annual period of ~~January~~ July 1 through ~~December~~ June 30.....

⁶ Reporting schedules will need to be aligned with the Santa Ana Permit reporting schedules.