

**California Regional Water Quality Control Board
San Diego Region**

Response to Comments Report

**Tentative Order No. R9-2013-0001
NPDES NO. CAS0109266**

**NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES) PERMIT
AND
WASTE DISCHARGE REQUIREMENTS FOR
DISCHARGES FROM THE
MUNICIPAL SEPARATE STORM SEWER SYSTEMS (MS4s)
DRAINING THE WATERSHEDS WITHIN THE SAN DIEGO REGION**

March 27, 2013

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GENERAL COMMENTS

Gnl-1: Implementation of the Tentative Order and its burdensome, untested regulations will be too costly.

RESPONSES TO COMMENTS RECEIVED ON TENTATIVE ORDER NO. R9-2013-0001

March 27, 2013

Gnl-1	GENERAL
	<u>COMMENT:</u> <i>Implementation of the Tentative Order and its burdensome, untested regulations will be too costly.</i> Comments were submitted by members of the Building Industry, Community Planning Groups, Copermittees, Engineering/Design Consultants, State Government, Societies/Associations/Coalitions, and Other Entities generally expressing concerns with costs to implement requirements. Commenters also generally expressed support for practical, cost-effective, and scientifically based regulation. Building Industry / Industry Associated General Contractors of America Community Planning Groups Jamul Dulzura Community Planning Group Julian Community Planning Group Pala Pauma Valley Community Sponsor Group Ramona Community Planning Group Copermittees County of San Diego San Diego County Fire Authority San Diego Unified Port District Environmental Organizations Clean Water Now Engineering/Design Consultants Latitude 33 Planning and Engineering State/Federal Government Senator Mark Wyland Societies/Associations/Coalitions BIOCOM East Otay Mesa Property Owners Association Otay Mesa Property Owners Association San Diego Association of Realtors San Diego County Taxpayers Association South County Economic Development Council Other Entities Carol Crossman Continental Maritime of San Diego Gable PR Hughes Marino Marston+Marston, Inc. National Enterprises Inc. Nuffer, Smith, Tucker, Inc. Peter Hekman Jr. San Diego Regional Chamber of Commerce Sheppard, Mullin, Richter & Hampton LLP Southern Cross Property Consultants Transition IT

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March 27, 2013

Gnl-1	GENERAL
	RESPONSE: The San Diego Water Board understands the concerns expressed by the commenters about the potential costs to implement the requirements, but disagrees that the requirements are burdensome and untested. Most of the requirements in the Tentative Order are not new to the San Diego Region. The Tentative Order incorporates many existing requirements from the MS4 permits for Orange and Riverside Counties. The San Diego Water Board has put considerable effort into developing a draft Regional MS4 permit (referred to as the Tentative Order) that that will jointly cover thirty-nine (39) municipal, county government, and special district entities (Copermittees) in San Diego County , southern Orange County abnd southwest Riverside County. The Tentative Order significantly modifies the prescriptive action-based regulatory approach of the current municipal storm water permits to an outcome-based approach, with a focus on measuring and achieving improvements in MS4 discharges and receiving water quality. A key feature of the Tentative Order is that it provides an adaptive management pathway for the Copermittees to select and address the highest priority water quality issues through a non-punitive iterative process. The proposed adaptive management permit provisions have great promise and will allow the Copermittees to more flexibly deploy resources to achieve goals that will yield the greatest water quality improvements in the most effective and efficient manner to restore and protect the quality of the San Diego Region's receiving waters. The regional approach of the Tentative Order offers the opportunity to better achieve regulatory consistency as well as maximum efficiency and economy of resources for both the San Diego Water Board and the Copermittees. The San Diego Water Board has carefully considered costs of both the Tentative Order and the TMDLs included in the Tentative Order and found them to be necessary. Consideration of costs is discussed under the Economic Considerations in Section IV of the Fact Sheet. The commenters assert that the Tentative Order is too expensive, but do not consider the costs of not addressing impacts from discharges from the MS4. In addition, the San Diego Water Board has significantly modified the structure and focus of the requirements in the Tentative Order to allow the Copermittees to more efficiently and cost effectively utilize their resources, which is expected to result in the realization of significant cost savings that could not be realized in the existing MS4 permits. The Tentative Order was developed over a two year period beginning in February 2011 through a participatory approach designed to actively engage key stakeholders, The transparent and comprehensive stakeholder participation process has resulted in a Tentative Order designed to be a strategic, cost-effective, and water

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Gnl-1	GENERAL	
	quality outcome based permit. Strategic in that it allows for identifying the highest priority water quality conditions to be addressed first. Cost-effective in that the Copermittees are allowed to use their limited resources on the highest priority water quality conditions and can look for efficiencies on a watershed scale. The Tentative Order is water quality outcome based in that it has a clearly defined iterative and adaptive management process that focuses on measuring and achieving improvements in MS4 discharges and receiving water quality. The Tenaitve Order evaluates success based on water quality monitoring data and assessment, not just completing a minimum number of actions without consideration if these actions are succeeding in improving water quality.	

Gnl-2: Allow current permit requirements to remain in effect until Water Quality Improvement Plans are developed.

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Gnl-2	GENERAL	
	COMMENT: <i>Allow current permit requirements to remain in effect until Water Quality Improvement Plans are developed.</i> Comments were submitted by members of the Building Industry, Engineering/Design Consultants, Societies/Associations/Coalitions, and Other Entities generally requesting that the Copermittees be allowed to continue implementing the current permit requirements until Water Quality Improvement Plans are developed and implemented.	Building Industry / Industry Associated General Contractors of America Otay Land Company Engineering/Design Consultants Latitude 33 Planning and Engineering Societies/Associations/Coalitions BIOCOM San Diego Association of Realtors Other Entities Carol Crossman Continental Maritime of San Diego Gable PR Hughes Marino Marston+Marston, Inc. Nuffer, Smith, Tucker, Inc. San Diego Regional Chamber of Commerce Sheppard, Mullin, Richter & Hampton LLP Southern Cross Property Consultants Transition IT
	RESPONSE: The San Diego Water Board agrees that the jurisdictional runoff management program requirements of the current permits should remain in effect until the Water Quality Improvement Plans are developed and accepted. The jurisdictional runoff management program requirements of the existing MS4 permits will remain in effect until the Water Quality Improvement Plans are developed and implemented. The introductory paragraph to Provision E states, <i>“Until the Copermittee has updated its jurisdictional runoff management program document with the requirements of Provision E, the Copermittee must continue implementing its current jurisdictional runoff management program.”</i> This includes the development planning requirements. The Copermittees, however, will be required to comply with the prohibitions and limitations, and implement the transitional monitoring requirements, transitional reporting requirements, and TMDL requirements upon adoption of the Tentative Order.	

Gnl-3: Regional MS4 Permit approach allowing prioritization may result in the neglect of parts of the watershed.

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Gnl-3	GENERAL
	COMMENT: <i>Regional MS4 Permit approach allowing prioritization may result in the neglect of parts of the watershed.</i> The Environmental Groups and the South Laguna Civic Association submitted comments expressing support for the Regional MS4 Permit allowing the Copermittees to focus on priorities, but they also expressed concern that the approach may also result in the neglect of parts of the watersheds. The South Laguna Civic Association are particularly concerned that high value habitats and coastal receiving waters of the Aliso Creek watershed will continue to be impacted by runoff from residential developments. The Environmental Groups are concerned that there will be “orphaned” priorities, or one jurisdiction will carry most of the burden of implementing the water quality improvement strategies within the watershed.
	RESPONSE: The San Diego Water Board understands the concerns, but disagrees that the approach of the Regional MS4 Permit will result in the neglect of parts of the watershed. The San Diego Water Board developed the approach of the Regional MS4 Permit because the Copermittees are no longer focused on achieving outcomes of improved water quality, but compliance with actions that must be implemented. In effect, the current approach is actually resulting in the neglect of the entire watershed because of the “everything, everywhere” approach. When everything is a priority, nothing is a priority. In contrast, the approach of the Regional MS4 Permit is to re-focus the Copermittees’ efforts toward achieving outcomes that will result in improvements in MS4 discharges and receiving water quality. While not all priorities will be addressed immediately, all priorities will be addressed at some point. In allowing the Copermittees to focus on the highest priorities, lower priorities may also be addressed by the strategies being implemented to address the highest priorities. The requirements of the Tentative Order also include several elements that are intended to provide the San Diego Water Board and the public the information necessary to determine if each Copermittee is participating in implementing the Water Quality Improvement Plans. The San Diego Water Board encourages the Environmental Organizations to remain involved during the development and implementation of the Water Quality Improvement Plans to provide recommendations to the Copermittees for the priority water quality conditions that should be addressed. By remaining involved, the environmental organizations can also understand the opportunities and constraints that are identified during the prioritization process.

Environmental Organizations
 Environmental Groups
 South Laguna Civic Association

Gnl-4: *Meaningful enforcement of permit requirements is necessary to protect receiving waters.***RESPONSES TO COMMENTS RECEIVED ON TENTATIVE ORDER NO. R9-2013-0001**

March 27, 2013

Gnl-4	GENERAL	
	COMMENT: <i>Meaningful enforcement of permit requirements is necessary to protect receiving waters.</i> The San Diego Green Building Council, Laguna Bluebelt Association, and South Laguna Civic Association each submitted comments that the Tentative Order must include requirements that result in meaningful enforcement actions. Without requirements for meaningful enforcement actions, the commenters are concerned that discharges from the MS4 and dry weather flows will continue to degrade water quality.	Building Industry / Industry San Diego Green Building Council Environmental Organizations Laguna Bluebelt Coalition South Laguna Civic Association
	RESPONSE: The San Diego Water Board agrees that meaningful enforcement actions are necessary to protect receiving waters. The requirements of the Tentative Order are all intended to result in the protection of the quality of receiving waters from MS4 discharges. The Tentative Order also includes requirements for the Copermittees to demonstrate that they are issuing enforcement actions in a timely manner to obtain compliance from sources that are discharging to their MS4s. Enforcement of the requirements of the Tentative Order by the San Diego Water Board may be necessary to compel the Copermittees to properly implement and enforce their legal authorities to adequately protect water quality. By issuing the Regional MS4 Permit, the San Diego Water Board expects to be able to reallocate its resources to better enforce permit requirements instead of developing permits and permit requirements.	

Gnl-5: *Include requirements to develop maps or charts to track and monitor coastal receiving waters subject to MS4 runoff flows and impacts.***RESPONSES TO COMMENTS RECEIVED ON TENTATIVE ORDER NO. R9-2013-0001**

March 27, 2013

Gnl-5	GENERAL	
	COMMENT: <i>Include requirements to develop maps or charts to track and monitor coastal receiving waters subject to MS4 runoff flows and impacts.</i> The Laguna Bluebelt Coalition and South Laguna Civic Association expressed support for the creation of maps to show water quality impacted areas of all creeks and coastal receiving waters within the region. The South Laguna Civic Association would like an interactive map that identifies protected coastal receiving water resources and dominant littoral currents and counter currents to help identify distribution patterns of urban runoff induced algal plumes and thermal plumes.	Environmental Organizations Laguna Bluebelt Coalition South Laguna Civic Association
	RESPONSE: The San Diego Water Board has considered the concept, but does not agree this requirement is appropriate or necessary to be included in the requirements of the Tentative Order. The San Diego Water Board understands the desire for such spatial and temporal information to be available in a visual format. However, the creation and maintenance of such map would require the collection and processing of data that is beyond the scope of what is required to be measured and reported for the purposes of the Tentative Order.	

Gnl-6: *Increase use of recycled water to reduce need for imported water and discharges from MS4s.***RESPONSES TO COMMENTS RECEIVED ON TENTATIVE ORDER NO. R9-2013-0001**

March 27, 2013

Gnl-6	GENERAL	
	<u>COMMENT:</u> <i>Increase use of recycled water to reduce need for imported water and discharges from MS4s.</i> The Laguna Bluebelt Coalition and South Laguna Civic Association expressed support for the increasing the use of recycled water to reduce imported water demand. The commenters contend that increasing recycled water use will reduce discharges to the ocean.	Environmental Organizations Laguna Bluebelt Coalition South Laguna Civic Association
	<u>RESPONSE:</u> The San Diego Water Board supports and promotes the use of recycled water. The Tentative Order does not prohibit the use of recycled water, but does limit the discharge of recycled water to receiving waters. The requirements of the Tentative Order do not specifically encourage the use of recycled water, nor is it appropriate for the Tentative Order to do so. Recycled water and the discharge of recycled water are regulated by the San Diego Water Board under separate regulatory mechanisms. The San Diego Water Board agrees that the recycling of wastewater, as well as recycling non-storm water discharges and retaining and using storm water runoff has the potential to reduce the need to import water to the San Diego Region. The San Diego Water Board encourages the Environmental Organizations to remain involved during the development and implementation of the Water Quality Improvement Plans to provide recommendations to the Copermitees for identifying opportunities to promote recycled water use and recycling of non-storm water and storm water discharges to and from the MS4.	

Gnl-7: Portions of San Diego County in the Colorado River Region should not be subject to requirements of San Diego Region.

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Gnl-7	GENERAL	
	COMMENT: <i>Portions of San Diego County in the Colorado River Region should not be subject to requirements of San Diego Region.</i> The Julian Community Planning Group submitted a comment stating that the portion of San Diego County under the jurisdiction of the Colorado River Water Board should not be subject to the requirements of the Tentative Order.	Community Planning Groups Julian Community Planning Group
	RESPONSE: The San Diego Water Board agrees. The requirements of the Tentative Order are only applicable to the portion of San Diego County within the jurisdiction of the San Diego Water Board.	

Gnl-8: *Urban runoff is the San Diego Region's most urgent pollution problem.***RESPONSES TO COMMENTS RECEIVED ON TENTATIVE ORDER NO. R9-2013-0001**

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Gnl-8	GENERAL	
	COMMENT: <i>Urban runoff is the San Diego Region's most urgent pollution problem.</i> Several Environmental Organizations, the San Diego Green Building Council, and Other Entities submitted comments stating that urban runoff is the San Diego Region's most urgent problem. Most of the commenters also acknowledged that it is a difficult problem to solve, but they are willing to work together to help solve the problem.	Building Industry / Industry San Diego Green Building Council Environmental Organizations The Escondido Creek Conservancy Friends of Rose Canyon Creek / Rose Creek Watershed Alliance Laguna Bluebelt Coalition Los Penasquitos Lagoon Foundation Natural Resources Defense Council San Diego Canyonlands San Elijo Lagoon Conservancy Other Entities Curious Company Hector Valtierra
	RESPONSE: The San Diego Water Board agrees that runoff from developed and developing areas pose a significant problem to protecting water quality in the San Diego Region. The San Diego Water Board has developed the Regional MS4 Permit approach to allow the Copermittees to tap into the community and the resources the community is willing to provide to help address the problems associated with runoff from developed and developing areas. The San Diego Water Board encourages the community to remain involved during the development and implementation of the Water Quality Improvement Plans to provide recommendations to the Copermittees for identifying opportunities to the public for addressing problems associated with runoff from developed and developing areas.	

Gnl-9: The term "prohibit" should be changed to "effectively prohibit" throughout Tentative Order when referring to non-storm water discharges.

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Gnl-9	GENERAL	
	COMMENT: <i>The term "prohibit" should be changed to "effectively prohibit" throughout Tentative Order when referring to non-storm water discharges.</i> The Orange County, Riverside County and San Diego County Copermittees each submitted comments requesting that the language of the Tentative Order be revised to "effectively prohibit" non-storm water discharges to the MS4 instead of just "prohibit" to be consistent with the language of the Clean Water Act. The Natural Resources Defense Council submitted comments that assert that the Clean Water Act and the Code of Federal Regulation require an absolute prohibition of non-storm water discharges, in any amount, to the MS4.	Copermittees Orange County Copermittees Riverside County Copermittees San Diego County Copermittees Environmental Organizations Natural Resources Defense Council
	RESPONSE: The San Diego Water Board agrees that the language of the Tentative Order should be consistent with the Clean Water Act and Code of Federal Regulations. The Clean Water Act requires MS4 permits to include a requirement that non-storm water discharges are to be "effectively prohibited" to the MS4. The Code of Federal Regulations requires each Copermittee to have the legal authority to "prohibit" non-storm water discharges to the MS4. The Phase I Final Rule clarifies what "effectively prohibit" means (55 FR 47995): <i>"Section 402(p)(3)(B) requires that permits for discharges from municipal separate storm sewers require the municipality to "effectively prohibit" non-storm water discharges from the municipal separate storm sewer...Ultimately, such non-storm water discharges through a municipal separate storm sewer must either be removed from the system or become subject to an NPDES permit (other than the permit for the discharge from the municipal separate storm sewer.)"</i> Where appropriate, the language in the Tentative Order has been revised to be consistent with the language of the Clean Water Act to include the term "effectively prohibit" instead of "prohibit" or "reduce and eliminate." In other cases, the language has been maintained to be consistent with the requirements of the Code of Federal Regulations requiring the Copermittees to establish the legal authority to "prohibit" non-storm water discharges to their MS4s and enforce that legal authority. The establishment and enforcement of the legal authority to "prohibit" non-storm water discharges to their MS4s is how the Copermittees will "effectively prohibit" non-storm water discharges to their MS4s.	

Gnl-10: The requirements of the Tentative Order do not allow Copermittees to adaptively manage their programs.

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Gnl-10	GENERAL	Copermittees Riverside County Copermittees
	COMMENT: <i>The requirements of the Tentative Order do not allow Copermittees to adaptively manage their programs.</i> The Riverside County Copermittees submitted comments contending that the requirements of the Tentative Order will not allow the Copermittees to adaptively manage their programs. In particular, the Riverside County Copermittees cite the prohibitions and limitations of Provision A and the development planning requirements of Provision E.3 as requirements that will limit their ability to adaptively manage.	
	RESPONSE: The San Diego Water Board disagrees that the requirements of the Tentative Order will not allow the Copermittees to adaptively manage their programs. The approach used in developing the requirements in the Tentative Order departs significantly from the approach used in developing the requirements of previous and current permits. The current MS4 permits essentially prescribe the programs that must be implemented by each Copermittee, resulting in a focus on complying with the implementation of required actions. The current permits provide the Copermittees little or no ability to adaptively manage the programs to become more focused on achieving outcomes. In contrast, the requirements of the Tentative Order allow the Copermittees to strategically plan by identifying the highest priority pollutants or conditions in a specific watershed, goals and strategies to address those pollutants or conditions, and resources to implement the strategies. Furthermore, the Copermittees are provided the monitoring and assessment information that allows them to determine when those priorities, goals and strategies should be adjusted or are no longer appropriate. The Tentative Order is predicated on a new emphasis on water quality based outcomes (i.e., restoration or protection of water quality and beneficial uses) instead of a prescriptive action based regulatory approach (e.g., implementation of programs). The flexibility that is provided in the Tentative Order should not be mistaken as the San Diego Water Board wishing to grant full autonomy to the Copermittees to implement their jurisdictional runoff management programs. The requirements of the Clean Water Act and the Code of Federal Regulations must still be incorporated into the requirements of the Tentative Order. The Code of Federal Regulations includes several program components that must be implemented by the Copermittees. The USEPA has also provided guidance as to what minimum requirements should be included in those programs. The San Diego Water Board must balance the Copermittees' desire to have more flexibility to adjust their	

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Gnl-10	GENERAL	
	programs with the statutory requirements of the Clean Water Act and the California Water Code which hold the Copermittees accountable for compliance with a minimum set of requirements that are enforceable. Given that the Tentative Order already provides the Copermittees great latitude in adjusting their programs to focus their resources on achieving improved water quality, the San Diego Water Board has extended that flexibility further by incorporating additional opportunities into the revised Tentative Order for identifying and implementing more watershed-specific requirements in areas of the Tentative Order where the Copermittees perceive and assert there is little to no flexibility provided. Please see responses to comments A-1 and E3c-2.	

Gnl-11: Implementation of current permit requirements and accomplishments of Orange and Riverside County Copermittees not being considered.

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Gnl-11	GENERAL	
	COMMENT: <i>Implementation of current permit requirements and accomplishments of Orange and Riverside County Copermittees not being considered.</i> The Orange County and Riverside County Copermittees each submitted comments expressing concern that the Tentative Order has been developed without considering the programs and plans being developed under their current permit requirements, and does not acknowledge the accomplishments achieved by the Copermittees during the previous and current permit terms. In addition, the Orange County and Riverside County Copermittees each submitted comments that they must have an opportunity to propose changes to the requirements of the Tentative Order through the Report of Waste Discharge. The San Diego Green Building Council recommended that the Tentative Order also take into account successes that have been achieved in other jurisdictions outside of the San Diego Region.	Building Industry / Industry San Diego Green Building Council Copermittees Orange County Copermittees Riverside County Copermittees
	RESPONSE: The San Diego Water Board disagrees that the Tentative Order does not consider the implementation of current permit requirements, and accomplishments and successes of the Orange County and Riverside County Copermittees and other jurisdictions. Most of the requirements included in the Tentative Order are also in the current permits issued to the Orange County and Riverside Copermittees (Order Nos. R9-2009-0002 and R9-2010-0016). The current permits issued to the Orange County and Riverside County Copermittees include prohibitions and limitations, numeric action levels, and the same jurisdictional runoff management program components. The structural BMP performance standards (i.e. storm water pollutant control retention and hydromodification management) are effectively the same as in the Orange County and Riverside County MS4 permits. The Watershed Workplans of the current permits are very similar to, and are expected to serve as the basis of the Water Quality Improvement Plans. The monitoring program requirements are very similar, with potential reductions of monitoring requirements in several instances. The reporting requirements in the Tentative Order have actually been significantly reduced compared to the current permits. The San Diego Water Board expects the Orange County and Riverside County Copermittees' implementation of their current permit requirements will make the transition from to the Tentative Order much easier than the San Diego County Copermittees because so many of the MS4 permit requirements are similar, and in many cases more prescriptive, than the requirements of the Tentative Order. The flexibility of the requirements of the Tentative Order compared to their current permit requirements will provide the Orange County and Riverside	

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Gnl-11	GENERAL	
	County Copermittees many opportunities to identify more effective and efficient ways to utilize their resources to improve water quality. However, until the Orange County and Riverside County Copermittees obtain coverage under the Tentative Order, they will remain subject to the more prescriptive requirements of their current permits. Furthermore, the requirements of the Tentative Order were developed with a strong consideration of the current permit requirements being implemented by the Orange County and Riverside County Copermittees, as well the accomplishments of all the Copermittees in the San Diego Region. In fact, the Tentative Order was developed and improved based on comments received from the Orange County and Riverside County Copermittees during the 18 month administrative draft focused meeting and comment process. The Tentative Order was also developed considering the accomplishments and successes of other jurisdictions outside of the San Diego Region. The basis of incorporating an allowance for implementing a true iterative and adaptive management process is because of the accomplishments, successes, and failures observed by the San Diego Region's Copermittees, as well as those observed in other jurisdictions within California and other states. By allowing a true iterative and adaptive management process to be implemented, the San Diego Water Board expects the Copermittees to not only learn from each other's successes and failures within the San Diego Region, but the successes and failures from other jurisdictions outside the San Diego Region. The fact of the matter is that the requirements of the Tentative Order are more similar to the current permits issued to the Orange County and Riverside Copermittees than the current permit issued to the San Diego County Copermittees (Order No. R9-2007-0001). This is because most of these elements in the Tentative Order were developed based on the requirements in the current Orange County and Riverside County MS4 permits. The Tentative Order also allows the Orange County and Riverside County Copermittees to provide additional recommendations and propose changes for consideration by the Board based on their experiences and successes when they submit their Report of Waste Discharge for coverage under the Regional MS4 Permit.	

Gnl-12: *Updating the Basin Plan needs to be a priority of the San Diego Water Board.***RESPONSES TO COMMENTS RECEIVED ON TENTATIVE ORDER NO. R9-2013-0001**

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Gnl-12	GENERAL	
	COMMENT: <i>Updating the Basin Plan needs to be a priority of the San Diego Water Board.</i> The Riverside County Copermittees commented that the San Diego Water Board should make updating the Basin Plan with water quality objectives based on background conditions, beneficial uses of specific water bodies, and specific conditions that influence the water bodies a priority. The Riverside County Copermittees contend that without the updates, the desired outcomes the Copermittees include in the Water Quality Improvement Plans will be arbitrary and may not achieve desired beneficial use improvements, or be appropriate.	Copermittees Riverside County Copermittees
	RESPONSE: The San Diego Water Board agrees that updating the Basin Plan should be a priority. Updating the Basin Plan, however, is not within the scope of developing and issuing the Tentative Order. On many occasions, dischargers have asserted that the water quality standards are not achievable, and because they are not achievable they are not appropriate. The San Diego Water Board disagrees. The water quality standards in the Basin Plan are protective of water quality and are therefore appropriate. The San Diego Water Board maintains that because they are appropriate, they must be achieved to protect water quality. If the Copermittees believe a different water quality objective is appropriate and will protect water quality, the San Diego Water Board recommends that the Copermittees collect the data and develop the evidence to support a different water quality objective to be incorporated into the Basin Plan through an amendment to the Basin Plan. Until then, the water quality standards in the Basin Plan are considered appropriate and must be implemented in MS4 permits.	

Gnl-13: "Clarify" responsibilities of the Copermittees under the Tentative Order.

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Gnl-13	GENERAL	
	COMMENT: <i>"Clarify" responsibilities of the Copermittees under the Tentative Order.</i> The Orange County, Riverside County and San Diego County Copermittees each submitted comments requesting that the requirements of the Tentative Order "clarify" the responsibilities of the Copermittees, consistent with the requirements of the Clean Water Act. The Copermittees requested revisions throughout the requirements of the Tentative Order to specify that the Copermittees must "effectively prohibit" non-storm water discharges "into the MS4" instead of "into and from the MS4," and control the discharge of "pollutants" not "pollutants in storm water" from the MS4 to the MEP. The Copermittees also requested including several qualifying phrases that the Copermittees could only operate "to the extent allowable" or "as applicable" or other such phrases to "clarify" the Copermittees were only responsible for implementing requirements subject to their legal authority The Natural Resources Defense Council (NRDC) expressed concern that the non-storm water action levels (NALs) may violate the effective prohibition of non-storm water discharges to the MS4. The NRDC requested that the Tentative Order be very clear that the Copermittees are responsible for prohibiting non-storm water discharges to the MS4. The Orange County and Riverside County Copermittees objected to language in the Tentative Order that implied the Copermittees were responsible for "enhancing" and "restoring" water quality in receiving waters, contending that they are only responsible for the discharges from their MS4s. The Orange County Copermittees also objected to the requirements for the Copermittees to evaluate stream channels for restoration, asserting the Copermittees are not responsible for restoring stream channels. The San Diego Unified Port District supported including requirements that result in jurisdictional accountability, recognizing that most of the discharges from the MS4 to San Diego Bay originate from upstream jurisdictions. The San Diego Unified Port District also provided requests for modifications to specify the downstream owners and operators of the MS4 are not responsible and should not be held liable for discharges and pollutants in discharges originating from upstream MS4s. The San Diego Unified Port District requested that the Tentative Order include requirements for the San Diego Water Board to demonstrate a Copermittee caused or contributed to an exceedance of water quality standards. The San Diego Unified Port District also encouraged the San Diego Water Board to include additional monitoring to ensure jurisdictional accountability.	Copermittees Orange County Copermittees Riverside County Copermittees San Diego County Copermittees San Diego Unified Port District San Diego Unified Port District / Brown and Winters Environmental Organizations Natural Resources Defense Council

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Gnl-13	GENERAL	
	<u>RESPONSE:</u> The San Diego Water Board reviewed and considered the recommendations and requests. The San Diego Water Board has revised the language in the Tentative Order to emphasize the Copermittees are responsible for “effectively prohibiting” non-storm water discharges “to the MS4.” The language has not been revised from the control of “pollutants in storm water” to “pollutants” from the MS4 to the MEP. The San Diego Water Board maintains that the Copermittees are required to control “pollutants in storm water” to the MEP. Pollutants in non-storm water discharges are controlled through the effective prohibition of non-storm water discharges to the MS4. Please see the response to comments Gnl-9 and Fnd-3. The Tentative Order has also been revised to replace any language of “restoring water quality standards in receiving waters” to “protecting water quality standards in receiving waters from MS4 discharges.” The San Diego Water Board generally did not revise the language with the qualifying phrases requested by the Copermittees. The Copermittees are required to establish the legal authority to implement the requirements of the Tentative Order. The Tentative Order does not require the Copermittees to implement requirements outside of their jurisdictions or outside of their legal authority. Please see response to comments E1-1 and E1-2. The San Diego Water Board appreciates the support expressed for the requirements that result in jurisdictional accountability. The San Diego Water Board agrees that the requirements of the Tentative Order must provide the San Diego Water Board the information necessary to account for each individual Copermittee’s contribution toward improving or degrading water quality. This information will allow the San Diego Water Board to provide support to improve the Copermittee’s programs, where needed, and the evidence necessary to enforce the requirements of the Tentative Order, when appropriate. The San Diego Water Board generally disagreed with the modifications to the Tentative Order requested by the San Diego Unified Port District. The San Diego Water Board maintains that the Copermittees are responsible for the discharges from their MS4s to receiving waters. If there are sources that originate from outside a Copermittee’s jurisdiction, it is the Copermittee’s responsibility to demonstrate to the San Diego Water Board that the source is outside of the Copermittee’s legal authority to control. The San Diego Water Board considered the request by the San Diego Unified Port District for additional monitoring to ensure jurisdictional accountability. The San Diego Water Board included additional monitoring for this purpose. Please see response to comment D-5.	

Gnl-14: Request for consistency in MS4 permit requirements for Copermittees under the jurisdiction of multiple Regional Water Boards.

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March 27, 2013

Gnl-14	GENERAL	
	COMMENT: <i>Request for consistency in MS4 permit requirements for Copermittees under the jurisdiction of multiple Regional Water Boards.</i> The Orange County Copermittees submitted comments requesting that the requirements in the Tentative Order be as consistent as possible with requirements in MS4 permits from other Regional Water Boards. The Orange County Copermittees include 5 municipalities that are split between 2 Regional Water Boards. The Orange County Copermittees provided recommended revisions to the Tentative Order aimed at creating greater uniformity and implementability for these 5 municipalities under two MS4 permits.	Copermittees Orange County Copermittees
	RESPONSE: The San Diego Water Board has reviewed and considered the recommended revisions. The San Diego Water Board understands implementing requirements that are not consistent between multiple Regional Water Board permits can present some challenges for a Copermittee. The requirements in the Tentative Order provide significantly more flexibility that will allow a Copermittee to align the implementation of its programs with the requirements of different permit requirements. The San Diego Water Board, however, has not and will not modify any requirements in the Tentative Order to reduce the accountability, enforceability or protectiveness to be more consistent with another Regional Water Board's permit requirements. For those areas of the MS4 permits where there are inconsistent requirements, the solution for the Copermittee would be to develop jurisdictional runoff management programs that implement the most protective elements of both Regional Water Boards' permit requirements and apply them throughout its jurisdiction. In doing so, the Copermittee will be in compliance with the requirements of both MS4 permits and have programs that will be most protective of water quality.	

Gnl-15: Findings and Fact Sheet do not provide adequate justification for new or modified requirements.

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Gnl-15	GENERAL	
	<u>COMMENT:</u> <i>Findings and Fact Sheet do not provide adequate justification for new or modified requirements.</i> The Building Industry Association of Southern California and the Orange County Copermittees submitted comments asserting that the Findings and the Fact Sheet do not provide adequate justification for the new or modified requirements in the Tentative Order. The Building Industry Association of Southern California is particularly interested in the justification for the development planning structural BMP performance standards. The Orange County Copermittees provided examples of several specific requirements in the Tentative Order that they assert were not adequately justified.	Building Industry / Industry Building Industry Association of Southern California Copermittees Orange County Copermittees
	<u>RESPONSE:</u> The San Diego Water Board disagrees that the Findings and Fact Sheet do not provide adequate justification for the new or modified requirements in the Tentative Order. The San Diego Water Board understands that the commenters may not be satisfied with the justification for the requirements of the Tentative Order provided in the Findings and Fact Sheet. The San Diego Water Board maintains that the Findings and the Fact Sheet provide the background information, regulatory and legal citations, references and additional explanatory information and data in support of all the Findings and requirements in the Tentative Order.	

Gnl-16: Recommendation for revising numbering system in the Tentative Order.

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March 27, 2013

Gnl-16 GENERAL		
	<u>COMMENT:</u> <i>Recommendation for revising numbering system in the Tentative Order.</i> The Orange County Copermittees submitted comments recommending that the numbering system of the provisions in the Tentative Order provide the full number of the provision (e.g. A.1 instead of 1). The recommended revisions would assist and better orient the reader.	Copermittees Orange County Copermittees
	<u>RESPONSE:</u> The San Diego Water Board appreciates the recommendation. The San Diego Water Board understands that the length and the numerous subsections of the provisions in the Tentative Order can be difficult to navigate at times. The San Diego Water Board has included footers to assist the reader in navigating through the provisions of the Tentative Order. Additionally, the electronic PDF version of the Tentative Order will have bookmarks for the major provisions to assist in navigating the requirements of the Tentative Order.	

Gnl-17: Requests for changes to schedules and deadlines in the Tentative Order.

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March 27, 2013

Gnl-17	GENERAL	
	COMMENT: <i>Requests for changes to schedules and deadlines in the Tentative Order.</i> The Orange County, Riverside County and San Diego County Copermittees each submitted comments requesting changes to the schedules and deadlines for developing, submitting, and implementing several requirements in the Tentative Order. In particular, the requests were focused on additional time for developing the Water Quality Improvement Plans. The San Diego Unified Port District supported the requests. The BIA Regulated Community Coalition and Environmental Groups each submitted comments with recommendations to include more time for public participation during the development of the Water Quality Improvement Plans. The commenters provided several recommendations for modifications to the schedules and deadlines in the Tentative Order that would result in more time to develop and implement the Water Quality Improvement Plans and the monitoring and assessment programs.	Building Industry / Industry BIA Regulated Community Coalition Copermittees Orange County Copermittees Riverside County Copermittees San Diego County Copermittees San Diego Unified Port District Environmental Organizations Environmental Groups
	RESPONSE: The San Diego Water Board reviewed and considered the recommendations to change the schedules and deadlines in the Tentative Order. The San Diego Water Board generally agrees that additional time should be provided to develop the Water Quality Improvement Plans, to allow for a robust public participation process and to provide enough time to implement the optional requirements that have been included in the revised Tentative Order if the Copermittees choose to do so. The San Diego Water Board modified many of the schedules to provide additional flexibility in scheduling the development of several deliverables, as well as including later deadlines for submitting several deliverables. The requirements have also been modified to allow the Copermittees more control in developing the schedules for implementing the monitoring requirements in the Water Quality Improvement Plans. Please see the revisions to Provisions B.3 and F.1 in the revised Tentative Order, as well as the responses to comments B-3 and F1-1.	

Gnl-18: Requests for additional opportunities to provide comments.

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Gnl-18	GENERAL	
	COMMENT: <i>Requests for additional opportunities to provide comments.</i> The Riverside County Copermittees, Clean Water Now, and Environmental Groups each submitted comments expressing interest in additional opportunities to provide comments. The Riverside County Copermittees requested an additional public review and comment period after the Tentative Order is revised and the responses to comments are released by the San Diego Water Board. Clean Water Now expressed disappointment with the focused meeting process used in the development of the Tentative Order, and the lack of time available to have protracted discussions. The Environmental Groups requested additional opportunities for the public to participate and provide comments during the development of the Water Quality Improvement Plans.	Copermittees Riverside County Copermittees Environmental Organizations Clean Water Now Environmental Groups
	RESPONSE: The San Diego Water Board considered the requests for additional opportunities to provide comments. The San Diego Water Board disagrees that an additional public review and comment period needs to be provided after the revised Tentative Order and responses to comments are released. Federal regulations only require that the San Diego Water Board provide at least 30 days for public comment on the Tentative Order. The lengthy public review and comment period that was provided for the Tentative Order complies with and exceeds the statutory and regulatory requirements for bringing the Tentative Order before the Board for consideration and adoption. The San Diego Water Board released an administrative draft of the Tentative Order in April 2012, which went through a 5 month review and comment period, with several focused meetings to discuss the requirements. The administrative draft of the Tentative Order was significantly revised based on the comments and information received during the focused meetings and written comments received. The Tentative Order was released in October 2012 and the public comment period was closed in January 2013. The revised Tentative Order will be the third draft of the permit, with a second round of revisions, and revisions reflected in it were made in direct response to written comments received by the San Diego Water Board. The San Diego Water Board has already provided multiple opportunities to comment on the Tentative Order. An additional opportunity to submit written comments is not required or necessary. There will be an opportunity to make oral comments on the revisions to the Tentative Order at the San Diego Water Board hearing. The San Diego Water Board understands that the commenter wished to have more lengthy discussions during the focused meetings that were held during the administrative draft review and comment period. With the exception of the commenter, the San Diego Water Board has received very positive feedback on the focused	

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Gnl-18	GENERAL	
	meetings that were held. The focused meeting process was above and beyond what is required and the discussions that did take place were more inclusive than previous permit renewal processes. At each focused meeting the San Diego Water Board also extended invitations to everyone present for additional meetings outside the focused meetings. The San Diego Water Board had multiple additional in depth discussions with several groups outside of the focused meeting process on specific topics. If the commenter had contacted the San Diego Water Board for an additional meeting, the San Diego Water Board could have scheduled a meeting with the commenter to have more in depth discussions. The San Diego Water Board agrees that additional opportunities should be provided to the public to participate and comment during the development of the Water Quality Improvement Plans. The San Diego Water Board disagrees that Water Quality Improvement Plans are equivalent in meaning to “water quality control plans” as defined in Water Code section 13050, subdivision (j), requiring a public hearing for the acceptance of the Water Quality Improvement Plans. Please see response to comment B-3.	

Gnl-19: The maximum extent practicable (MEP) standard is the floor, not the limit, for MS4 permit requirements.

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Gnl-19	GENERAL	Environmental Organizations Natural Resources Defense Council
	COMMENT: <i>The maximum extent practicable (MEP) standard is the floor, not the limit, for MS4 permit requirements.</i> The Natural Resources Defense Council (NRDC) submitted comments asserting that the San Diego Water Board has the authority to include MS4 permit requirements that are more stringent than the MEP standard if necessary to ensure that discharges from the Copermittees' MS4s do not cause or contribute to exceedances of water quality standards in receiving waters. The NRDC cited several court decisions that support their position that the MEP standard is the floor for MS4 permit requirements, and the San Diego Water Board has the authority to impose additional more stringent requirements over and above MEP as determined to be appropriate.	
	RESPONSE: The San Diego Water Board agrees that the MEP standard is the floor for permit requirements. In concept, the MEP standard is supposed to evolve and improve and become more stringent over time through an iterative process. In reality, in the current and previous permits issued by the San Diego Water Board, the MEP standard was essentially defined by the requirements of the MS4 permit and the iterative process only occurred when an MS4 permit was renewed by incorporating additional and more stringent requirements. Thus, the MEP standard became static rather than dynamic for each permit term, and only advanced with each permit renewal. This has resulted in multiple MS4 permits by the San Diego Water Board that have different requirements, each a little more stringent than the last one issued. In the Tentative Order the San Diego Water Board has incorporated a new regulatory approach that is expected to result in a more dynamic iterative process to advance the MEP standard during the permit term. Instead of dictating the actions that must be implemented by the Copermittees, and defining the MEP "floor" of requirements that will be utilized to determine compliance, the requirements of the Tentative Order define the iterative process that must be implemented to achieve water quality improvement outcomes through an ever advancing and improving MEP standard. With the exception of the TMDL requirements, the San Diego Water Board disagrees it is necessary to include requirements that are more stringent than the MEP standard. The approach incorporated into the Tentative Order redefines the MEP "floor" from being a "static floor" to a "dynamic floor" that is expected to rise as the Copermittees learn from their failures and successes while working toward achieving tangible improvements in water quality.	

Gnl-20: *Include graphical representation of areas covered by the Tentative Order.***RESPONSES TO COMMENTS RECEIVED ON TENTATIVE ORDER NO. R9-2013-0001**

March 27, 2013

Gnl-20	GENERAL	
	<u>COMMENT:</u> <i>Include graphical representation of areas covered by the Tentative Order.</i> The San Diego Green Building Council submitted comments recommending that the final permit include a graphic representation of both the political and natural boundaries related to the area under the jurisdiction of the Order.	Building Industry / Industry San Diego Green Building Council
	<u>RESPONSE:</u> The San Diego Water Board appreciates the recommendation. Including a graphical representation of the area under the jurisdiction of the Tentative Order is not necessary. The Tentative Order is expected to cover all the Phase I municipalities in the San Diego Region in a phased manner. The Tentative Order will no longer be issued to three separate counties or include requirements separated by political boundaries.	

Gnl-21: Federal regulations require that the term of the Tentative Order not exceed five years.

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March 27, 2013

Gnl-21 GENERAL		
	COMMENT: <i>Federal regulations require that the term of the Tentative Order not exceed five years.</i> The USEPA submitted comments that expressed concern that the San Diego Water Board was considering a permit term longer than five years. The USEPA supported a permit term that does not exceed five years.	State/Federal Government USEPA
	RESPONSE: The San Diego Water Board agrees that the term of the permit will not exceed five years.	

Gnl-22: *Identification of grammatical and typographical errors.***RESPONSES TO COMMENTS RECEIVED ON TENTATIVE ORDER NO. R9-2013-0001**

March 27, 2013

Gnl-22	GENERAL	
	<u>COMMENT:</u> <i>Identification of grammatical and typographical errors.</i> The San Diego County Copermittees submitted comments noting several grammatical and typographical errors in the text of the Tentative Order that should be corrected.	Copermittees San Diego County Copermittees
	<u>RESPONSE:</u> The San Diego Water Board appreciates the identification of grammatical and typographical errors. The San Diego Water Board has corrected the grammatical and typographical errors identified by the commenter. The San Diego Water Board has corrected any grammatical and typographical errors to the extent possible in the revised Tentative Order. If there are additional grammatical and typographical errors identified in the revised Tentative Order after adoption, the San Diego Water Board can correct them without re-opening the adopted Order if they are considered minor modifications pursuant to the requirements of Provision H.	

LEGAL COMMENTS

Lgl-1: Concerns with strict liability for exceedances of water quality standards and receiving water limitations.

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Lgl-1	LEGAL
	COMMENT: <i>Concerns with strict liability for exceedances of water quality standards and receiving water limitations.</i> Comments were submitted by members of the Community Planning Groups, Copermittees, Engineering/Design Consultants, State Government, Societies/Associations/Coalitions, and Other Entities generally expressed concerns with the strict liability that the Copermittees are exposed to for exceedances of the water quality standards and receiving water limitations. The Copermittees submitted several comments that a recent Ninth Circuit Court of Appeals decision resulted in a new interpretation of precedential receiving water limitations language, or that it creates any new third party liability risks. Community Planning Groups Jamul Dulzura Community Planning Group Ramona Community Planning Group Copermittees City of Dana Point City of Imperial Beach City of Laguna Hills City of Lake Forest City of Mission Viejo City of Rancho Santa Margarita City of San Juan Capistrano County of San Diego County of San Diego Office of County Counsel Orange County Copermittees Riverside County Copermittees San Diego Unified Port District / Brown and Winters Engineering/Design Consultants Latitude 33 Planning and Engineering State/Federal Government Senator Mark Wyland Societies/Associations/Coalitions BIOCOM San Diego Association of Realtors South County Economic Development Council Other Entities Carol Crossman Continental Maritime of San Diego Gable PR Hughes Marino Marston+Marston, Inc. Nuffer, Smith, Tucker, Inc. San Diego Regional Chamber of Commerce Sheppard, Mullin, Richter & Hampton LLP Southern Cross Property Consultants Transition IT
	RESPONSE: The San Diego Water Board disagrees that the recent Ninth Circuit Court of Appeals decision in <i>NRDC v. County of Los Angeles (Natural Resources Defense Council v. County of Los Angeles, et al. (673 F.3d</i>

RESPONSES TO COMMENTS RECEIVED ON TENTATIVE ORDER NO. R9-2013-0001

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Lgl-1	LEGAL
	1235 (9th Cir. 2011) (revd. on other grounds and remanded, <i>Los Angeles County Flood Control District v. Natural Resources Defense Council</i> (133 S.Ct. 710 (2013))), adopted a new interpretation of precedential receiving water limitations language or that it creates any new third party liability risks. Rather the Ninth Circuit's interpretation is consistent with the San Diego Water Board's interpretation of the precedential receiving water limitations language that affords the San Diego Water Board with discretion to take enforcement action for violations of receiving water limitations and discharge prohibitions and also allows for citizen suit enforcement – in other words, engagement in the iterative process does not create a safe harbor from liability for violations of water quality standards. In precedential orders, the State Water Board exercised its discretion to require compliance with water quality standards by directing that MS4 permits contain provision requiring discharges of pollutants in storm water to be controlled so as not to cause or contribute to exceedances of water quality standards in receiving waters. (State Water Board Order WQ-98-01 (<i>Environmental Health Coalition</i>), and WQ 99-05 (<i>Environmental Health Coalition</i>.) Consistent with federal law, the State Water Board also found it appropriate to implement best management practices (BMPs) in lieu of imposing numeric water quality-based effluent limitations to meet water quality standards. (See SWRCB Orders WQ 91-03 (<i>Citizens for a Better Environment</i>), WQ 98-01 (<i>Environmental Health Coalition</i>), WQ 2001-15 (<i>Building Industry Association of San Diego County</i>); See also 40 CFR sec. 122.44(k); Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits, USEPA, September 1995.) In these orders and USEPA guidance, the State Water Board and USEPA recognize that the storm water program will evolve over time to incorporate more stringent limitations, including improved BMPs, to meet water quality standards or numeric water quality based effluent limitations. While the State Water Board and San Diego Water Board in its recent MS4 permits have directed MS4 dischargers to achieve compliance with water quality standards through an "iterative process," using the State Water Board's precedential receiving water limitations language, the Water Boards have never interpreted the iterative process to provide a "safe harbor" for MS4 dischargers. Thus, the Ninth Circuit's recent opinion is consistent with the Water Boards' interpretation and does not create any new uncertainty or third party liability risks that did not previously exist. The San Diego Water Board recognizes and will continue to follow the State Water Board's process (commenced with a public workshop in November 2012) for reconsidering the precedential receiving water limits language and the possibility of creating a "safe harbor" from enforcement for violations of water quality

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Lgl-1	LEGAL
	standards while an MS4 discharger engages in an iterative process of improving its controls and practices. However, the Tentative Order has been revised to provide a discharge prohibitions and receiving water limitations compliances option. Please see response to comment A-1.

Lgl-2: Concerns with the Copermittees' legal authority to impose requirements on development projects where a nexus between impact on the receiving water and the project cannot be established.

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Lgl-2	LEGAL
	COMMENT: <i>Concerns with the Copermittees' legal authority to impose requirements on development projects where a nexus between impact on the receiving water and the project cannot be established.</i> Comments were submitted by members of the Copermittees, Societies/ Associations/Coalitions, and Other Entities generally expressed concerns with the Copermittees' legal authority to imposed requirements on development projects where a nexus between impact on the receiving water and the project cannot be established. The Copermittees assert that they would be subject to liability under takings clauses of the US and California Constitutions and the Mitigation Fee Act for requiring hydromodification management BMP requirements on new development or redevelopment projects that discharge to hardened channels where a hydromodification impact would be questionable and difficult to establish. Comments from the Societies/ Associations/Coalitions assert that allowing an in lieu fee for improvements to Priority Development Projects that do not cause hydromodification impacts is a direct violation of CEQA. In contrast, the South Laguna Civic Association asserts that the regulatory and legal nexus is clear between MS4 discharges and creek erosion and infrastructure damage, ocean pollution and public health hazards.
	RESPONSE: The San Diego Water Board recognizes the concerns of about the Copermittees' legal authority to impose hydromodification management requirements on development that causes no hydromodification impacts. Federal law mandates that permits issued to MS4s require management practices that will result in reducing pollutants to the maximum extent practicable. The state is required, by law, to select the BMPs. (See <i>NRDC v. USEPA</i> (9th Cir. 1992) 966 F.2d 1292; <i>Environmental Defense Center v. USEPA</i> (9th Cir. 2002) 344 F.3d 832, 855; <i>Rancho Cucamonga v. Regional Water Quality Control Bd., Santa Ana Region</i> (2006) 135 Cal.App.4th 1377, 1389.) The Tentative Order's requirements for Low Impact Development and hydromodification management controls are authorized by federal law. Federal NPDES regulation 40 CFR 122.26(d)(2)(iv)(A)(2) provides that Copermittees develop and implement a management program which is to include "A description of planning procedures including a comprehensive master plan to develop, implement and enforce controls to reduce the discharge of pollutants from municipal separate storm sewers which receive discharges from areas of new development and significant redevelopment. Such plans shall address controls to reduce pollutants in discharges from municipal separate storm sewers after construction is completed." The Tentative Order does not impose land use regulations, nor does it restrict or control local land-use decision-

Copermittees

City of Dana Point
City of Imperial Beach
City of Rancho Santa Margarita
City of San Diego City Attorney
County of San Diego Office of County Counsel
Orange County Copermittees
Riverside County Copermittees
San Diego County Copermittees

Environmental Organizations

South Laguna Civic Association

Societies/Associations/Coalitions

East Otay Mesa Property Owners Association

Otay Mesa Property Owners Association

Other Entities

National Enterprises Inc.

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Lgl-2	LEGAL
	making authority. Rather, the Tentative Order requires the permittees to fulfill Clean Water Act requirements and protect water quality in their land use decisions. The requirements in the Tentative Order allow for flexibility in compliance options to the extent allowable under the Clean Water Act. The substantive regulatory requirements of the Clean Water Act are a valid exercise of the federal government's enumerated powers and authority over navigable waters. (<i>NRDC v. USEPA</i> (9th Cir. 1998) 863 F.2d 1420, 1436.) Environmental regulation is not land use regulation, and therefore does not infringe upon local authority over land use decisions. (<i>California Coastal Commission v. Granite Rock</i> (1987) 480 U.S. 572. In addition, local land use planning must be consistent with general statewide laws. (<i>County of Los Angeles v. California State Water Resources Control Board</i> (2006) 143 Cal.App.4th 985, 1003.) Article 11, section 7, of the California Constitution states that a county or city may not enact laws that conflict with general laws. The Porter-Cologne Water Quality Control Act contains the California Legislature's finding that water quality is a matter of state-wide concern, requiring a statewide program administered at a regional level. (See, e.g., Wat. Code, § 13000; see also generally <i>Southern California Edison v. State Water Resources Control Board</i> (1981) 116 Cal.App.3d 751, 758.) Section 101 of the CWA has a companion policy statement, where Congress found that water quality is a matter of federal concern. The Tentative Order also does not dictate specific methods of compliance or dictate the manner in which the Copermittees use their land. Where the Tentative Order includes detailed requirements, it is to comply with the Clean Water Act and its regulations. USEPA's regulations mandate that certain requirements be included in MS4 permits in order to achieve the requirements of the Clean Water Act. Thus, federal law mandates that permits issued for MS4s require certain actions that will result in the elimination or reduction of pollutants to receiving waters and the state is required, by federal law, to select the controls necessary to meet this standard. (See <i>NRDC v. USEPA</i> (9th Cir. 1992) 966 F.2d 1292, 1308; <i>City of Rancho Cucamonga v. Regional Water Quality Control Bd., Santa Ana Region</i> (2006) 135 Cal.App.4th 1377, 1389-90.) The requirement that the Copermittees require Priority Development Projects to control post-project runoff flow rates and durations so that they do not exceed pre-development runoff flow rates and durations by more than ten percent is appropriate and necessary to reduce erosion and the discharge of pollutants into receiving waters. It does not require mitigation beyond redevelopment project impacts because the requirement lessens (although does not eliminate) the perpetuating impacts that originated upon initial land alteration (i.e., the project would continue to cause accelerated erosion) absent improved controls of post-project runoff flow rates and durations. The San Diego Water Board maintains that the Copermittees have authority to implement this

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Lgl-2	LEGAL
	requirement, and that if implemented it would not rise to the level of a taking of private property. The pre-development condition provision is also consistent with the requirements in both the current Orange County and Riverside County MS4 permits. Please see response to comment E3c2-2. However, to remove the question of the nexus between a project's impact on an already hardened channel, the San Diego Water Board has included a hydromodification management exemption for projects that discharge to conveyance channels whose bed and bank are concrete lined all the way from the point of discharge to water storage reservoirs, lakes, enclosed embayments, or the Pacific Ocean. Please see response to comment E3c2-3. The hydromodification management requirements that may be imposed on projects with no hydromodification impacts has been modified, but in any case would not have violated CEQA because the mitigation requirement was not imposed as a result of a CEQA analysis.

Lgl-3: The Tentative Order must address water quality inconsistencies with the California Coastal Act and California Water Code.

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Lgl-3	LEGAL
	COMMENT: <i>The Tentative Order must address water quality inconsistencies with the California Coastal Act and California Water Code.</i> The South Laguna Civic Association submitted comments that asserts the Tentative Order is inconsistent with the California Coastal Act and the water reclamation requirements of the California Water Code. The commenter asserts that the Tentative Order must address the water quality inconsistencies.
	Environmental Organizations South Laguna Civic Association RESPONSE: The Tentative Order is not issued pursuant to the requirements of the California Coastal Act. The Tentative Order is issued pursuant to and consistent with the requirements of the federal Clean Water Act, Code of Federal Regulations, and the California Water Code for discharges of non-storm water and discharges of pollutants in storm water from the Copermittees' MS4s to receiving waters. Compliance with the requirements of the Tentative Order should also allow the Copermittees to be in compliance with the requirements of the California Coastal Act. When and where applicable, however, the Copermittees may be required to comply with the California Coastal Act under other regulatory mechanisms. The Tentative Order is not required to implement the requirements of the California Coastal Act. The Tentative Order also is not the appropriate regulatory mechanism for implementing the water reclamation requirements of the California Water Code. The water reclamation requirements of the California Water Code are implemented by the San Diego Water Board under separate regulatory mechanisms.

Lgl-4: San Diego Water Board has legal authority to not incorporate the Beaches and Creeks Bacteria TMDLs into the Tentative Order.

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Lgl-4	LEGAL
	COMMENT: <i>San Diego Water Board has legal authority to not incorporate the Beaches and Creeks Bacteria TMDLs into the Tentative Order.</i> The County of San Diego and the County of San Diego Office of County Counsel each submitted comments that assert that the San Diego Water Board has the authority to not incorporate the Beaches and Creeks Bacteria TMDLs into the Tentative Order. The comments from the County cite the MEP standard, <i>Defenders of Wildlife v. Browner</i>, and a November 2010 USEPA memorandum as providing the the basis for the legal authority. The City of Lake Forest submitted comments that also cited <i>Defenders of Wildlife v. Browner</i> as providing the the basis for the legal authority to not incorporate TMDLs into the Tentative Order. The comments from the County also assert that the scientific basis of the Beaches and Creeks Bacteria TMDLs is flawed, the requirements of the TMDLs are not achievable, and the costs to implement the requirements of the TMDLs are not worth the benefits that may be achieved. The County requested that the San Diego Water Board elect not to include the Beaches and Creeks Bacteria TMDLs in the Tentative Order and re-evaluate the TMDL. Clean Water Now submitted comments alluded to “recent legal renderings” that called into question the TMDL provisions included in the Tentative Order. Conversely, the USEPA submitted comments in support of the the San Diego Water Board’s approach for incorporating applicable TMDL requirements into the Tentative Order.
	RESPONSE: The San Diego Water Board disagrees that it has the legal authority to not incorporate the requirements of the Beaches and Creeks Bacteria TMDLs into the Tentative Order. Federal regulations under 40 CFR 122.44(d)(1)(vii)(B) require that NPDES permit requirements incorporate water quality based effluent limitations (WQBELs) that must be consistent with the requirements and assumptions of any available wasteload allocations (WLAs) developed under TMDLs. The federal regulations do not provide the option or discretion to not incorporate these WQBELs into NPDES permits. The San Diego Water Board is required to adopt and implement TMDLs through the MS4 permit, where the Copermittees’ MS4 discharges are a source of the impairment. TMDLs are adopted by the San Diego Water Board pursuant to CWA section 303(d) and CWC sections 13240 and 13242. TMDL implementation programs consist of a description of the nature of actions that are necessary to achieve the WLAs (and LAs), a time schedule for the actions to be taken, and a description of the monitoring and reporting to be undertaken to

Copermittees

City of Lake Forest
County of San Diego
County of San Diego Office of County Counsel

Environmental Organizations

Clean Water Now

State/Federal Government

USEPA

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Lgl-4	LEGAL
	determine compliance with the WLAs. Because TMDLs and their programs of implementation are adopted through the Basin Plan amendment process in California, the TMDL implementation program contained in a regional water board's basin plan becomes a regulation upon approval by the State of California Office of Administrative Law. All permits must implement the applicable water quality control plan (i.e. Basin Plan), including any applicable TMDL implementation programs (CWA §§ 303(d), 402(p)(3)(B)(iii); Cal. Water Code §§ 13263, 13377). These Basin Plan provisions thus become the applicable regulations that authorize an MS4 permit to include compliance schedules to achieve effluent limitations derived from TMDL WLAs. It is unclear whether the commenters understand that the TMDL implementation programs are the basis for the compliance schedules and, without the TMDL implementation program, Copermittees would be required to comply with final WQBELs immediately. Further, USEPA has set forth guidance regarding MS4 permits, that such permits must require compliance with applicable TMDLs to meet water quality standards. (See "Revisions to the November 22, 2002 Memorandum 'Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) (for Storm Water Sources and NPDES Requirements Based on Those WLAs.'" (USEPA Office of Water, Nov. 10, 2010.) <i>"Where a TMDL has been established and there is an accompanying implementation plan that provides a schedule for an MS4 to implement the TMDL, the permitting authority [in this case, the Regional Water Board] should consider the schedule as it decides whether and how to establish enforceable interim requirements and interim dates in the permit."</i> (Id.) The San Diego Water Board is aware that the USEPA memorandum is not legally binding, but finds it very instructive and it is appropriate to consider USEPA guidance, even if that guidance <i>may</i> be modified in some manner in the future. NPDES permits are intended to support the objective of the federal Clean Water Act <i>"to restore and maintain the chemical, physical, and biological integrity of the Nation's waters"</i> (Clean Water Act section 101(a)). Water quality standards, which are the basis for the receiving water limitations in the Tentative Order, are the foundation for achieving this objective. To ensure that discharges do not cause or contribute to exceedances of water quality standards, receiving water limitations provisions are included in all NPDES permits issued pursuant to CWA section 402. Further, Clean Water Act section 402(p)(3)(B)(iii) requires permits for discharges from municipal storm sewers to <i>"require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design, and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants."</i> [Emphasis added.] In its Phase I Stormwater Regulations, Final Rule, USEPA elaborated on these requirements, stating that, "permits for discharges from municipal separate storm sewer systems must require

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Lgl-4	LEGAL
	controls to reduce the discharge of pollutants to the maximum extent practicable, and where necessary, water quality-based controls.” (See 55 Fed. Reg. 47990, 47994 (Nov. 16, 1990).) USEPA reiterated in its Phase II Stormwater Regulations, Final Rule, that MS4 “permit conditions must provide for attainment of applicable water quality standards (including designated uses), allocations of pollutant loads established by a TMDL, and timing requirements for implementation of a TMDL.” The Clean Water Act provides the San Diego Water Board, to the same extent as the Administrator of USEPA, the discretion to determine what controls are appropriate to protect water quality and achieve the objectives of the Clean Water Act. (See <i>Defenders of Wildlife v. Browner</i> (1999) 191 F.3d 1159, 1166.) As explained in the Tentative Order, compliance with the WLAs established in TMDLs is necessary to achieve compliance with water quality standards. The State Water Board and the San Diego Water Board have previously concluded that discharges from the MS4 contain pollutants that have the reasonable potential to cause or contribute to excursion above water quality standards. As such, receiving water limitations are included in the Tentative Order to ensure that individual and collective discharges from the MS4 do not cause or contribute to exceedances of water quality standards necessary to protect the beneficial uses of the receiving waters. Compliance with the WLAs established in TMDLs is necessary to achieve compliance with water quality standards. In recognition of the purpose of the NPDES program in supporting the objective of the Clean Water Act and utilizing its authority provided by CWA section 402(p)(3)(B)(iii), and considering USEPA’s statements and guidance, the State Water Board has determined that MS4 permits must include compliance with water quality standards. (See State Water Board Order Nos. WQ91-03, WQ 98-01, WQ 99-05 and WQ 2001-15.) Accordingly, the provisions contained in 40 CFR 122.44(d), are applicable to MS4 permits. The San Diego Water Board also disagrees that incorporation of TMDL requirements is based on state law provisions of the Porter Cologne Water Quality Control Act and that consideration of the factors under Water Code section 13241 is required before the requirements may be implemented. TMDLs implement existing water quality objectives that are designed to protect designated beneficial uses. Numeric targets used by TMDLs to implement water quality standards are not designed to re-balance the policy interests underlying those standards. While policy considerations are important in developing water quality standards in the first instance, they are less important in formulating TMDLs that implement them. The statutory directive to adopt TMDLs in the first instance is to “implement the applicable water quality standards with seasonal variations and a margin of safety.” (33 U.S.C. § 1313(c)(2)(A). See also 40 CFR §§ 131.10-13.) While consideration of economic

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	factors may be appropriate in adopting TMDLs, a section 13241 economic analysis is not required either in the adoption of TMDLs or in the implementation through an NPDES permit. Additionally, the implementation plan included as part of the Beaches and Creeks Bacteria TMDLs requires the San Diego Water Board to incorporate the requirements of the TMDLs into the appropriate regulatory mechanisms to implement the TMDL requirements. If the requirements of the Beaches and Creeks Bacteria TMDLs are not incorporated into any regulatory mechanisms (e.g. NPDES permits), the TMDL requirements will not be implemented and will not be enforceable. Implementation of the TMDL requirements in regulatory mechanisms must be initiated as soon as possible to achieve the requirements of the TMDL within the compliance schedules of the TMDL. The San Diego Water Board is obligated to incorporate the requirements into the MS4 permit. Otherwise, the San Diego Water Board would be in conflict with its own implementation plan requirements within the Basin Plan as well as the requirements of the Code of Federal Regulations. Please also see response to comment Lgl-10.

Lgl-5: San Diego Water Board does not have the legal authority to issue a regional permit

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	COMMENT: <i>San Diego Water Board does not have the legal authority to issue a regional MS4 permit.</i> The Orange County and Riverside County Copermittees each submitted comments asserting that the San Diego Water Board does not have the authority to issue a regional MS4 permit under the Clean Water Act. The Orange County Copermittees argue that while it geographically abuts San Diego County, there is extensive federal land separating MS4s within its county from other MS4s and the federal regulations to not allow the issuance of a regional MS4 permit without a “connection.” The commenters also raised concerns over the regulatory requirement to file a Report of Waste Discharge before obtaining coverage under the Tentative Order.
	Copermittees Orange County Copermittees Riverside County Copermittees RESPONSE: The San Diego Water Board disagrees that the federal regulations do not authorize the issuance of a region-wide MS4 permit coextensive with the jurisdictional boundaries of the San Diego Region. Despite the geographic separation, the San Diego Water Board has legal authority to issue a regional MS4 permit through its authority in the Clean Water Act. (See Attachment No. 2, September 7, 2012 Letter from San Diego Water Board Counsel on Legal Authority Supporting Issuance of a Regional MS4 Permit) Section 402, subpart (p)(3)(B) of the Clean Water Act states that “Permits for discharges from municipal storm sewers – (i) may be issued on a system- or jurisdiction-wide basis” The federal storm water regulations in 40 CFR at Part 122.26, subdivision (a)(1)(v) also state that the Director (the San Diego Water Board) may designate dischargers from municipal separate storm sewers on a system-wide or jurisdiction-wide basis, taking into consideration the following factors: (A) location of the the discharge with respect to waters of the United States; (B) the size of the discharge; (C) the quantity and nature of the pollutants discharged to waters of the United States and (D) other relevant factors. Consideration of these factors provides wide discretion to the San Diego Water Board in issuing MS4 permits. More specifically, the regulations permit issuance of system-wide permits covering all MS4s in “adjacent . . . large or medium separate storm sewer systems.” (See 40 CFR sec. 122.26(a)(3)(iv). The regulations also support issuance of MS4 permits on watershed or “other basis” contemplating that such permits may “specify different conditions relating to different discharges covered by the permit, including different management programs for different drainage areas” (40 CFR Part 122.26(a)(3)(v).) The USEPA responses to comments for the above regulations also make clear that the permitting authority, in this case, the San Diego Water Board, has flexibility to establish system- or region-wide permits. In the Final

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	Rule published in the Federal Register and containing USEPA's responses to comments, USEPA notes that paragraph (iv) of section 122.26(a)(3) would allow an entire system in a geographical region under the purview of a state agency to be designated under a permit. (National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, 55 Fed.Reg. 47990, 48030-48042 (Nov. 16, 1990).) It is important to note that a regional MS4 permit does not expand the requirements for each municipality beyond its borders as the federal regulations make clear that MS4 permittees need only comply with permit conditions relating to discharges from the MS4s for which they are operators. (40 CFR Part 122.26(a)(3)(vi).) See also September 7, 2012, memorandum from Jessica Jahr and Catherine Hagan, State Water Board's Office of Chief Counsel, to Ryan Baron and David Huff, counsels for Orange and Riverside Counties, respectively which is incorporated into this response. The other objection commenters raise concerns the regulatory requirement to file a Report of Waste Discharge (ROWD). The Tentative Order does not cover or become effective for either the Orange County or Riverside County Copermittees until the earlier of (1) either or both Counties voluntarily seeks to be covered by the permit, once adopted, or (2) Orange or Riverside County timely submits its respective ROWD proposing changes or other recommendations to the Tentative Order and appropriate changes are made concurrent with permit coverage becoming effective as to one or each County. In other words, the obligation to submit a ROWD and for the San Diego Water Board to consider an ROWD has not been abandoned and the Tentative Order reflects that the San Diego Water Board will rely on the ROWD process to frame prospective revisions to the permit. And while neither county has yet filed its next ROWD, both have been provided with ample and extensive opportunities to participate fully in the development of this Tentative Order.

Lgl-6: The requirements of the Tentative Order are more stringent than Federal law and require a CWC 13241 analysis

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Lgl-6	LEGAL	
	COMMENT: <i>The requirements of the Tentative Order are more stringent than Federal law and require a CWC 13241 analysis.</i> The Orange County and Riverside County Copermitees, City of Lake Forest, and the Building Industry Association of Southern California assert that several requirements of the Tentative Order go beyond the requirements of Federal law, thus an analysis pursuant to California Water code section 13241 is required. The commenters also make several assertions about the deficiencies they perceive with the economic considerations discussed in the Fact Sheet, and assert that a cost-benefit analysis needs to be included in the Fact Sheet discussion.	Building Industry / Industry Building Industry Association of Southern California Copermitees City of Lake Forest Orange County Copermitees Riverside County Copermitees
	RESPONSE: The San Diego Water Board disagrees that there are “many requirements in the Draft Permit which exceed the federal MEP standard.” The San Diego Water Board is charged with construction of and administration of the Clean Water Act in the San Diego Region. In issuing MS4 permits, “[t]he permitting agency has discretion to decide what practices, techniques, methods and other provisions are appropriate and necessary to control the discharge of pollutants.” (<i>City of Rancho Cucamonga v. Regional Water Quality Control Board-Santa Ana Region</i> (2006) 135 Cal.App.4th 1377,1389.) However, the “<i>Regional Board must comply with federal law requiring detailed conditions for NPDES permits.</i>” (<i>Ibid.</i>) Further, USEPA expects the permitting authority to develop the specific practices that comply with the Clean Water Act on a permit-by-permit basis. (<i>NRDC v. USEPA</i> (9th Cir. 1992) 966 F.2d 1292, 1308.) To the extent the Board is exercising discretion in including certain permit requirements, the Board is exercising discretion required and/or authorized by federal law, not state law. (See <i>City of Rancho Cucamonga, supra</i>, 135 Cal.App.4th at 1389; <i>Building Industry Association of San Diego County v. State Water Resources Control Bd.</i> (2004) 124 Cal.App.4th 866, 882-883.) Further, the MEP standard is a flexible standard that balances a number of considerations, including technical feasibility, cost, public acceptance, regulatory compliance, and effectiveness. (<i>Id.</i> at pp. 873, 874, 889.) Such considerations change over time with advances in technology and with experience gained in storm water management. (55 Fed. Reg. 47990, 48052 (Nov. 16, 1990).) Accordingly, a determination of whether the conditions contained in Tentative Order exceed the requirements of federal law cannot be based on a point by point comparison of the permit conditions with federal law. The appropriate focus is whether the permit conditions as a whole exceed the MEP standard. The commenters have failed to cite any evidence that demonstrates how requirements in the Tentative Order exceed the MEP	

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Lgl-6	LEGAL
	standard or applicable requirements of federal law. The commenters assert that provisions of the Tentative Order are more stringent than the requirements of the Clean Water Act and therefore require an analysis of the factors, including economic considerations, in Water Code section 13241 before the San Diego Water Board can approve such provisions. As indicated above, the San Diego Water Board disagrees that provisions of the Tentative Order are more stringent than requirements of the Clean Water Act. Because the Tentative Order is not more stringent than federal law, its adoption does not require the San Diego Water Board to consider Water Code section 13241 factors. The California Supreme Court in <i>City of Burbank v. State Water Resources Control Board, et al.</i>, ((2005) 35 Cal.4th 613) (<i>Burbank</i>), held: [Water Code s]ection 13377 specifies that wastewater discharge permits must meet the federal standards set by federal law. In effect, section 13377 forbids a regional board's consideration of any economic hardship on the part of the permit holder if doing so would result in the dilution of the requirements set by Congress in the Clean Water Act. That act prohibits the discharge of pollutants into the navigable waters of the United States unless there is compliance with federal law (33 U.S.C. § 1322(a)), and publicly operated wastewater treatment plants such as those before us here must comply with the act's clean water standards, regardless of cost [citations]. Because [Water Code] section 13263 cannot authorize what federal law forbids, it cannot authorize a regional board, when issuing a wastewater discharge permit, to use compliance costs to justify pollutant restrictions that do not comply with federal clean water standards." (<i>Burbank</i>, 35 Cal.4th at 625.) While the <i>Burbank</i> decision does require an analysis of Water Code section 13241 factors when the state adopts permit conditions that are more stringent than federal law (<i>id.</i> at 618) the Tentative Order reflects that all of the challenged provisions are necessary to implement federal law. Thus, the San Diego Water Board is not required to consider economic information to justify a "dilution of the requirements" established in federal law. Even when applicable, consideration of economic information pursuant to section 13241 does not require a cost-benefit analysis, as some commenters suggest. And section 13241 neither specifies how regional water boards must consider its enumerated factors nor does it require that regional water boards may specific findings documenting consideration of the factors. (See <i>California Ass'n of Sanitation Agencies, et al. v. State Water Resources Control Board, et al.</i>, (208 Cal.App.4th 1438, 1464 (2012).) Nonetheless, the Fact Sheet and Response to Comments reflect economic information that has either been developed or gathered by the San Diego Water Board or has been submitted by Copermittees or others as part of this proceeding. To the extent that economic information in connection with compliance and other costs associated with challenged permit provisions, the San Diego Water Board has fully considered this information. Under these circumstances, <i>Burbank</i> does not require more.

Lgl-7: The San Diego Water Board cannot determine whether a particular mandate is unfunded

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Lgl-7	LEGAL
	COMMENT: <i>The San Diego Water Board cannot determine whether a particular mandate is unfunded.</i> The Orange County, Riverside County and San Diego County Copermittees each submitted comments asserting that the San Diego Water Board does not have the legal authority to determine whether any provisions in the Tentative Order constitute a state mandate, and only the Commission on State Mandates can make the determination.
	Copermittees Orange County Copermittees Riverside County Copermittees San Diego County Copermittees RESPONSE: The San Diego Water Board does not dispute that the Commission on State Mandate ultimately has jurisdiction to determine whether the State has imposed a mandate requiring state subvention. However, it is entirely appropriate for the San Diego Water Board to set forth its legal basis to support the provisions in the Tentative Order, finding them to be necessary and appropriate to meet the federal Clean Water Act standards. While the Commission may be expert in state mandates, it has no expertise in the field of water law. As indicated in response to comment Lgl-6, above, the San Diego Water Board does not agree that provisions in the Tentative Order exceed federal requirements of the Clean Water Act. The San Diego Water Board is charged by law with administering and constructing the Clean Water Act's requirements and is entitled to considerable deference in its interpretation of the Act. (See <i>Buidling Industry Ass'n of San Diego, supra</i>, 124 Cal.App.5th at pp. 873, 879 fn.9; <i>County of Los Angeles v. California State Water Resources Control Bd.</i> (2006) 143 Cal.App.4th 985, 997.) In issuing MS4 permits, "[t]he permitting agency has discretion to decide what practices, techniques, methods and other provisions are appropriate and necessary to control the discharge of pollutants." (<i>City of Rancho Cucamonga v. Regional Water Quality Control Board-Santa Ana Region</i> (2006) 135 Cal.App.4th 1377,1389.) However, the "Regional Board must comply with federal law requiring detailed conditions for NPDES permits." (<i>Ibid.</i>) Further, USEPA expects the permitting authority to develop the specific practices that comply with the Clean Water Act on a permit-by-permit basis. (<i>NRDC v. USEPA</i> (9th Cir. 1992) 966 F.2d 1292, 1308.) To the extent the Board is exercising discretion in including certain permit requirements, the Board is exercising discretion required and/or authorized by federal law, not state law. (See <i>City of Rancho Cucamonga, supra</i>, 135 Cal.App.4th at 1389; <i>Building Industry Association of San Diego County v. State Water Resources Control Bd.</i> (2004) 124 Cal.App.4th 866, 882-883.) Further, the MEP standard is a flexible standard that balances a number of considerations, including technical feasibility, cost, public acceptance, regulatory compliance, and effectiveness. (<i>Id.</i> at pp. 873, 874, 889.) Such considerations change over time with advances in technology and with experience gained in storm water management. (55 Fed. Reg. 47990, 48052 (Nov. 16, 1990).) The San Diego Water Board's findings are the

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Lgl-7	LEGAL
	expert conclusions of the principal state agency charged with implementing the NPDES program in California. (Cal. Wat. Code §§ 13001, 13370.) The San Diego Water Board is not precluded from including provisions in the Tentative Order which commenters may contend are state mandates and it is well within the San Diego Water Board's authority to conclude, based on its expertise in administering the Clean Water Act, the the Tentative Order does not exceed federal law and is therefore not a state mandate subject to subvention.

Lgl-8: "Waters of the state" should be revised to "waters of the U.S" or "receiving waters" throughout the Tentative Order

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Lgl-8	LEGAL
	COMMENT: <i>"Waters of the state" should be revised to "waters of the U.S" or "receiving waters" throughout the Tentative Order.</i> The Riverside County and San Diego County Copermittees each submitted comments objecting to applying the requirements of the Tentative Order to "waters of the state" instead of "waters of the U.S." which is consistent with the Clean Water Act, or "receiving waters." The Copermittees are concerned that "waters of the state" may include groundwater, which exceeds federal requirements. The Copermittees requested several revisions throughout the Tentative Order reflecting this comment.
	Copermittees Riverside County Copermittees San Diego County Copermittees RESPONSE: The San Diego Water Board agrees that certain requirements of the Tentative Order should be revised to "waters of the U.S." or "receiving waters." Where applicable and appropriate, the San Diego Water Board revised "waters of the state" to "waters of the U.S." or "receiving waters" to limit the application of a requirement to surface waters. However, because the Tentative Order also serves as waste discharge requirements and incorporates the water quality standards of the Basin Plan (i.e. discharge prohibition A.1.a), the term "waters of the state" remains appropriate where the phrase exists in the applicable Basin Plan provision, incorporated into the Tentative Order. Because the Tentative Order regulates discharges of pollutants to waters of the United States, the San Diego Water Board does not anticipate there being any MS4 discharges to groundwaters that could violate the prohibition as to waters of the state. Additionally, such provisions are not new to San Diego Region MS4 permits. .

Lgl-9: The Tentative Order cannot include requirements to regulate storm water flow.

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Lgl-9	LEGAL
	COMMENT: <i>The Tentative Order cannot include requirements to regulate storm water flow.</i> The Riverside County and San Diego County Copermittees, the City of Lake Forest, and the BIA Regulated Community Coalition each submitted comments that assert the Tentative Order cannot include requirements (i.e. hydromodification management requirements) to regulate storm water flow. The commenters cite a recent court decision from Virginia (<i>Virginia Dept. of Transp. v. U.S. Environmental Protection Agency</i>) as the basis for this assertion. In contrast, the Los Penasquitos Lagoon Foundation requests that the Tentative Order finds discharges (i.e. flow) from the MS4s can generate and/or contribute to discharges of pollutants downstream of the MS4 outfalls (e.g. discharge of sediment due to scouring of the natural channels).
	RESPONSE: The San Diego Water Board disagrees that the Tentative Order cannot include requirements that will result in decreasing the impact of pollutants in storm water runoff discharged from the MS4s on the physical, chemical, and biological integrity of receiving waters to the maximum extent practicable (MEP). The Tentative Order includes requirements to effectively prohibit non-storm water discharges to the MS4, and control the discharge of pollutants from the MS4 to the MEP, consistent with the requirements of the Clean Water Act and Code of Federal Regulations. If non-storm water discharges are effectively prohibited to the MS4s, there should be little to no flow from the MS4s to receiving waters. Thus, the Tentative Order already includes requirements to regulate non-storm water flow to and from the MS4s. In contrast, the MEP standard is a technologically based effluent limitation (TBEL) that applies specifically to storm water discharges from the MS4s. The Tentative Order includes development planning structural BMP requirements that act as BMP-based TBELs to implement the MEP standard for new development and significant redevelopment projects. While the development planning structural BMP requirements are separated into “storm water pollutant control” and “hydromodification management” BMP requirements, they are both for the control of pollutants in storm water discharges from the MS4 to the MEP. The hydromodification management BMP requirements of the Tentative Order do, to a significant extent, regulate flow. However, the primary purpose of the hydromodification management BMP requirements still stems from the requirement that MS4 permits include controls to reduce the discharge of pollutants in storm water from the MS4s to receiving waters. The increases in flows and durations caused by new development

Building Industry / Industry

BIA Regulated Community Coalition

Copermittees

City of Lake Forest

Riverside County Copermittees

San Diego County Copermittees

Environmental Organizations

Los Penasquitos Lagoon Foundation

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Lgl-9	LEGAL
	and significant redevelopment also results in increases to pollutants that are discharged in storm water from the MS4s to the receiving waters. The pollutants discharged will always be in excess of what would be generated in a natural environment, even with controls in place. Those increased pollutant loads associated with increased flows and durations of storm water discharging from the MS4s impact the chemical integrity (e.g. salinity, temperature, toxic pollutants), biological integrity (e.g. biological toxicity, supportable flora and fauna, habitat alteration), and physical integrity (e.g. destabilization of stream channels, excessive sediment deposition) of receiving waters. Thus, the hydromodification management BMP requirements of the Tentative Order are necessary to control the discharge of pollutants generated by new development and significant redevelopment projects in storm water discharges from the MS4 to the MEP, even if they do result in the regulation of flow. The recent district court decision from the Eastern District of Virginia (<i>Virginia Dept. of Transportation, et al. v. United States Environmental Protection Agency, et al.</i> (2013 WL 53741 (E.D.Va.) (Virginia Decision)) cited by commenters does not support their argument in the context of the Tentative Order. In the Virginia Decision, USEPA had established a TMDL limiting the flow rate of stormwater into a creek to 681.8 ft/acre-day. USEPA characterized the flow rate as a “surrogate” for sediment, a pollutant. USEPA recognized that flow in and of itself is not a pollutant. As some commenters acknowledge, the Virginia Decision is not precedential and does not bind the San Diego Water Board. More importantly, the decision is inapposite as it concerns section 303(d) of the Clean Water Act concerning total daily maximum loads (TMDLs) which sets forth a very specific requirement that for impaired water bodies, states must establish numeric loads “for those <i>pollutants</i> which the Administrator identifies under section 1314(a)(2) of this title are suitable for such calculation.” Instead of setting a load for a pollutant, USEPA calculated a load for flow as a surrogate for the relevant pollutant. In contrast, as explained above, section 402(p) of the Clean Water Act provides that states issuing MS4 permits shall “require <i>controls</i> to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.” (CWA, § 402(p)(3)(B)(iii).) Following the directives of this section of the Clean Water Act, the Tentative Order establishes controls discussed above such as best management practices to remove pollutants in storm water, source control and restrictions on the flow rate and duration of post-construction runoff, the latter of which not only can

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	contain pollutants but can affect the discharge of pollutants in the runoff. (See State Water Board Order No. WQ 2000-11 (p. 5) (<i>Cities of Bellflower, et al.</i>) and State Water Board Order WQ 2001-15 (fn.23) (<i>Building Industry Association of San Diego</i>)). One commenter also cites to the Virginia Decision in requesting that the San Diego Water Board conform the TMDL provisions in the Tentative Order to the Virginia Decision. It is unclear how the commenter believes the Virginia Decision applies to the TMDL provisions in the Tentative Order, but as indicated above, the decision is not binding on the San Diego Water Board and any concerns with the loads established in TMDLs should most appropriately be raised in the context of the TMDL approval proceeding.

Lgl-10: The numeric WQBELs violate requirements of law because they are infeasible

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Lgl-10	LEGAL	Copermittees Orange County Copermittees
	COMMENT: <i>The numeric WQBELs violate requirements of law because they are infeasible.</i> The Orange County Copermittees submitted comments that object to the incorporation of numeric WQBELs for TMDLs, and assert that the inclusion of the numeric WQBELs violate the law because they are infeasible (presumably, to achieve). The Copermittees assert that the WQBELs should be BMP-based and not numeric. The Copermittees cite a 2010 USEPA memorandum, 40 CFR 122.44(k), and the Caltrans MS4 permit as justification for BMP-based instead of numeric WQBELs in the Tentative Order.	
	RESPONSE: The San Diego Water Board disagrees that including numeric WQBELs for the TMDLs in the Tentative Order violate the requirements of law. The federal regulations under 40 CFR 122.44(d)(1)(vii)(B) require that NPDES permit requirements incorporate WQBELs that must be consistent with the requirements and assumptions of any available wasteload allocations (WLAs) developed under TMDLs. The federal regulations under 40 CFR 122.44(k) do not require WQBELs to be BMP-based if numeric effluent limitations are infeasible, but only that WQBELs that implement WLAs <u>may</u> be expressed in the form of BMPs. BMP-based WQBELs may be allowed if BMPs alone adequately implement WLAs, and additional controls are not necessary. This is consistent with a 2002 USEPA memorandum for “<i>Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs.</i>” WQBELs are required for point source discharges that have the reasonable potential to cause or contribute to an excursion of water quality standards and technology based effluent limitations or standards are not sufficient to achieve water quality standards. Where a WLA has been assigned to a discharge in a TMDL, it is concluded that there is reasonable potential for the discharger to cause or contribute to an excursion of water quality standards. The 2010 USEPA memorandum for “<i>Revisions to the November 22, 2002 Memorandum ‘Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs.’</i>” cited by the Copermittees states, “<i>For the purpose of this memorandum, numeric WQBELs use numeric parameters such as pollutant concentrations, pollutant loads, or numeric parameters acting as surrogates for pollutants [...].</i>” The memorandum goes on to recommend, “<i>Where the NPDES authority determine that MS4 discharges have a reasonable potential to cause or contribute to a water quality standard excursion, EPA recommends that, where feasible, the NPDES permitting authority exercise its discretion to include numeric effluent limitations necessary to meet water quality standards.</i>” The “where feasible” in the memorandum applies to the NPDES permitting authority’s discretion to include numeric effluent	

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Lgl-10	LEGAL
	limitations necessary to meet water quality standards, not to the feasibility of achieving the numeric effluent limitations. The State Water Board, in Order WQ 2006-0012 (Boeing), has made clear that “infeasibility” in the context of numeric effluent limitations refers to “the ability or propriety of establishing” numeric limits, as opposed to the feasibility of compliance. Please also see response to comment Lgl-4. The Caltrans MS4 permit is issued by the State Water Board. Even though the Caltrans MS4 permit may allow for BMP-based WQBELs, this does not require the San Diego Water Board to include BMP-based WQBELs in the Tentative Order regardless of any potential or apparent conflict. The San Diego Water Board will issue additional requirements to Caltrans with numeric WQBELs when and where warranted. The San Diego Water Board considered the feasibility of incorporating numeric WQBELs to implement the requirements of each of the TMDLs and has determined that they are feasible, and necessary, to include to meet water quality standards, consistent with the 2010 USEPA memorandum. Numeric WQBELs are also “additional controls” necessary to implement the WLAs, consistent with the 2002 USEPA memorandum. Each of the TMDLs in the Tentative Order, however, includes BMP-based WQBELs which must be implemented to achieve the numeric WQBELs. The Tentative Order requires the Copermittees to implement the BMP-based WQBELs to achieve the numeric WQBELs. This is consistent with the 40 CFR 122.44(d)(1)(vii)(B) and 40 CFR 122.44(k), and the recommendations of the 2010 USEPA memorandum. The Tentative Order has also been revised to include interim and final TMDL compliance determination options that allow the Copermittees to demonstrate that the BMP-based WQBELs will achieve the numeric WQBELs. The numeric WQBELs are necessary for the Copermittees to quantitatively demonstrate that the BMPs implemented are achieving the WLAs of the TMDLs. Please see response to comments AttE-1 and AttE-3. Thus, the Tentative Order appropriately includes numeric WQBELs and does not violate any requirements of law.

Lgl-11: Storm water pollutant control retention requirements of the Tentative Order conflict with Rainwater Capture Act of 2012 (AB 1750).

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Lgl-11	LEGAL	
	COMMENT: <i>Storm water pollutant control retention requirements of the Tentative Order conflict with Rainwater Capture Act of 2012 (AB 1750).</i> The BIA Regulated Community Coalition commented that the Rainwater Capture Act does not provide the authority to collect and retain storm water from impervious surfaces other than rooftops. Thus, the BIA Regulated Community Coalition asserts that the storm water pollutant control retention requirements of the Tentative Order may be in conflict with the Rainwater Capture Act and the retention requirements of the Tentative Order should not be enforced.	Building Industry / Industry BIA Regulated Community Coalition
	RESPONSE: The San Diego Water Board disagrees that the storm water pollutant control retention requirements of the Tentative Order are in conflict with the Rainwater Capture Act. The Rainwater Capture Act provides additional clarification that the collection of rainwater from rooftops does not require a water right permit. The Rainwater Capture Act does not address collection of water from other surfaces, nor does it modify or alter existing law pertaining to appropriative water rights. Retention of rainwater or diffuse surface flow before it flows into a watercourse does not require a water right permit. The storm water pollutant control retention requirements of the Tentative Order are not in conflict with the Rainwater Capture Act or existing water rights law.	

FINDINGS

Fnd-1: Requests for additional findings.

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Fnd-1	FINDINGS
	COMMENT: <i>Requests for additional findings.</i> The Riverside County Copermittees requested several additional findings be included in the Tentative Order associated with water law, flooding, flood control acts, and limitations on legal authority. The County of San Diego and the County of San Diego Department of Environmental Health requested a finding with vector-related language.
	Copermittees County of San Diego County of San Diego Department of Environmental Health Riverside County Copermittees RESPONSE: The San Diego Water Board considered the requests for the additional findings and determined that including the additional findings is not necessary. The requirements of the Tentative Order are consistent with the federal Clean Water Act, Code of Federal Regulations, and the California Water Code. The additional findings requested associated with water law, flooding, flood control acts, limitations on legal authority and vector-related issues are not necessary to establish that the requirements of the Tentative Order are consistent the federal Clean Water Act, Code of Federal Regulations, and the California Water Code. The San Diego Water Board did not include any additional findings as requested by the commenters. The San Diego Water Board did, however, incorporate an additional requirement under the general requirements of all development projects (new Provision E.3.a.(1)(c)) to avoid the creation of nuisance or pollution associated with vectors. Subsequently, additional discussion was also included in the Fact Sheet to encourage the design and implementation of BMPs in consultation with local vector control agencies and the California Department of Public Health.

Fnd-2: Findings 2 and 26: Remove language that states the San Diego Water Board has the authority to issue a regional MS4 permit.

RESPONSES TO COMMENTS RECEIVED ON TENTATIVE ORDER NO. R9-2013-0001

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Fnd-2	FINDINGS
	COMMENT: <i>Findings 2 and 26: Remove language that states the San Diego Water Board has the authority to issue a regional MS4 permit.</i> The Orange County and Riverside County Copermittees each submitted comments asserting that Findings 2 and 26 were inaccurate and the San Diego Water Board does not have the authority to issues a regional MS4 permit under the Clean Water Act.
	Copermittees Orange County Copermittees Riverside County Copermittees RESPONSE: The San Diego Water Board disagrees that it does not have the authority to issue a regional MS4 permit. The San Diego Water Board maintains Findings 2 and 26 are accurate and the San Diego Water Board has the authority to issue a regional MS4 permit. Please see the response to comment Lgl-5.

Fnd-3: Finding 3 and 15 (and elsewhere in permit): Remove "in storm water" from "reduce discharges of pollutants in storm water to the maximum extent practicable"

RESPONSES TO COMMENTS RECEIVED ON TENTATIVE ORDER NO. R9-2013-0001

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Fnd-3	FINDINGS	Building Industry / Industry BIA Regulated Community Coalition Copermittees Riverside County Copermittees San Diego County Copermittees Environmental Organizations Clean Water Now
	COMMENT: <i>Finding 3 and 15 (and elsewhere in the Tentative Order): Remove "in storm water" from "reduce discharges of pollutants in storm water to the maximum extent practicable."</i> The Riverside County and San Diego County Copermittees each submitted comments that objected to requiring the control of pollutants "in storm water" to the MEP. The Copermittees assert that the Tentative Order is inconsistent with the Clean Water Act and the control of pollutants to the MEP applies to both storm water and non-storm water. The BIA Regulated Community Coalition cited a recent court decision that they assert calls into question several findings, including Findings 3 and 15. Clean Water Now supported the BIA Regulated Community Coalition concerns and also alluded to court decisions that call into question several findings. In both cases, the commenters requested that the Tentative Order be delayed until a definitive interpretation of the legal decisions is made available.	
	RESPONSE: The San Diego Water Board disagrees that there is any inconsistency with the requirements of the Clean Water Act, or that the adoption of the Tentative Order should be delayed. Comments received assert that the "plain language" of the Clean Water Act states that the MEP standard applies to all pollutants discharged from the MS4, not just pollutants in storm water. The commenter, however, fails to acknowledge the "plain language" of the Clean Water Act that specifically makes a clear distinction that non-storm water discharges are to be effectively prohibited from entering the MS4. Since the "plain language" of the Clean Water Act states that non-storm water discharges to the MS4 are to be effectively prohibited (CWA section 402(p)(3)(B)(ii)), then no pollutants in non-storm water will enter the MS4 if the discharger is in compliance with this requirement. If no pollutants are entering the MS4 because non-storm water discharges are not entering the MS4, then clearly the very next requirement to control pollutant discharges from the MS4 be reduced to the MEP (CWA section 402(p)(3)(B)(iii)) intends that the discharge of pollutants only apply to storm water. Provisions A.1.b and A.3.a are consistent with CWA section 402(p)(3)(B)(ii) and CWA section 402(p)(3)(B)(iii), respectively, and the Fact Sheet further clarifies this distinction between non-storm water discharges and pollutants in storm water discharges. Findings 3 and 15 are consistent with the Clean Water Act have not be modified. The United States Supreme Court decision, <i>Los Angeles County Flood Control v. Natural Resources Defense Council</i> (2013) 133 S.Ct. 710 does not require any modifications to the Tentative Order.	

Fnd-4: Finding 7: Finding should be modified to support construction of BMPs in receiving waters

RESPONSES TO COMMENTS RECEIVED ON TENTATIVE ORDER NO. R9-2013-0001

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Fnd-4	FINDINGS	
	COMMENT: <i>Finding 7: Finding should be modified to support construction of BMPs in receiving waters.</i> The BIA Regulated Community Coalition submitted comments requesting revisions to Finding 7 to support the construction of BMPs in receiving waters. The commenter is concerned that the Tentative Order will not allow the construction of BMPs, or implementation of retrofitting or rehabilitation projects in waters of the U.S. or waters of the state to treat pollutants in storm water from areas of existing development. The commenter also requested a revision to Provision E.3.a.(1)(b) to reflect the requested revision to Finding 7.	Building Industry / Industry BIA Regulated Community Coalition
	RESPONSE: The San Diego Water Board disagrees revisions to Finding 7 are appropriate or necessary. Finding 7 correctly provides that pursuant to federal regulations under 40 CFR 131.10(a) waste transport or waste assimilation cannot be a designated use for any waters of the U.S. Thus, waters of the U.S. cannot be utilized for the treatment of pollutants in storm water discharges from the MS4s, and treatment control BMPs must not be constructed in waters of the U.S. to treat pollutants in storm water discharges from the MS4s. Finding 7 does not, however, include construction of BMPs for the treatment of pollutants in waters of the state. Thus, the San Diego Water Board has revised Provision E.3.a.(1)(b) to limit the prohibition of constructing structural BMPs in only waters of the U.S. consistent with 40 CFR 131.10(a).	

Fnd-5: Findings 8, 16 and 17: Finding should not include presumption that discharges from MS4s always contain waste or pollutants.

RESPONSES TO COMMENTS RECEIVED ON TENTATIVE ORDER NO. R9-2013-0001

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Fnd-5	FINDINGS
	COMMENT: <i>Findings 8, 16 and 17: Findings should not include presumption that discharges from MS4s always contain waste or pollutants.</i> The Orange County and San Diego County Copermittees objected to Finding 8 stating that discharges from the MS4s contain waste, and does not acknowledge that there may not be pollutants in the discharges from the MS4s. The Copermittees requested revisions to Findings 8, 16 and 17 to reflect this position. The BIA Regulated Community Coalition cited a recent court decision that they assert calls into question several findings, including Finding 8. Clean Water Now supported the BIA Regulated Community Coalition concerns and also alluded to court decisions that call into question several findings. In both cases, the commenters requested that the Tentative Order be delayed until a definitive interpretation of the legal decisions is made available. In contrast, the Los Penasquitos Lagoon Foundation recommended that Finding 8 should also acknowledge pollutant discharges that are caused as a result of discharges from the MS4s (e.g. sediment discharged due to scouring of the receiving waters).
	RESPONSE: The San Diego Water Board disagrees that Findings 8, 16, or 17 are inaccurate, or that the adoption of the Tentative Order should be delayed. The Tentative Order is implementing the requirements of the California Water Code as well as the requirements of the Clean Water Act. Under the California Water Code section 13376, any person discharging waste, or proposing to discharge wastes to waters of the state is not authorized to discharge waste unless issued waste discharge requirements. The requirements of the Clean Water Act, specific to discharges of pollutants to waters of the U.S. are also included in the California Water Code, Chapter 5.5 of Division 7. Thus, under the California Water Code, any person discharging pollutants, or proposing to discharge pollutants to waters of the U.S. is not authorized to discharge pollutants unless issued waste discharge requirements that include NPDES requirements. Waste discharge requirements that include NPDES requirements is also an NPDES permit under the Clean Water Act. The Clean Water Act requires municipalities to obtain NPDES permits to authorize discharges of pollutants from their MS4s. Commenters cite the definition of “waste” in the California Water Code to assert that the definition does not include storm water or any discharge that is not created by human activity. Comments received also assert that

Building Industry / Industry

BIA Regulated Community Coalition

Copermittees

Orange County Copermittees

San Diego County Copermittees

Environmental Organizations

Clean Water Now

Los Penasquitos Lagoon Foundation

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Fnd-5	FINDINGS
	waste discharge requirements and NPDES permits cannot regulate the discharge of “pure storm water” and that not all discharges from the MS4 contain pollutants. Discharges from the MS4 are not “pure storm water.” Storm water that flows over the surface of any developed area, which includes the MS4 itself, do not enter or discharge from the MS4 without coming into contact with pollutants or constituents that alter the storm water such that it is no longer “pure storm water.” Thus, storm water discharges from the MS4 contains pollutants and contain waste. It is well-known and documented that urban runoff and storm water contains pollutants. (See, e.g., State Water Board Order WQ 2001-015 (“As we stated in Board Order WQ 95-2, the requirement to adopt permits for urban runoff is undisputed, and Regional Water Boards are not required to obtain any information on the impacts of runoff prior to issuing a permit (citation). It is also undisputed that urban runoff contains ‘waste’ within the meaning of Water code section 13050(d), and that the federal regulations define ‘discharge of a pollutant’ to include ‘additions of pollutants into waters of the United States from surface runoff which is collected or channeled by man.’ (40 C.F.R. § 122.2.) But it is the waste or pollutants in the runoff that meet these definitions of ‘waste’ and ‘pollutant.’ And not the runoff itself. [fn]. (p. 5.)) The Tentative Order is not regulating “pure storm water” but the discharge of storm water that is being discharged as a waste and contains pollutants. Finding 8 accurately states that discharges from the MS4s contain waste, as defined in the California Water Code. Finding 8 also accurately states that discharges from the MS4s contain pollutants that adversely affect the quality of waters of the state. Findings 16 and 17 also accurately conclude that BMPs and implementation of BMPs are necessary to remove waste and pollutants in storm water discharges from the MS4s. The San Diego Water Board does not understand the comments concerning the recent United States Supreme Court decision in Los Angeles County Flood Control District v. NRDC (133 S.Ct 710 (2013)). The San Diego Water Board has reviewed the opinion and does not believe the opinion necessitates any changes to the Tentative Order.

Fnd-6: Finding 10: Finding should be modified to specify linear underground projects (LUPs) should not be subject to permanent post construction BMP requirements

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Fnd-6	FINDINGS
	COMMENT: <i>Finding 10: Finding should be modified to specify linear underground projects (LUPs) should not be subject to permanent post construction BMP requirements.</i> San Diego Gas and Electric and the Southern California Gas Company each submitted comments requesting revisions to Finding 10 to specify that linear underground/overhead (utility) projects (LUPs) are not subject to post construction requirements to be consistent with the State Water Board Construction General Permit findings.
	RESPONSE: The San Diego Water Board disagrees that revisions to Finding 10 are appropriate or necessary. Finding 10 accurately states that pollutants are generated by land development. Finding 10 discusses the generation of pollutants by land development in broad and general terms, and does not specify types of land development activities. Incorporating language into Finding 10 specific to LUPs is inappropriate and not necessary.

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 San Diego Gas and Electric
 Southern California Gas Company

Fnd-7: Finding 11: Finding should not classify natural waters as part of the MS4, and cannot be classified as both an MS4 and receiving water.

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Fnd-7	FINDINGS
	COMMENT: <i>Finding 11: Finding should not classify natural waters as part of the MS4, and cannot be classified as both an MS4 and receiving water.</i> The Orange County, Riverside County, and San Diego County Copermittees each submitted comments asserting that Finding 11 was inaccurate and the San Diego Water Board cannot classify natural waters as part of the MS4. The BIA Regulated Community Coalition cited a recent court decision that they assert calls into question several findings, including Finding 11. Clean Water Now supported the BIA Regulated Community Coalition concerns and also alluded to court decisions that call into question several findings. In both cases, the commenters requested that the Tentative Order be delayed until a definitive interpretation of the legal decisions is made available. In contrast, the Los Penasquitos Lagoon Foundation recommended that the language of Finding 11 should be maintained. Building Industry / Industry BIA Regulated Community Coalition Copermittees Orange County Copermittees Riverside County Copermittees San Diego County Copermittees Environmental Organizations Clean Water Now Los Penasquitos Lagoon Foundation
	RESPONSE: The San Diego Water Board disagrees that Finding 11 is inaccurate, or that the adoption of the Tentative Order should be delayed. An MS4 is defined in the federal regulations as a conveyance or system of conveyances owned or operated by a Copermittee, and designed or used for collecting or conveying runoff. Therefore, the San Diego Water Board considers natural drainages that are used by the Copermittees as conveyances of runoff, as both part of the MS4 and as receiving waters. The State Water Board supports this approach. In reviewing a Petition on Order No. R9-2001-0001, the State Water Board stated "<i>We also agree with the Regional Water Board's concern, as stated in its response, that there may be instances where MS4s use 'waters of the United States as part of their sewer system [...]</i>" State Water Resources Control Board Order WQ 2001-15. Furthermore, the U.S. Supreme Court's 2006 <i>Rapanos</i> decision supports the conclusion that natural streams in developed areas can be both receiving waters and MS4s by confirming that ephemeral and intermittent streams can be waters of the U.S. subject to regulation under Clean Water Act section 404 and also be considered point sources of pollution discharges regulated under Clean Water Act section 402. (See <i>Rapanos, et al. v. United</i>

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Fnd-7	FINDINGS
	<i>States and Carabell et al. v. United States Army Corps of Engineers, et al.</i> (2006) 547 U.S. 715, 743-744.) Finding 11 is accurate and consistent with the Clean Water Act and NPDES regulations.

Fnd-8: Finding 12: Finding should not state that Copermittees provide free and open access to MS4s; Copermittees are not responsible for all discharges not prohibited.

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Fnd-8	FINDINGS	
	COMMENT: <i>Finding 12: Finding should not state that Copermittees provide free and open access to MS4s; Copermittees are not responsible for all discharges not prohibited.</i> The Orange County and Riverside County Copermittees each submitted comments objecting to Finding 12 stating that the Copermittees provide free and open access to MS4s. The Riverside County Copermittees also objected to Finding 12 stating that the Copermittees cannot passively receive and discharge pollutants from third parties. The Copermittees assert that they are not responsible for discharges from their MS4s that are from third parties that are subject to the jurisdiction of the San Diego Water Board.	Copermittees Orange County Copermittees Riverside County Copermittees
	RESPONSE: The San Diego Water Board disagrees that Finding 12 is inaccurate. The Copermittees have the option to request the authority to discharge from their MS4s under an NPDES permit or comply with the complete prohibition against the discharge of pollutants pursuant to Clean Water Act section 301(a) (33 U.S.C. § 1311(a)). These choices are provided by the federal Clean Water Act, not state laws. The Copermittees have opted to discharge from their MS4s under an NPDES permit. In doing so, they are responsible for discharges from the MS4s. Thus, Finding 12 correctly provides that the Copermittees provide free and open access to their MS4s and they are responsible for discharges into the MS4 that they do not prohibit or otherwise control. Finding 12 also correctly provides that the Copermittees cannot passively receive and discharge pollutants from third parties. The Copermittees have the responsibility of identifying the sources of discharges and pollutants from their MS4s. If the Copermittees are not actively identifying sources and cannot identify sources of discharges and pollutants to and from their MS4s, then the Copermittees are the source of the MS4s discharges and pollutants to receiving waters, even if they believe third parties are responsible for the discharges and pollutants. If, however, the Copermittees identify the sources of discharges and pollutants to or from the MS4s as outside of their legal authority to prohibit or otherwise control, then they are not passively receiving and discharging pollutants, even if they are providing free and open access to the MS4s. The data and information that the Copermittees collect to identify the third party sources can provide the evidence that the Copermittees are not responsible for the discharges and pollutants from the MS4s that can be attributed to third parties. Until the data and information are provided to identify those third parties, and demonstrate those parties are not subject to the Copermittees' legal authority, then the Copermittees are responsible for all of the discharges to and from their MS4s unless such discharges are authorized by a separate NPDES permit.	

Fnd-9: Finding 15: Finding should state that the maximum extent practicable standard applies to both non-storm water and storm water, not just storm water.

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Fnd-9	FINDINGS
	COMMENT: <i>Finding 15: Finding should state that the maximum extent practicable standard applies to both non-storm water and storm water, not just storm water.</i> The Orange County, Riverside County and San Diego County Copermittees each submitted comments that assert Finding 15 is inaccurate. The Copermittees assert that the Tentative Order is inconsistent with the Clean Water Act and the MEP standard applies to both non-storm and water storm water, not just storm water. The BIA Regulated Community Coalition cited a recent court decision that they assert calls into question several findings, including Finding 15. Clean Water Now supported the BIA Regulated Community Coalition concerns and also alluded to court decisions that call into question several findings. In both cases, the commenters requested that the Tentative Order be delayed until a definitive interpretation of the legal decisions is made available. San Diego Gas and Electric and the Southern California Gas Company each submitted comments requesting revisions to Finding 15 to clarify that non-storm water discharge authorized by a NPDES permit are authorized to be discharged to the MS4s.
	RESPONSE: The San Diego Water Board disagrees that the MEP standard applies to both non-storm water and storm water. The San Diego Water Board also disagrees that Finding 15 should be revised. Finding 15 accurately states the requirements of the Clean Water Act. The San Diego Water Board maintains that MEP standard only applies to pollutants in storm water. The San Diego Water Board also maintains that Finding 15 does not need to be clarified to state that non-storm water discharge authorized by a NPDES permit are authorized to be discharged to the MS4s. Please see the responses to comments Fnd-3 and Fnd-8, and also see Memorandum from San Diego Water Board Counsel to San Diego Water Board dated 5 November 2009, incorporated by reference herein.

Building Industry / Industry

BIA Regulated Community Coalition
San Diego Gas and Electric
Southern California Gas Company

Copermittees

Orange County Copermittees
Riverside County Copermittees
San Diego County Copermittees

Environmental Organizations

Clean Water Now

Fnd-10: Finding 27: Finding should state that implementation of the requirements of the Tentative Order "will" not "may" allow the San Diego Water Board to re-categorize impaired water bodies to Category 4 in the Integrated Report.

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Fnd-10	FINDINGS
	COMMENT: <i>Finding 27: Finding should state that implementation of the requirements of the Tentative Order "will" not "may" allow the San Diego Water Board to re-categorize impaired water bodies to Category 4 in the Integrated Report.</i> The San Diego County Copermittees requested that Finding 27 be revised to state that the requirements of the Tentative Order "will" allow the San Diego Water Board to re-categorize impaired water bodies to Category 4 in the Integrated Report, as opposed to only "may" allow the re-categorization.
	Copermittees San Diego County Copermittees RESPONSE: The San Diego Water Board disagrees that revising Finding 27 is appropriate. Finding 27 is accurate to state that the implementation of the Water Quality Improvement Plan "may" allow the San Diego Water Board to re-categorize an impaired water body in Category 4 in the Integrated Report meaning a TMDL is not required. The Integrated Report is ultimately approved by the USEPA. The USEPA may not allow the San Diego Water Board to re-categorize an impaired water body from Category 5 (i.e. TMDL required) to Category 4 (i.e. TMDL not required) if they do not agree that the implementation of the requirements of the Tentative Order will result in attainment of the water quality standards.

Fnd-11: Finding 28: Finding should state that the requirements of the Tentative Order are more stringent than Federal law and require a CWC 13241 analysis.

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Fnd-11	FINDINGS	
	COMMENT: <i>Finding 28: Finding should state that the requirements of the Tentative Order are more stringent than Federal law and require a CWC 13241 analysis.</i> The Orange County and Riverside County Copermittees each submitted comments objecting to Finding 28. The Copermittees assert that several requirements of the Tentative Order go beyond the requirements of Federal law, thus an analysis pursuant to California Water code section 13241 is required. The Copermittees make several assertions about the deficiencies they perceive with the economic considerations discussed in the Fact Sheet. The Copermittees assert that a cost-benefit analysis needs to be included in the Fact Sheet discussion. The BIA Regulated Community Coalition cited a recent court decision that they assert calls into question several findings, including Finding 28. Clean Water Now supported the BIA Regulated Community Coalition concerns and also alluded to court decisions that call into question several findings. In both cases, the commenters requested that the Tentative Order be delayed until a definitive interpretation of the legal decisions is made available.	Building Industry / Industry BIA Regulated Community Coalition Copermittees Orange County Copermittees Riverside County Copermittees Environmental Organizations Clean Water Now
	RESPONSE: The San Diego Water Board disagrees that provisions of the Tentative Order go beyond the requirements of the Clean Water Act or Code of Federal Regulations, or that the adoption of the Tentative Order should be delayed. The San Diego Water Board considered economic information in developing the Tentative Order using the best available information, but did not do so in accordance with an analysis pursuant to California Water code section 13241. The provisions of the Tentative Order are based on and fully supported by federal requirements, as demonstrated by the legal authority provided by the Clean Water Act and Code of Federal Regulations sections cited in the Fact Sheet. Thus, the San Diego Water Board maintains that an analysis pursuant to California Water code section 13241 is not required. Federal NPDES regulations do not require that the San Diego Water Board conduct a cost-benefit analysis. Please also see response to comment Lgl-6.	

Fnd-12: Finding 29: San Diego Water Board cannot determine what is a state mandate.

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Fnd-12	FINDINGS	
	COMMENT: <i>Finding 29: San Diego Water Board cannot determine what is a state mandate.</i> The Orange County, Riverside County and San Diego County Copermittees each submitted comments objecting to Finding 29 generally asserting that the San Diego Water Board does not have the legal authority to determine whether any provisions in the Tentative Order constitute a state mandate, and only the Commission on State Mandates can make the determination. The County of San Diego also submitted a similar comment.	Copermittees County of San Diego Orange County Copermittees Riverside County Copermittees San Diego County Copermittees
	RESPONSE: The San Diego Water Board agrees that the Commission on State Mandates ultimately has jurisdiction to determine that a provision in the Tentative Order constitutes a state mandate. Finding 29 is, nonetheless, appropriate and necessary to express and support the San Diego Water Board's position that the Tentative Order is the result of a federal and not a state mandate. Please see the response to comment Lgl-7.	

Fnd-13: Finding 31: Finding should support implementation of the iterative process to comply with prohibitions and limitations.

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Fnd-13	FINDINGS	Copermittees Riverside County Copermittees
	COMMENT: <i>Finding 31: Finding should support implementation of the iterative process to comply with prohibitions and limitations.</i> The Riverside County Copermittees submitted a comment related to Finding 31 requesting that the Tentative Order be revised to support the iterative process as a means to comply with the discharge prohibitions and receiving water limitations of Provision A. The Copermittees did not request or recommend any revisions to Finding 31, but requested revisions to Provision A to support implementation of the iterative process to comply with the discharge prohibitions and receiving water limitations.	
	RESPONSE: The San Diego Water Board agrees that implementation of the iterative process is necessary to achieve compliance with the discharge prohibitions and receiving water limitations of Provision A. The San Diego Water Board did not make any revisions to Finding 31 or Provision A as requested by the commenter. The San Diego Water Board did, however, include an option as part of the Water Quality Improvement Plan requirements that each Copermittee may choose to implement to demonstrate compliance with the discharge prohibitions and receiving water limitations of Provision A. Please see response to comment A-1.	

Fnd-14: Finding 32: Finding should clarify that NPDES permitted discharges to MS4s that discharge to ASBS are authorized.

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Fnd-14	FINDINGS
	COMMENT: <i>Finding 32: Finding should clarify that NPDES permitted discharges to MS4s that discharge to ASBS are authorized.</i> San Diego Gas and Electric and Southern California Gas Company requested modifications to Finding 32 to specify that the San Diego Water Board finds that NPDES-permitted discharges to the MS4 that subsequently discharge to ASBS will not alter ocean water quality and the Tentative Order authorizes these NPDES-permitted discharges. The commenters are concerned that the Tentative Order does not clearly state that NPDES permitted discharges to the Copermittees' MS4s that then discharge to ASBS are authorized. The BIA Regulated Community Coalition cited a recent court decision that they assert calls into question several findings, including Finding 32. Clean Water Now supported the BIA Regulated Community Coalition concerns and also alluded to court decisions that call into question several findings. In both cases, the commenters requested that the Tentative Order be delayed until a definitive interpretation of the legal decisions is made available.
	RESPONSE: The San Diego Water Board disagrees that revisions to Finding 32 are appropriate or necessary, or that the adoption of the Tentative Order should be delayed. The Tentative Order requires discharges from the Copermittees' MS4 to be consistent with the requirements of Special Protections contained in Attachment B to State Water Board Resolution No. 2012-0012 (Special Protections). The Tentative Order includes provisions that apply to the Copermittees' MS4 discharges to ASBS, thus the Copermittees are subject to the requirements of the Special Protections. Incorporating the requested language into Finding 32 to find that the San Diego Water Board authorizes discharges of other NPDES-permitted discharges to the MS4 is inappropriate and not necessary.

Building Industry / Industry

BIA Regulated Community Coalition
San Diego Gas and Electric
Southern California Gas Company

Environmental Organizations

Clean Water Now

PROVISION A: PROHIBITIONS AND LIMITATIONS

A-1: Revise Provision A to clarify how compliance with prohibitions and limitations can be achieved.

RESPONSES TO COMMENTS RECEIVED ON TENTATIVE ORDER NO. R9-2013-0001

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A-1	PROVISION A: PROHIBITIONS AND LIMITATIONS	
	COMMENT: <i>Revise Provision A to clarify how compliance with prohibitions and limitations can be achieved.</i> The Orange County, Riverside County and San Diego County Copermittees each submitted comments requesting that the requirements of Provision A be modified to provide a clear linkage between the prohibitions and limitations of Provisions A.1 to A.3 with the iterative process required under Provision A.4 to be demonstrated through the implementation of the Water Quality Improvement Plans. The Copermittees are concerned that the language of Provision A, if not modified, will be interpreted as requiring strict and immediate compliance with the prohibitions and limitations, and the implementation of the iterative process would not be enough the demonstrate compliance with the prohibitions and limitations. Among the many recommended modifications to the requirements of Provision A, the Copermittees are generally requesting that the discharge prohibitions and receiving water limitations of Provisions A.1.a, A.1.c and A.2.a specifically state that implementation of Provision A.4 constitutes compliance. Furthermore, the Copermittees have requested that Provision A.4 explicitly state that the implementation of the iterative process constitutes compliance with any of the prohibitions and limitations under Provision A.1 to A.3, including compliance with the effective prohibitions of non-storm water discharges to the MS4s, the special protections for ASBS, and the TMDL requirements. Many Copermittees submitted separate comments in support of the requested modifications. One commenter from the Building Industry also requested similar modifications to the requirements of Provision A. In contrast, commenters from Environmental Organizations were strongly in support of maintaining the existing language and asserted that modifications to Provision A that would “weaken” the requirements, or provide “safe harbor” and would violate federal anti-backsliding requirements.	Building Industry / Industry BIA Regulated Community Coalition Copermittees City of Del Mar City of Imperial Beach City of Laguna Hills City of Lake Forest City of Mission Viejo City of Rancho Santa Margarita City of San Diego City of San Juan Capistrano County of San Diego County of San Diego Office of County Counsel Orange County Copermittees Riverside County Copermittees San Diego County Copermittees San Diego Unified Port District / Brown and Winters Environmental Organizations Environmental Groups Natural Resources Defense Council
	RESPONSE: The San Diego Water Board agrees with the comments from the Copermittees and their supporters, as well as the Environmental Organizations. The San Diego Water Board understands the concerns that the Copermittees have expressed regarding the requirements of Provision A and the apparent lack of a linkage between the iterative process under Provision A.4 and the strict compliance with the discharge prohibitions and receiving water limitations of Provisions A.1.a, A.1.c and A.2.a. This language, however, is consistent with the precedential language that was issued under State Water Board Order WQ-1999-05 and has been implemented in all MS4 permits issued by the San Diego Water Board since 2001. The State Water Board has not issued an order or taken other action to supersede the	

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A-1	PROVISION A: PROHIBITIONS AND LIMITATIONS	
	precedential language. Under the Porter-Cologne Water Quality Control Act, waste discharge requirements must implement applicable water quality control plans, including water quality objectives. The discharge prohibitions and receiving water limitations of Provision A.1.a, A.1.c and A.2.a are consistent with this requirement, and are included in all NPDES permits and Waste Discharge Requirements issued by the San Diego Water Board. These are the fundamental requirements that protect water quality by ensuring that discharges comply with applicable water quality standards to ensure protection of receiving water beneficial uses. The San Diego Water Board does recognize an increasing body of monitoring data indicates that water quality standards are in fact not being met by many of the Copermittees' MS4 discharges. The San Diego Water Board has as a matter of practice chosen not to enforce the discharge prohibitions and receiving water limitations of Provision A.1.a, A.1.c or A.2.a if the Copermittees are actively engaged in implementing the other requirements of the MS4 permit. The focus of the previous MS4 permits and the San Diego Water Board has been on compliance with implementation of the actions required by the permit, rather than the water quality outcomes that are expected to be achieved. The San Diego Water Board has initiated enforcement against the Copermittees on several occasions for noncompliance with permit requirements. As noted by the Copermittees, however, the approach of the Tentative Order is a significant departure from the approach of previous MS4 permits. Previous MS4 permits did not provide the Copermittees enough flexibility to truly implement an iterative process to adaptively manage their programs to identify innovative new ways to improve the quality of discharges from their MS4s or in the receiving waters, because the actions required by the permit were relatively fixed and prescriptive. In contrast, the Tentative Order is structured to allow the Copermittees to take advantage of the iterative process and adaptively manage their programs to focus on achieving outcomes. The Tentative Order has been revised to provide an optional pathway for the Copermittees to demonstrate compliance with the discharge prohibitions and receiving water limitations of Provision A.1.a, A.1.c or A.2.a through implementation of technically supported iterative and adaptive management processes applicable to specific pollutant/waterbody combinations. The appropriate location in the Tentative Order for providing this "compliance mechanism," however, is not under Provision A. Instead, the appropriate location is under Provision B. Under the requirements of Provision B for the development of the Water Quality Improvement Plans, the San Diego Water Board has added Provision B.3.c. Provision B.3.c explicitly provides that a Copermittee will be in compliance with the requirements of Provision A.1.a, A.1.c and A.2.a if a specific set of	

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A-1	PROVISION A: PROHIBITIONS AND LIMITATIONS
	requirements are incorporated and implemented as part of an accepted Water Quality Improvement Plan. Under this option, a Copermittee can demonstrate compliance with the discharge prohibitions and receiving water limitations of Provisions A.1.a, A.1.c and A.2.for specific pollutant/waterbody combinations if the Water Quality Improvement Plan demonstrates through a robust technical analysis that the water quality improvement strategies the Copermittee plans on implementing will achieve applicable water quality stand based numeric goals by a certain date. The implementation must be verified through monitoring and assessments, and the goals, strategies and schedules in the plan can be adjusted accordingly based on those results. The more specific planning, implementation, monitoring and assessment program required under Provision B.3.c, combined with a clear set of numeric goals, strategies, and schedules that the Copermittee demonstrates will achieve compliance through, becomes the iterative and adaptive management process that the San Diego Water Board may accept as being in compliance with Provisions A.1.a, A.1.c and A.2.a, as well as Provision A.4. As recommended by the Environmental Organizations, the San Diego Water Board did not revise Provisions A.1.a, A.1.c, A.2.a and A.4, and the language of Provision A remains consistent with State Water Board Order WQ 1999-05. The addition of Provision B.3.c provides the linkage for compliance with the discharge prohibitions and receiving water limitations through the iterative process that the Copermittees and their supporters requested. The San Diego Water Board did modify Provision A.1.b to clarify how to demonstrate compliance with the effective prohibition of non-storm water discharges to the MS4s. The San Diego Water Board recognizes that the effective prohibition of non-storm water discharges to the MS4 is specifically required by the federal regulations to be achieved through the implementation of an illicit discharge detection and elimination program as specified under 40CFR122.26(d)(2)(iv)(B). Provision A.1.b has been revised to refer to Provision E.2, which is the illicit discharge detection and elimination program requirements that must be implemented by each Copermittee within its jurisdiction to effectively prohibit non-storm water discharges to its MS4. As for the requests to modify the requirements of Provision A to allow the Copermittees to utilize the Water Quality Improvement Plan to demonstrate compliance with the other requirements of Provision A pertaining to the special protections for ASBS and the TMDL requirements, the San Diego Water Board generally did not agree to modify the requirements as requested.

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A-1	PROVISION A: PROHIBITIONS AND LIMITATIONS	
	The linkage for compliance with the ASBS requirements is provided under Provision A.1.d. Provision A.1.d specifies that discharges from MS4s to ASBS are authorized subject to the Special Protections contained in Attachment B to State Water Board Resolution No. 2012-0012. The provisions of the Special Protections are provided in Attachment A to the Order for easy reference, but the Special Protections are actually part of the Ocean Plan. The requirements for the Water Quality Improvement Plan take into account the requirements for the Special Protections. The development and implementation of the Water Quality Improvement Plans should allow the Copermittees that discharge to ASBS to demonstrate that they are in compliance with the Special Protections. As for the linkage for compliance with the TMDL requirements, the linkage is provided under Provision A.3.b. The Copermittees are required to comply with the WQBELs for the TMDLs in Attachment E. The requirements for the Water Quality Improvement Plan take into account the requirements for the TMDLs. The requirements of the TMDLs in Attachment E must be incorporated into the Water Quality Improvement Plan. The development and implementation of the Water Quality Improvement Plans should allow the Copermittees subject to TMDL requirements to demonstrate that they are in compliance with the WQBELs.	

A-2: The maximum extent practicable (MEP) standard applies to both non-storm water and storm water.

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A-2	PROVISION A: PROHIBITIONS AND LIMITATIONS	
	COMMENT: <i>The maximum extent practicable (MEP) standard applies to both non-storm water and storm water.</i> The Riverside County Copermittees submitted comments asserting that the MEP standard of the Clean Water Act and federal regulations applies to reducing pollutants in non-storm water discharges as well as in storm water discharges. Accordingly, non-storm water discharges are authorized to be discharged if pollutants in non-storm water are reduced to the MEP. The Riverside County Copermittees requested that the language be revised to reflect this concept throughout the Tentative Order. In contrast, the Natural Resources Defense Council (NRDC) submitted comments that the non-storm water action levels (NALs) in the permit may contradict the effective prohibition of non-storm water discharges to the MS4. The NRDC is concerned that stating that the NALs are not considered by the San Diego Water Board to be enforceable limitations could be interpreted as an authorization for discharges of non-storm water, which would be in conflict with the effective prohibition requirements of the Clean Water Act for non-storm water discharges to the MS4.	Copermittees Riverside County Copermittees Environmental Organizations Natural Resources Defense Council
	RESPONSE: The San Diego Water Board disagrees that the MEP standard applies to both non-storm water and storm water. Building on the effective prohibition against non-storm water discharges, the Clean Water Act requirement to reduce pollutants discharged from the MS4 to the MEP standard necessarily is limited to storm water discharges. (See Attachment 1 November 5, 2009 Memorandum from San Diego Water Board Counsel, Non-Storm Water Discharges) The San Diego Water Board disagrees that including the NALs in the permit may contradict the effective prohibition of non-storm water discharges to the MS4. Please see the responses to comments Fnd-3 and C-1.	

A-3: *The Copermittees should only be subject to "applicable" prohibitions and water quality standards in the Basin Plan, plans and policies.*

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A-3	PROVISION A: PROHIBITIONS AND LIMITATIONS	
	COMMENT: <i>The Copermittees should only be subject to "applicable" prohibitions and water quality standards in the Basin Plan, plans and policies.</i> The Riverside County Copermittees are concerned that there are prohibitions and water quality standards included in Provisions A.1.c and A.2.a that do not apply to their jurisdictions. Thus those prohibitions or water quality standards should be deleted or clarified to state that they are only applicable if those discharges or water bodies are within their jurisdictions.	Copermittees Riverside County Copermittees
	RESPONSE: The San Diego Water Board does not agree that it is necessary to delete or clarify any of the requirements under Provisions A.1.c or A.2.a. If there are discharge prohibitions that are not applicable, then there should not be any violations of those discharge prohibitions. Likewise, if there are water quality standards that are not applicable, there should not be any violations of those water quality standards. If, however, any of those prohibitions or water quality standards is applicable, the Copermittees are required to comply or demonstrate compliance with those prohibitions and water quality standards.	

PROVISION A.1: Discharge Prohibitions

A1-1: *MS4 discharges to environmentally sensitive area (ESA) shellfish habitat should be prohibited.***RESPONSES TO COMMENTS RECEIVED ON TENTATIVE ORDER NO. R9-2013-0001**

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A1-1	PROVISION A.1: Discharge Prohibitions	
	COMMENT: <i>MS4 discharges to environmentally sensitive area (ESA) shellfish habitat should be prohibited.</i> The South Laguna Civic Association commented that dry weather discharges and elevated storm water flows are incompatible with the protection of ESA shellfish habitat and should be vigorously regulated and prohibited in the Tentative Order.	Environmental Organizations South Laguna Civic Association
	RESPONSE: The San Diego Water Board agrees that dry weather discharges and storm water flows should be regulated to protect ESA shellfish habitats. Provision A.1.a prohibits discharges from MS4s in a manner causing, or threatening to cause, a condition of pollution, contamination, or nuisance in receiving waters of the state. Provision A.2.c requires that discharges from MS4s must not cause or contribute to the violation of water quality standards in any receiving waters. And, specifically for dry weather discharges, Provision A.1.b requires the Copermittees to effectively prohibit non-storm water discharges to the MS4s. Thus, the Tentative Order includes requirements for MS4 discharges that are protective of ESAs.	

A1-2: Specify that NPDES permitted discharges to MS4s discharging to ASBS are authorized.

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A1-2	PROVISION A.1: Discharge Prohibitions	
	COMMENT: <i>Specify that NPDES permitted discharges to MS4s discharging to ASBS are authorized.</i> San Diego Gas and Electric and Southern California Gas Company requested modifications to Provision A.1.d to specify that storm water and non-storm water discharges from the Copermittees MS4s from ASBS “made pursuant to NPDES permit” are authorized under the Tentative Order. The commenters are concerned that the Tentative Order does not clearly state that NPDES permitted discharges to the Copermittees’ MS4s that then discharge to ASBS are authorized.	Building Industry / Industry San Diego Gas and Electric Southern California Gas Company
	RESPONSE: The San Diego Water Board disagrees that it is necessary to revise Provision A.1.d. Provision A.1.d requires discharges from the Copermittees’ MS4 to be consistent with the requirements of Special Protections contained in Attachment B to State Water Board Resolution No. 2012-0012 (Special Protections). Provision A.1.d applies to the Copermittees’ MS4 discharges to ASBS, thus the Copermittees are subject to the requirements of the Special Protections. If storm water and non-storm water discharges are authorized under an NPDES permit and discharged to a Copermittee’s MS4, the Copermittee is responsible for identifying this NPDES permitted discharge to its MS4 that then discharges to ASBS. If the NPDES permitted discharge does not allow the Copermittees to be consistent with the requirements of the Special Protections, the Copermittees should notify the NPDES permitted discharger and/or the San Diego Water Board that the discharge must be brought into compliance with the requirements of the Special Protections. Additionally, please see the response to comment Fnd-14.	

PROVISION B: WATER QUALITY IMPROVEMENT PLANS

B-1: *Link compliance with prohibitions and limitations to development and implementation of Water Quality Improvement Plans.***RESPONSES TO COMMENTS RECEIVED ON TENTATIVE ORDER NO. R9-2013-0001**

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B-1	PROVISION B: WATER QUALITY IMPROVEMENT PLANS	
	COMMENT: <i>Link compliance with prohibitions and limitations to development and implementation of Water Quality Improvement Plans.</i> The Orange County, Riverside County and San Diego County Copermittees each submitted comments requesting that they be allowed to utilize the development and implementation of the Water Quality Improvement Plans as a compliance mechanism for the prohibitions and limitations of Provisions A.1 to A.3. Several Copermittees submitted separate comments in support of the request. Comments submitted by the Environmental Groups were not in support of such an approach, but did support incorporating numeric goals into the Water Quality Improvement Plans that are based on water quality standards and using the Water Quality Improvement Plans to hold the Copermittees accountable for achieving the water quality standards.	Copermittees City of Del Mar City of Poway Orange County Copermittees Riverside County Copermittees San Diego County Copermittees San Diego Unified Port District Environmental Organizations Environmental Groups
	RESPONSE: The San Diego Water Board agrees with the comments from the Copermittees and the Environmental Organizations. The San Diego Water Board has added Provision B.3.c to provide a “pathway” to compliance with the discharge prohibitions and receiving water limitations of Provisions A.1.a, A.1.c and A.2.a. Please see the response to comment A-1. Several commenters indicated that including an analysis to demonstrate that the implementation of the water quality improvement strategies would achieve compliance with the discharge prohibitions and receiving water limitations of Provisions A.1.a, A.1.c and A.2.a is not necessary. The San Diego Water Board disagrees that the analysis is not necessary. Without the analysis, the San Diego Water Board would not be able to make a determination that the implementation of the water quality improvement strategies would result in the achievement of and compliance with Provisions A.1.a, A.1.c and A.2.a for specific pollutant /waterbody combinations. In addition, the required analysis provides another level of transparency that would allow the public to make a determination that the Copermittees are in fact implementing strategies that are making progress toward achieving the requirements of Provisions A.1.a, A.1.c and A.2.a. Thus, the analysis has been incorporated into the requirements of Provision B.3.c.	

B-2: *Support for the Water Quality Improvement Plan approach.***RESPONSES TO COMMENTS RECEIVED ON TENTATIVE ORDER NO. R9-2013-0001**

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B-2	PROVISION B: WATER QUALITY IMPROVEMENT PLANS	
	COMMENT: <i>Support for the Water Quality Improvement Plan approach.</i> Comments were submitted by members of the Building Industry, Industry, the Copermittees, Environmental Organizations, Engineering/Design Consultants, Societies/Associations/Coalitions, and Other Entities generally supporting the approach in the Tentative Order to utilize the Water Quality Improvement development and implementation process as a more strategic, cost effective, holistic approach to improving water quality in the San Diego Region.	Building Industry / Industry American Society of Landscape Architects Associated General Contractors of America BIA Regulated Community Coalition Industrial Environmental Association Otay Land Company Otay Ranch New Homes Copermittees Orange County Copermittees Riverside County Copermittees San Diego Unified Port District Environmental Organizations The Escondido Creek Conservancy Friends of Rose Canyon Creek / Rose Creek Watershed Alliance Laguna Bluebelt Coalition San Diego Canyonlands San Elijo Lagoon Conservancy Engineering/Design Consultants Latitude 33 Planning and Engineering Societies/Associations/Coalitions BIOCOM San Diego Association of Realtors Other Entities Carol Crossman Continental Maritime of San Diego Curious Company Hector Valtierra Hughes Marino Marston+Marston, Inc. Nuffer, Smith, Tucker, Inc. San Diego Regional Chamber of Commerce Sheppard, Mullin, Richter & Hampton Southern Cross Property Consultants Transition IT
	RESPONSE: The San Diego Water Board appreciates the support expressed by the commenters for the Water Quality Improvement Plan and the more structured iterative and adaptive management process.	

B-3: *Ensure adequate public participation in the development and updating of the Water Quality Improvement Plans.***RESPONSES TO COMMENTS RECEIVED ON TENTATIVE ORDER NO. R9-2013-0001**

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B-3 PROVISION B: WATER QUALITY IMPROVEMENT PLANS		
	COMMENT: <i>Ensure adequate public participation in the development and updating of the Water Quality Improvement Plans.</i> Comments were submitted by members of the Building Industry, Environmental Organizations, Engineering/Design Consultants, USEPA, Societies/Associations/Coalitions, and Other Entities requesting the requirements of the Tentative Order ensure that there is adequate public participation during the development of the Water Quality Improvement Plans. Comments from the Environmental Organizations, the San Diego Green Building Council, and a joint comment letter from San Diego Coastkeeper and the BIA, requested that the Tentative Order require the Copermittees to form a stakeholder advisory group with knowledge of the watersheds. The comments from the Environmental Groups recommending several additional requirements for public participation during the development of the Water Quality Improvement Plans, including: 1) Requiring the Copermittees to create a schedule for developing the Water Quality Improvement Plans, 2) Modifying the required formal public review requirements to occur after identifying priorities, after identifying strategies, and after identifying goals and assessment methods, 3) Requiring Water Quality Improvement Plans to be developed consecutively instead of concurrently, 4) Require approval of the Water Quality Improvement Plans at a public hearing, and 5) Require public participation during the adaptive management process.	Building Industry / Industry American Society of Landscape Architects Associated General Contractors of America BIA Regulated Community Coalition San Diego Green Building Council Environmental Organizations Environmental Groups The Escondido Creek Conservancy Friends of Rose Canyon Creek / Rose Creek Watershed Alliance Laguna Bluebelt Coalition Los Penasquitos Lagoon Foundation Natural Resources Defense Council San Diego Canyonlands San Diego Coastkeeper and BIA San Elijo Lagoon Conservancy Engineering/Design Consultants Latitude 33 Planning and Engineering State/Federal Government USEPA Societies/Associations/Coalitions BIOCOM San Diego Association of Realtors Other Entities Continental Maritime of San Diego Hector Valtierra Curious Company Carol Crossman Gable PR Marston+Marston, Inc. Nuffer, Smith, Tucker, Inc. San Diego Regional Chamber of Commerce Sheppard, Mullin, Richter & Hampton Southern Cross Property Consultants Transition IT
	RESPONSE: The San Diego Water Board agrees that the Tentative Order should ensure adequate public participation during the development and updating of the Water Quality Improvement Plans. The public participation requirements for the development and updates of the Water Quality Improvement Plan	

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B-3	PROVISION B: WATER QUALITY IMPROVEMENT PLANS	
	are contained in Provisions F.1 and F.2.c. The San Diego Water Board has revised Provisions F.1 and F.2.c to include several of the elements into the public participation requirements as recommended by the commenters, and provide additional time for a robust public participation process to be included in the development of the Water Quality Improvement Plans. Provision F.1.a has been modified to include a set of public participation requirements for the development of the Water Quality Improvement Plan under Provision F.1.a.(1). Included in Provision F.1.a.(1) are requirements to: a) develop a publicly available and noticed schedule of the opportunities for the public to participate and provide comments during the development of the Water Quality Improvement Plan; b) form a Water Quality Improvement Consultation Panel that will consist of at least one San Diego Water Board staff, one representative of the environmental community, and one representative of the development community; and c) coordinate the schedules for the public participation process among the Watershed Management Areas to provide the public as much time and opportunity as possible to participate during the development of the Water Quality Improvement Plans. The role of the Water Quality Improvement Consultation Panel is similar to the requested stakeholder advisory group, which will review the elements that the Copermittees propose to include in the Water Quality Improvement Plan after the public is provided an opportunity to provide data, information and recommendations for each element. The elements of the Water Quality Improvement Plan that require public review and comment remain the same, but have been revised and reorganized under Provisions F.1.a.(2) and F.1.a.(3). The Tentative Order required a public review of the priorities and goals and then a public review of the strategies and schedules. The revised Tentative Order has been modified to first require a public review of the priorities and potential water quality improvement strategies and then a review of the goals, strategies that Copermittees plan on implementing, and the schedules. In each case, the public will be provided an opportunity to provide data, information and recommendations and the Water Quality Improvement Consultation Panel will review the elements required to be developed with the Copermittees to provide recommendations or concurrence prior to submitting to the San Diego Water Board for a public review and comment period. Provisions B.2 and B.3 were also revised and reorganized to be consistent with revisions made to Provisions F.1.a.(2) and F.1.a.(3). Provision B.2.e was revised to require the Copermittees to identify the “potential” water quality improvement strategies that could be implemented to address the highest priority water quality conditions	

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B-3	PROVISION B: WATER QUALITY IMPROVEMENT PLANS
	identified by the Copermittees. The requirements for identifying numeric goals and schedules for achieving the goals were moved to Provision B.3. Thus the requirements of Provision B.2 will be subject to the public participation and development process requirements of Provision F.1.a.(2), and the requirements of Provision B.3 will be subject to the public participation and development process requirements of Provision F.1.a.(3). Provision F.1.b has also been revised to clarify the completed Water Quality Improvement Plan public review and acceptance process. The San Diego Water Board will make the determination if a public hearing to accept the Water Quality Improvement Plans will be required, or if public input will be limited to written comments. Provision F.1.b has been revised to clarify when the Water Quality Improvement Plans will be considered accepted. Finally, Provision F.2.c has been revised to clarify the requirements for public participation during the updates of the Water Quality Improvement Plans. The public will be provided an opportunity to provide data, information and recommendations and the Water Quality Improvement Consultation Panel will review the elements required to be developed with the Copermittees to provide recommendations or concurrence prior to submitting the requested updates to the San Diego Water Board.

B-4: Allow current permit requirements to remain in place until Water Quality Improvement Plans are developed.

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B-4	PROVISION B: WATER QUALITY IMPROVEMENT PLANS	
	COMMENT: <i>Allow current permit requirements to remain in place until Water Quality Improvement Plans are developed.</i> Comments were submitted by members of the Building Industry, Engineering/Design Consultants, State Government, Societies/Associations/Coalitions, and Other Entities requesting the Tentative Order allow the requirements of the current permits to remain in place until the Water Quality Improvement Plans were developed. There was general concern that enforcement and implementation of the new requirements of the Tentative Order would preempt the Water Quality Improvement Plans before the Water Quality Improvement Plans had a chance to be developed.	Building Industry / Industry Associated General Contractors of America Otay Land Company Otay Ranch New Homes Engineering/Design Consultants Latitude 33 Planning and Engineering State/Federal Government Senator Mark Wyland Societies/Associations/Coalitions BIOCOM San Diego Association of Realtors Other Entities Continental Maritime of San Diego Carol Crossman Gable PR Hughes Marino Marston+Marston, Inc. Nuffer, Smith, Tucker, Inc. San Diego Regional Chamber of Commerce Sheppard, Mullin, Richter & Hampton Southern Cross Property Consultants Transition IT
	RESPONSE: The San Diego Water Board agrees that the jurisdictional runoff management program requirements should remain in place until the Water Quality Improvement Plans are developed and accepted by the San Diego Water Board. According to the second paragraph of the opening to Provision E, <i>“Until the Copermittee has updated its jurisdictional runoff management program document with the requirements of Provision E the Copermittee must continue implementing its current jurisdictional runoff management program.”</i> Provision F.2.c does not require the jurisdictional runoff management program documents to be updated until 3 months after the acceptance of the Water Quality Improvement Plan. The Copermittees will be subject to requirements of Provision A (Prohibitions and Limitations), and responsible for implementing the requirements of Provision D (Monitoring and Assessment Program Requirements), Provision F (Reporting), and Attachment E (Specific Provisions for TMDLs) upon the effective date of the Tentative Order.	

B-5: *Adopt Water Quality Improvement Plans as Orders to implement the permit requirements.***RESPONSES TO COMMENTS RECEIVED ON TENTATIVE ORDER NO. R9-2013-0001**

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B-5	PROVISION B: WATER QUALITY IMPROVEMENT PLANS	
	COMMENT: <i>Adopt Water Quality Improvement Plans as Orders to implement the requirements of the Tentative Order.</i> Comments were submitted by Engineering/Design Consultants, Societies/Associations/Coalitions, and Other Entities requesting that the San Diego Water Board adopt the Water Quality Improvement Plans as Orders to implement the requirements of the Tentative Order.	Engineering/Design Consultants Latitude 33 Planning and Engineering Societies/Associations/Coalitions BIOCOM San Diego Association of Realtors Other Entities Continental Maritime of San Diego Carol Crossman Gable PR Hughes Marino Marston+Marston, Inc. Nuffer, Smith, Tucker, Inc. San Diego Regional Chamber of Commerce Sheppard, Mullin, Richter & Hampton Southern Cross Property Consultants Transition IT
	RESPONSE: The San Diego Water Board disagrees with adopting the Water Quality Improvement Plans as Orders to implement the requirements of the Tentative Order. The Tentative Order, when adopted by the San Diego Water Board, is an Order issued to the Copermittees to implement the requirements of the Clean Water Act and Code of Federal Regulations. The Tentative Order includes specific requirements that must be included in the Water Quality Improvement Plans, which are to be developed by the Copermittees. The Water Quality Improvement Plans themselves, therefore, cannot and should not be adopted as Orders issued by the San Diego Water Board.	

B-6: *Align Water Quality Improvement Plan requirements with the Jurisdictional Runoff Management Program requirements.***RESPONSES TO COMMENTS RECEIVED ON TENTATIVE ORDER NO. R9-2013-0001**

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B-6	PROVISION B: WATER QUALITY IMPROVEMENT PLANS	
	COMMENT: <i>Align Water Quality Improvement Plan requirements with the Jurisdictional Runoff Management Program requirements.</i> The Orange County, Riverside County and San Diego County Copermittees each submitted comments requesting that requirements in Provision E be allowed to be modified based on what is proposed in the Water Quality Improvement Plans. The Copermittees assert that the jurisdictional runoff management program requirements of Provision E are a “one size fits all” set of requirements, and the requirements of the Water Quality Improvement Plan become “additive” rather than “complimentary.” Several Copermittees submitted separate comment letters supporting the concept by requesting the San Diego Water Board align the development and implementation of the Water Quality Improvement Plan better with the jurisdictional runoff management program requirements. The BIA Regulated Community Coalition also submitted comments supporting the concept. The Environmental Groups are concerned with the flexibility of the jurisdictional runoff management program requirements and commented that the Water Quality Improvement Plan should include a detailed list of activities and what activities each Copermittee will implement within its jurisdiction. The Environmental Groups are concerned that without this specificity in the Water Quality Improvement Plans, and the flexibility that is provided in the jurisdictional runoff management program requirements, would result in the burden of achieving water quality improvement within a watershed falling to only one or two Copermittees. The Environmental Groups would like to see a clearer commitment of what will be implemented by each Copermittee either in the Water Quality Improvement Plan or in the jurisdictional runoff management program documents for each Copermittee.	Building Industry / Industry BIA Regulated Community Coalition Copermittees City of Dana Point City of Laguna Hills City of Lake Forest City of Mission Viejo City of Rancho Santa Margarita City of San Juan Capistrano Orange County Copermittees Riverside County Copermittees San Diego County Copermittees Environmental Organizations Environmental Groups
	RESPONSE: The San Diego Water Board agrees that the Water Quality Improvement Plans and jurisdictional runoff management program requirements should be better aligned and clearly present the water quality improvement strategies that each Copermittee will implement within its jurisdiction. The San Diego Water Board does not agree that the jurisdictional runoff management program requirements of Provision E should be allowed to be modified by the Water Quality Improvement Plan. The revised Tentative Order requires the Copermittees to clearly present the water quality improvement strategies that each Copermittees will implement within its jurisdiction in the Water Quality Improvement Plan. Each Copermittee must incorporate the strategies that the Copermittee commits to implement, as identified in the Water Quality Improvement Plan, into its jurisdictional runoff management program document. Please see the response to comment E-1.	

B-7: *Recommendations for revisions to the introductory paragraph of Provision B.***RESPONSES TO COMMENTS RECEIVED ON TENTATIVE ORDER NO. R9-2013-0001**

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B-7 PROVISION B: WATER QUALITY IMPROVEMENT PLANS		
	COMMENT: <i>Recommendations for revisions to the introductory paragraph of Provision B.</i> The Orange County, Riverside County and San Diego County Copermittees each submitted comments recommending revisions to the introductory paragraph under Provision B. The Copermittees recommended revising the goal statement to be focused more on MS4 discharges and not on receiving waters. The Copermittees also recommended adding a statement about the linkage between the Water Quality Improvement Plan and compliance with the prohibitions and limitations of Provision A.	Copermittees Orange County Copermittees Riverside County Copermittees San Diego County Copermittees
	RESPONSE: The San Diego Water Board disagrees with the recommended revisions to the introductory paragraph of Provision B. The recommended revisions by the Copermittees were not necessary and not appropriate for the introductory paragraph to Provision B. After considering the comments and recommendations from the Copermittees, however, the San Diego Water Board did make one minor revision to the introductory paragraph of Provision B. Please see the revised Tentative Order for the revision to the introductory paragraph to Provision B.	

PROVISION B.1: Watershed Management Areas

B1-1: Allow San Diego County to use WURMP for the Santa Margarita River Watershed Management Area until the Riverside County Copermittees are covered under the Tentative Order.

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B1-1	PROVISION B.1: Watershed Management Areas	
	COMMENT: Allow San Diego County to use Watershed Urban Runoff Management Plan (WURMP) for the Santa Margarita River Watershed Management Area until the Riverside County Copermittees are covered under the Tentative Order. The County of San Diego and the San Diego County Copermittees requested that the requirement to develop a Water Quality Improvement Plan for the Santa Margarita River Watershed Management Area be postponed until the Riverside County Copermittees become covered by the Tentative Order. The Riverside County Copermittees supported the request.	Copermittees County of San Diego Riverside County Copermittees San Diego County Copermittees
	RESPONSE: The San Diego Water Board agrees with the request. The San Diego Water Board has revised the footnote to Table B-1 to state that the County of San Diego is not required to develop a Water Quality Improvement Plan for the Santa Margarita River Watershed Management Area until the Riverside County Copermittees receive notification of coverage under the Tentative Order. Until then, the County of San Diego will be required to implement their jurisdictional runoff management program in conformance with the requirements of Order No. R9-2007-0001, and implement the transitional monitoring and assessment requirements of Provision D, the transitional reporting requirements of Provisions F.3.b, and the TMDL requirements in Attachment E.	

PROVISION B.2.e: Numeric Goals and Schedules

B2e-1: Clearly state that numeric goals are enforceable or not enforceable limitations.

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B2e-1	PROVISION B.2.e: Numeric Goals and Schedules	
	COMMENT: <i>Clearly state that numeric goals are enforceable or not enforceable limitations.</i> The Orange County, Riverside County and San Diego County Copermittees each submitted comments requesting that the Tentative Order specify that numeric goals are not enforceable limitations. In contrast, the USEPA recommended that the Tentative Order or Fact Sheet clarify that the numeric goals (and the schedule for attainment of the goals) would become enforceable requirements once the Water Quality Improvement Plans are accepted by the San Diego Water Board.	Copermittees Orange County Copermittees Riverside County Copermittees San Diego County Copermittees State/Federal Government USEPA
	RESPONSE: The San Diego Water Board disagrees that additional revisions are necessary to specify the numeric goals are not enforceable limitations. The San Diego Water Board agrees with the USEPA interpretation, but disagrees with the recommendation. The San Diego Water Board did not modify the language of Provision B.2.e (now Provision B.3.a.(1) in the revised Tentative Order) because the San Diego Water Board will utilize the numeric goals to determine if the Copermittees are making progress toward improving water quality. As part of the iterative and adaptive management process, the Copermittees are allowed to modify the numeric goals and the schedules for achieving the goals if the monitoring and assessments provide the rationale to do so. If, however, the Copermittees did not modify the numeric goals or the schedules to achieve the goals, and an interim or final goal was not achieved pursuant to the schedule, the San Diego Water Board would consider the failure to achieve the numeric goal a point of non-compliance. The non-compliance would include the failure to achieve the numeric goal within the schedule, the failure to implement the iterative and adaptive management process, and a demonstration that one or more prohibitions or limitations under Provision A have been violated. Thus, the numeric goals and schedules are enforceable.	

B2e-2: Remove or modify the language for the 10 year limitation of the schedules to achieve numeric goals.

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B2e-2	PROVISION B.2.e: Numeric Goals and Schedules	
	<u>COMMENT:</u> <i>Remove or modify the language for the 10 year limitation of the schedules to achieve numeric goals.</i> The Orange County and San Diego County Copermittees each submitted comments requesting modifications to the requirement to achieve the numeric goals within 10 years of the effective date of the Tentative Order. The Orange County Copermittees provided several reasons for removing the 10 year requirement. The San Diego County Copermittees requested that the Tentative Order clarify that the 10 year requirement be limited to achieving a goal that represents progress toward attainment of water quality standards.	Copermittees Orange County Copermittees San Diego County Copermittees
	<u>RESPONSE:</u> The San Diego Water Board agrees with the request to remove the requirement. The San Diego Water Board has removed the requirement that the Copermittees must include the final dates for achieving the numeric goals that do not initially extend more than 10 years beyond the effective date of the Tentative Order. In its place, the Copermittees must develop a schedule to achieve the numeric goals within a “reasonable period of time” that can be identified during the public participation process required for the development of the Water Quality Improvement Plans. The modifications are provided under Provision B.3.a.(2) of the revised Tentative Order.	

PROVISION B.3: Water Quality Improvement Strategies and Schedules

B3-1: Provide a mechanism for compliance with the prohibitions and limitations in Provision A through the Water Quality Improvement Plan.

RESPONSES TO COMMENTS RECEIVED ON TENTATIVE ORDER NO. R9-2013-0001

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B3-1	PROVISION B.3: Water Quality Improvement Strategies and Schedules	
	COMMENT: <i>Provide a mechanism for compliance with the prohibitions and limitations in Provision A through the Water Quality Improvement Plan.</i> The San Diego County Copermittees proposed modifications to the requirements of Provision B.3 to include a compliance mechanism that could be included in the Water Quality Improvement Plan to demonstrate compliance with the prohibitions and limitations in Provision A. The San Diego County Copermittees proposed including an option to perform a Reasonable Assurance Analysis to demonstrate that the water quality improvement strategies will attain discharge prohibitions, receiving water limitations, and effluent limitations. The San Diego Unified Port District submitted separate comments that did not support the inclusion of a compliance option utilizing the Water Quality Improvement Plan. The Orange County and Riverside County Copermittees supported the concept of allowing the Copermittees to demonstrate that the water quality improvement strategies in the Water Quality Improvement Plan will attain discharge prohibitions, receiving water limitations, and effluent limitations, but objected to requiring a Reasonable Assurance Analysis.	Copermittees Orange County Copermittees Riverside County Copermittees San Diego County Copermittees San Diego Unified Port District
	RESPONSE: The San Diego Water Board agrees with including an optional mechanism for compliance with the prohibitions and limitations in Provision A as part of Provision B.3. The San Diego Water Board has added Provision B.3.c as an optional mechanism that the Copermittees may utilize to demonstrate compliance with the discharge prohibitions and receiving water limitations of Provisions A.1.a, A.1.c and A.2.a. Please see the responses to comments A-1 and B-1.	

B3-2: *Allow Copermittees to "reduce" instead of "prevent and eliminate" non-storm water discharges through Water Quality Improvement Plan.***RESPONSES TO COMMENTS RECEIVED ON TENTATIVE ORDER NO. R9-2013-0001**

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B3-2	PROVISION B.3: Water Quality Improvement Strategies and Schedules	
	COMMENT: <i>Allow the Copermittees to "reduce" instead of "prevent and eliminate" non-storm water discharges through the Water Quality Improvement Plan.</i> Comments from the Building Industry included a recommendation to modify the language of Provision B.3 to allow the Copermittees to "reduce" non-storm water discharges instead of "prevent and eliminate" these discharges to the MS4.	Building Industry / Industry BIA Regulated Community Coalition
	RESPONSE: The San Diego Water Board disagrees with the proposed recommendations. The Clean Water Act requires MS4 permits to include a requirement that the MS4 dischargers must "effectively prohibit" non-storm water discharges to the MS4, not just "reduce" non-storm water discharges to the MS4. Provision B.3 included the phrase "prevent and eliminate" to specify what "effectively prohibit" means. To be consistent with the language in the Clean Water Act, the San Diego Water Board has revised "prevent and eliminate" to "effectively prohibit" in Provision B.3.	

PROVISION B.5: Iterative Approach and Adaptive Management Process

B5-1: Recommendations for minor revisions to the language under iterative and adaptive management process requirements.

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B5-1	PROVISION B.5: Iterative Approach and Adaptive Management Process	
	<u>COMMENT:</u> <i>Recommendations for minor revisions to the language under iterative and adaptive management process requirements.</i> The Riverside County and San Diego County Copermittees each submitted comments recommending minor revisions to the language under Provision B.5 to “clarify” the requirements or to be consistent with their comments regarding non-storm water discharges (see comment Gnl-13).	Copermittees Riverside County Copermittees San Diego County Copermittees
	<u>RESPONSE:</u> The San Diego Water Board disagrees with the recommended revisions to Provision B.5. The San Diego Water Board did not make any of the minor revisions recommended by the Copermittees as they were not necessary, not appropriate, or changed the intent of the requirement. The San Diego Water Board did, however, make several revisions to Provision B.5 to be consistent with the revisions made to Provisions B.2 and B.3, as discussed in the response to comment B-3.	

PROVISION B.6: Water Quality Improvement Plan Submittal, Updates, and Implementation

B6-1: Clarify that the implementation of Water Quality Improvement Plans may demonstrate TMDLs are not required.

RESPONSES TO COMMENTS RECEIVED ON TENTATIVE ORDER NO. R9-2013-0001

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B6-1	PROVISION B.6: Water Quality Improvement Plan Submittal, Updates, and Implementation	
	COMMENT: <i>Clarify that the implementation of Water Quality Improvement Plans may demonstrate TMDLs are not required.</i> The San Diego County Copermittees requested that the Tentative Order, under Finding 27, clarify that the implementation of the requirements “will” not “may” allow the San Diego Water Board to include an impaired water body in Category 4 in the Integrated Report (i.e. TMDL not required). The USEPA recommended including language in the Fact Sheet to clarify that the monitoring and assessments implemented as part of the Water Quality Improvement Plan may demonstrate that TMDLs are not necessary for water bodies listed on the 303(d) List.	Copermittees San Diego County Copermittees State/Federal Government USEPA
	RESPONSE: The San Diego Water Board disagrees with the request by the Copermittees. The San Diego Water Board agrees with the recommendation from the USEPA. Finding 27 is correct to state that the implementation of the Water Quality Improvement Plan “may” allow the San Diego Water Board to re-categorize an impaired water body in Category 4 in the Integrated Report meaning a TMDL is not required. Please see the response to comment Fnd-8. The San Diego Water Board has modified the Fact Sheet discussion for Provision B.6 as recommended by the USEPA.	

PROVISION C: ACTION LEVELS

C-1: Clarify that action levels are enforceable or not enforceable limitations.

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C-1	PROVISION C: ACTION LEVELS	
	COMMENT: <i>Clarify that action levels are enforceable or not enforceable limitations.</i> The Orange County, Riverside County and San Diego County Copermittees each submitted comments requesting that the Tentative Order clarify that the non-storm water action levels (NALs) and storm water action levels (SALs) developed pursuant to Provision C are not enforceable limitations. San Diego Gas and Electric and the Southern California Gas Company requested that the permit clarify that the NALs and SALs are not applicable to non-storm water discharges that have NPDES permits. The Natural Resources Defense Council is concerned that stating that the NALs are not considered by the San Diego Water Board to be enforceable limitations could be interpreted as an authorization for discharges of non-storm water, which would be in conflict with the effective prohibition requirements of the Clean Water Act for non-storm water discharges to the MS4. The USEPA also expressed concern that action levels based on wasteload allocations (WLAs) established as WQBELs in the TMDL requirements of Attachment E may be interpreted as not enforceable.	Building Industry / Industry San Diego Gas and Electric Southern California Gas Company Copermittees Orange County Copermittees Riverside County Copermittees San Diego County Copermittees Environmental Organizations Natural Resources Defense Council State/Federal Government USEPA
	RESPONSE: The San Diego Water Board agrees that additional clarification of the enforceability of the action levels is necessary. The San Diego Water Board did not revise the footnotes as requested by the Copermittees, but did revise the footnotes to clarify that NALs and SALs are not enforceable limitations unless they are based on WQBELs expressed as interim or final effluent limitations for any TMDLs in Attachment E and the interim or final compliance dates have passed. The San Diego Water Board also revised the introductory paragraph under Provision C.1 to specify that the NALs must be incorporated into the Water Quality Improvement Plans to support the development and prioritization of water quality improvement strategies for “effectively prohibiting” not just “addressing” non-storm water discharges to the MS4, consistent with the requirements of the Clean Water Act. Finally, the San Diego Water Board did not revise the requirements of Provision C to clarify that NALs do not apply to non-storm water discharges that have NPDES permits. The requirements of the Tentative Order, including the NALs and SALs, apply to the Copermittees’ MS4 discharges, not to other NPDES permitted discharges, thus it is not necessary or appropriate to specify that the NALs are not applicable to other NPDES permitted discharges.	

C-2: Allow the Copermittees to develop action levels instead of prescribing required action levels.

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C-2	PROVISION C: ACTION LEVELS	
	COMMENT: <i>Allow the Copermittees to develop action levels instead of prescribing required action levels.</i> The Orange County, Riverside County and San Diego County Copermittees each submitted comments requesting that they be allowed to develop or propose non-storm water action levels (NALs) and storm water action levels (SALs) as part of the Water Quality Improvement Plan development process rather than being required to include a prescribed set of NALs and SALs in addition to other NALs and SALs that may be developed as part of the Water Quality Improvement Plan. The Copermittees expressed concern that requiring the prescribed NALs and SALs under Provision C would result in unnecessary analyses for constituents that are not a priority identified in the Water Quality Improvement Plan. The Orange County and San Diego County Copermittees are concerned that the inclusion of the chemically-based prescribed action levels under Provision C may not be the best metric to measure progress toward protection and enhancement of receiving waters if the numeric goals are biologically- or physically-based.	Copermittees Orange County Copermittees Riverside County Copermittees San Diego County Copermittees
	RESPONSE: The San Diego Water Board disagrees with the request to remove the requirements to include the prescribed NALs and SALs in the Water Quality Improvement Plans. The NALs and SALs under Provision C have been included to support the development and prioritization of the water quality strategies that will be implemented based on the highest priority water quality conditions identified by the Copermittees in the Water Quality Improvement Plans. The NALs and SALs have been included as a tool that the Copermittees and the San Diego Water Board can utilize to determine if the Copermittees are implementing the requirements of the Clean Water Act for MS4 permits, which is to <i>effectively prohibit non-storm water discharges to the MS4 and reduce pollutants in storm water discharges from the MS4 to the MEP</i>. The NALs and SALs are not new, and are included in both of the current MS4 permits issued to Orange County (Order No. R9-2009-0002) and Riverside County (Order No. R9-2010-0016). The Copermittees are required to effectively prohibit non-storm water discharges to their MS4s, which in turn should result in little to no discharges from their MS4s to receiving waters. If there are non-storm water discharges from the Copermittees' MS4s to receiving waters, those discharges should only be NPDES permitted discharges. Even if those discharges are NPDES permitted discharges, the Copermittees are responsible for demonstrating that those discharges are not illicit discharges by identifying the sources as	

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C-2	PROVISION C: ACTION LEVELS
	NPDES permitted discharges. The prescribed NALs in Table C-1 through C-4 are associated with most if not all the pollutants that are known or suspected to be causing or contributing to impairments in water bodies on the 303(d) List for the San Diego Region. The NALs are appropriately based on water quality objectives because non-storm water discharges that do not contain pollutants at levels in exceedance of the NALs are not expected to cause or contribute to exceedances of water quality standards in receiving waters. Thus, the prescribed NALs have been included to allow the Copermittees to prioritize their efforts in effectively prohibiting unpermitted non-storm water discharges to their MS4s, demonstrate that they have effectively prohibited non-storm water discharges to their MS4s that could cause or contribute to exceedances of water quality standards, or identify NPDES permitted sources that are resulting in discharges from their MS4s that are causing or contributing to exceedances of water quality standards in receiving waters. In any case, the prescribed NALs are necessary to allow the San Diego Water Board to determine if the Copermittees are effectively prohibiting non-storm water discharges to the MS4. In contrast, the prescribed SALs are not based on water quality objectives, but set at higher levels because the San Diego Water Board recognizes that reducing pollutants in wet weather discharges from the MS4s to water quality objectives is difficult. The prescribed SALs, however, will allow the Copermittees to prioritize their efforts in reducing pollutants in storm water discharges from their MS4s, and allow the San Diego Water Board to determine if the Copermittees are reducing pollutants in storm water discharges from their MS4s to the MEP. The San Diego Water Board disagrees with the concerns about monitoring for constituents that are not associated with the highest priority water quality conditions. Periodically analyzing non-storm water and storm water discharges from the Copermittees' MS4 for other pollutants other than those associated with the highest priority water quality conditions is necessary if the Copermittees would like to re-prioritize or identify new priority water quality conditions that will be addressed. The San Diego Water Board does recognize that there is a cost associated with analyzing for additional constituents. Thus, the San Diego Water Board has modified the MS4 outfall monitoring requirements to reduce the number of dry weather MS4 outfall monitoring stations that must be analyzed (see Provision D.2.b.(2)(b) of the revised Tentative Order), and provided the Copermittees some flexibility to modify the analytes for the wet weather MS4 outfall monitoring stations (see Provision D.2.c.(5)(f) of the revised Tentative Order).

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C-2	PROVISION C: ACTION LEVELS
	As for the concerns about the chemically-based NALs and the biologically- or physically-based numeric goals for receiving waters, the San Diego Water Board disagrees that they cannot be linked or may be incompatible. Biologically- or physically-based numeric goals will likely be measured in the receiving waters. The chemically-based NALs apply to the MS4 outfalls. The quality of the MS4 discharges and the improvement of biological or physical measurements can be linked. Both are likely necessary to demonstrate that MS4 discharges are either not causing or contributing to a biological or physical impairment of the receiving water, or an improvement in MS4 discharges is resulting in improvements in the biological or physical conditions of the receiving water. The San Diego Water Board did not revise Provision C as requested by the Copermittees.

C-3: Notes to Table C-3 should refer to CTR instead of including equations.

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C-3	PROVISION C: ACTION LEVELS	
	COMMENT: Notes to Table C-3 should refer to the California Toxics Rule (CTR) instead of including equations. The San Diego County Copermittees recommended removing the equations to calculate the non-storm water action levels (NALs) for the priority pollutants from the notes under Table C-3 and instead refer to the CTR under 40 CFR 131.38(b)(2), where the equations can be found.	Copermittees San Diego County Copermittees
	RESPONSE: The San Diego Water Board agrees with the recommendations. The San Diego Water Board has revised the notes under Table C-3 to refer to 40 CFR 131.38(b)(2).	

C-4: *Action levels should be included for insecticides.***RESPONSES TO COMMENTS RECEIVED ON TENTATIVE ORDER NO. R9-2013-0001**

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C-4	PROVISION C: ACTION LEVELS	
	COMMENT: <i>Action levels should be included for insecticides.</i> The Los Penasquitos Lagoon Foundation recommended specifying action levels for insecticides.	Environmental Organizations Los Penasquitos Lagoon Foundation
	RESPONSE: The San Diego Water Board disagrees with this recommendation. Provision C includes numeric actions levels for specific pollutants consistent with Order Nos. R9-2009-0002 and R9-2010-0016. Provisions C.1.b and C.2.b require the Copermittees to develop additional numeric action levels for pollutants or waste constituents that cause or contribute, or are threatening to cause or contribute to a condition of pollution or nuisance associated with the highest water quality priorities related to non-storm water and storm water discharges from the MS4s, respectively. If insecticides cause or contribute to the highest priority water quality conditions identified in the Water Quality Improvement Plan, the Copermittees are required to incorporate numeric action levels into the Water Quality Improvement Plan for insecticides. The San Diego Water Board did not revise Provision C to specify action levels for insecticides.	

PROVISION D: MONITORING AND ASSESSMENT PROGRAM REQUIREMENTS

D-1: *Revise monitoring and assessment requirements as recommended by San Diego County Copermittees.***RESPONSES TO COMMENTS RECEIVED ON TENTATIVE ORDER NO. R9-2013-0001**

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D-1	PROVISION D: MONITORING AND ASSESSMENT PROGRAM REQUIREMENTS	
	COMMENT: <i>Revise monitoring and assessment requirements as recommended by San Diego County Copermittees.</i> The San Diego County, Orange County, and Riverside County Copermittees designed a question driven monitoring and assessment program that would allow the Copermittees to adaptively manage their storm water programs more effectively and efficiently based on the monitoring data collected and the program assessments. The monitoring and reporting program in Provision D of the Tentative Order largely includes the monitoring and assessment program designed by the Copermittees. The commenters requested further revisions be made to the monitoring and assessment program in Provision D of the Tentative Order. Commenters from Environmental Organizations and Industry support the monitoring and assessment program in Provision D, however stress the importance of the Tentative Order requiring enough monitoring so that the Copermittees are able to track specific short, medium, and long term progress towards detecting and eliminating illicit discharges and improving water quality throughout the San Diego Region. Failing to require enough monitoring puts at risk a Copermittee's ability to detect increases in pollutant discharges and their effects on receiving water conditions.	Building Industry / Industry Industrial Environmental Association Copermittees City of San Diego City of Imperial Beach City of National City Environmental Organizations Environmental Groups
	RESPONSE: The San Diego Water Board agrees with the comments from the Copermittees as well as the Environmental Organizations and Industry. Provision D largely includes the question driven monitoring and assessment program collectively designed by the Copermittees. The program requires a sufficient amount of monitoring such that the Copermittees are able to track specific short, medium, and long term progress towards the goals established in the Water Quality Improvement Plan. Through development of the Water Quality Improvement Plans, the monitoring and assessment program required in Provision D can be modified to address specific needs and strategies developed to address the highest priority water quality conditions within each jurisdiction in each Watershed Management Area. The monitoring approach in Provision D has been further refined, based on the specific comments received on the Tentative Order, to allow Copermittees to more efficiently and effectively address the critical questions necessary to adaptively manage their storm water programs and achieve improved water quality within their jurisdiction and each watershed throughout the San Diego Region.	

D-2: *Include requirements to track and monitor progress toward watershed goals and health of watersheds.***RESPONSES TO COMMENTS RECEIVED ON TENTATIVE ORDER NO. R9-2013-0001**

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D-2 PROVISION D: MONITORING AND ASSESSMENT PROGRAM REQUIREMENTS		
	COMMENT: <i>Include requirements to track and monitor progress toward watershed goals and health of watersheds.</i> The Coastal Environmental Rights Foundation, Environmental Health Coalition, and the San Diego Coastkeeper jointly provided comments expressing concern that the monitoring and assessment requirements of the Tentative Order are not robust enough to: 1) support the Copermittees’ ability to track progress towards achieving the goals and requirements of the Clean Water Act and the San Diego Basin Plan (i.e. effectively prohibiting non-storm water discharges, reducing pollutants in storm water to the maximum extent practicable, supporting the beneficial uses of the receiving waters), 2) enable the San Diego Water Board to determine compliance with the requirements of the Tentative Order, and 3) inform the public of the Copermittees’ compliance with the requirements of the Tentative Order and progress towards achieving its goals. Other commenters from the Environmental Organizations expressed their support to include more monitoring in the Tentative Order, specifically requesting monitoring that provides assurances that Copermittees are able to detect any increase in pollutant discharges from their MS4 systems and be better able to address them sooner rather than later. Commenters from Industry requested the monitoring approach be iterative, strategic, cost-effective and question–driven so that it can provide the Copermittees with cost-effective informed data to guide their future storm water program actions through coordination with the San Diego Water Board staff. Several other commenters provided topic specific comments related to the need for mapping of coastal receiving waters and creeks. The USEPA commented on the need to bring the toxicity sampling requirements up to date with those recently adopted in other general and regional MS4 permits, as well as clarification to the monitoring locations required for determining compliance with TMDLs.	Building Industry / Industry Industrial Environmental Association Environmental Organizations South Laguna Civic Association CERF, EHC and SDCK Environmental Groups Laguna Bluebelt Coalition State/Federal Government USEPA
	RESPONSE: The San Diego Water Board disagrees with commenters from the Environmental Organizations that the monitoring and assessment requirements of the Tentative Order are not robust enough to support the Copermittees’ ability to track progress towards achieving goals and requirements of the Clean Water Act (CWA), the California Water Code (CWC), and the San Diego Basin Plan (i.e. effectively prohibiting non-storm water discharges, reducing pollutants in storm water to the maximum extent practicable, and supporting the beneficial uses of the receiving waters). Provision D includes a monitoring program structure that is expected to be refined through the Water Quality	

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D-2	PROVISION D: MONITORING AND ASSESSMENT PROGRAM REQUIREMENTS	
	Improvement Plan. The Provision D monitoring and assessment program should be customized to achieve the desired outcomes of the Water Quality Improvement Plan and ultimately the CWA and the CWC. The desired outcomes of the CWA and the CWC are about conditions in water bodies (chemical, physical, and biological integrity), and information about conditions in water bodies is essential to help guide the work of protection and restoration. The Tentative Order's monitoring and assessment program requires collection of chemical, physical, and biological data from outfalls and receiving waters designed to inform the Copermittees, the San Diego Water Board, and the public about the condition of the discharge and the conditions of the water bodies in the San Diego Region. The Tentative Order's assessment requirements are designed to take the data collected from the monitoring program and convert it to useful information about the successfulness of the Copermittees' storm water management programs to achieve the desired outcomes of the CWA and the CWC. The San Diego Water Board agrees with comments from Industry that the monitoring program needs to be iterative, strategic, cost-effective and question-driven. As part of the iterative approach and adaptive management requirements of the Tentative Order, Provision D.4 requires the Copermittees to integrate: 1) the data collected pursuant to Provision D.1 through D.3; 2) the assessment findings required pursuant to Provision D.4a-c; and, 3) information collected during the implementation of the jurisdictional runoff management programs required pursuant to Provision E to assess the effectiveness of, and any necessary modifications to, the Water Quality Improvement Plans. The requirements of the Tentative Order allow the Copermittees to adapt the monitoring based on watershed specific priority conditions within the confines of a robust Water Quality Improvement Plan development and implementation process. The San Diego Water Board agrees that the Tentative Order should be modified to increase clarity of what is required of each Copermittee, thus enabling the San Diego Water Board to better determine compliance. Several commenters provided suggested improvements to Provision D language. Selected modifications to Provision D of the Tentative Order were made to increase clarity of what is expected of the Copermittees throughout the iterative monitoring approach in efforts to increase specificity of what is minimally required and how compliance with the Tentative Order will be determined. The San Diego Water Board also agrees that the Tentative Order should be modified to increase the public's awareness of the Copermittees' compliance and progress towards achieving the goals of the Water Quality Improvement Plans. Provision F.1.a was modified to require the Copermittees implement a robust public participation process with multiple opportunities for public participation throughout the development of each component of the Water Quality Improvement Plan. Provision F.1.b provides the public another opportunity to	

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D-2	PROVISION D: MONITORING AND ASSESSMENT PROGRAM REQUIREMENTS	
	submit comments on the Water Quality Improvement Plan during the acceptance process. The Copermittees are also required to include public participation during any updates to the Water Quality Improvement Plan. Finally, the data and information collected from monitoring, and the findings from the assessments will be reported in the Water Quality Improvement Plan Annual Reports. The San Diego Water Board has revised Provision D to be consistent with the toxicity sampling requirements included in the most recently adopted State Water Board and other Regional Water Board MS4 permits. Modifications were also made to Provision D requirements to clarify the monitoring locations for determining compliance with TMDLs.	

D-3: *Requests for changes to schedules for monitoring and monitoring reports.***RESPONSES TO COMMENTS RECEIVED ON TENTATIVE ORDER NO. R9-2013-0001**

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D-3 PROVISION D: MONITORING AND ASSESSMENT PROGRAM REQUIREMENTS		
	COMMENT: <i>Requests for changes to schedules for monitoring and monitoring reports.</i> The San Diego County Copermittees submitted comments requesting an extension to the duration of the transitional monitoring program to accommodate the acceptance process of the Water Quality Improvement Plan and municipal program budget cycles. The Orange County Copermittees also submitted a comment requesting the commencement of the wet weather transitional outfall monitoring be delayed to year 2 of the transitional period to allow time to inventory and evaluate MS4 outfalls as required by Provision D.2.a.(1).	Copermittees Orange County Copermittees San Diego County Copermittees
	RESPONSE: The San Diego Water Board agrees with the comment that the transitional monitoring program should be continued until such time that the monitoring program within a Water Quality Improvement Plan is accepted by the San Diego Water Board. Provision D.1.a. Receiving Water, D.2.a. MS4 Outfall Discharge Monitoring, D.2.a.(2) Dry Weather MS4 Outfall Discharge Field Screening, and D.2.a.(3) Wet Weather MS4 Outfall Discharge Monitoring have been revised to require the Copermittees to conduct the transitional monitoring program until the Water Quality Improvement Plan is accepted. The San Diego Water Board disagrees with the recommendation to begin wet weather transitional monitoring in year two of the transitional period. Municipalities have already mapped the location of their MS4s for operation and maintenance reasons. Municipalities are also already aware of the majority of information listed in Provision D.2.a.(1), therefore delaying the commencement of the transitional wet weather MS4 outfall monitoring is not appropriate and no change to the Tentative Order was necessary.	

D-4: *Require the Copermittees to utilize monitoring data from third party sources.***RESPONSES TO COMMENTS RECEIVED ON TENTATIVE ORDER NO. R9-2013-0001**

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D-4 PROVISION D: MONITORING AND ASSESSMENT PROGRAM REQUIREMENTS		
	COMMENT: <i>Require the Copermittees to utilize monitoring data from third party sources.</i> Comments submitted by Environmental Groups support the position that the Tentative Order should require the Copermittees to use third party data that meets particular criteria in their efforts to assess the watersheds and progress towards achieving water quality standards. The particular criteria would require third parties to maintain and make available for review the quality assurance plan, list of methods used, and standard operating procedures for the data. Additionally, the commenters requested the Tentative Order specify that data is “appropriate” if it has been collected using the latest Standard Methods of Water and Wastewater Analysis. The commenters further requested the Tentative Order require the Copermittees to solicit and evaluate third party data that meets the Tentative Order’s criteria for collection, not just the data collected pursuant to Provisions D.1, D.2, and D.3 when evaluating the causes of water quality conditions. Lastly, the commenters support the position that the Copermittees should be allowed to partner with environmental groups or other third parties to complete regional special studies.	Environmental Organizations Environmental Groups
	RESPONSE: The San Diego Water Board agrees that the Copermittees should be required to use appropriately collected data from third parties during their efforts to assess conditions of the watershed. During development of the Water Quality Improvement Plan, the Copermittees are required under Provision B.2.a.(6) and Provision B.2.d.(4)(e) to consider available, relevant, and appropriately collected and analyzed data, information, or studies during their efforts to identify water quality priorities based on impacts of MS4 discharges on receiving waters and pollutant sources and/or stressors that contribute to the highest priority water quality conditions. Provision B.2.a.(6) and Provision B.2.d.(4)(e) allow the Copermittees to consider other data, not just data collected by the Copermittees. Additionally, Provision D.2 allows any data, “<i>not collected specifically for the Order that meet the quality assurance criteria of the Copermittees and the monitoring requirements of the Order</i>” to be used by the Copermittees in their MS4 outfall monitoring program. Lastly, the assessments required under Provision D.4 require evaluation of the data collected pursuant to Provisions D.1, D.2, and D.3, which isn’t restricted to that data which is collected solely by the Copermittees, and which will be heavily influenced by the Water Quality Improvement Plans which are required to use “<i>other available, relevant, and appropriately collected data, information, and studies.</i>” The San Diego Water Board agrees that the Copermittees should be allowed to partner with Environmental Groups or other third parties to complete regional special studies and additional language has been added to Provision D.3.	

D-5: *Include monitoring that will ensure compliance and jurisdictional accountability.***RESPONSES TO COMMENTS RECEIVED ON TENTATIVE ORDER NO. R9-2013-0001**

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D-5	PROVISION D: MONITORING AND ASSESSMENT PROGRAM REQUIREMENTS	
	COMMENT: <i>Include monitoring that will ensure compliance and jurisdictional accountability.</i> The Coastal Environmental Rights Foundation (CERF), Environmental Health Coalition (EHC), and the San Diego Coastkeeper (SDCK) collectively submitted comments in support of increasing the nature, frequency, and amount of monitoring in the Tentative Order. The commenters expressed concern that the “lax approach” to monitoring currently in the Tentative Order is not adequate to assess compliance with the requirements. The USEPA requested the Tentative Order be more specific with regards to required monitoring locations and minimum monitoring frequencies to determine compliance with the TMDLs in Attachment E. The San Diego Unified Port District specifically requested additional jurisdictional outfall monitoring be required to support the San Diego Water Board’s and the Copermittees’ ability to determine the sources of any exceedances(s) of water quality standard(s) in receiving waters.	Copermittees San Diego Unified Port District / Brown and Winters Environmental Organizations CERF, EHC and SDCK State/Federal Government USEPA
	RESPONSE: The San Diego Water Board generally disagrees with the comments from the Environmental Organizations that the monitoring approach in Tentative Order is too “lax.” However, the San Diego Water Board agrees that certain monitoring provisions need additional specificity requiring minimum monitoring frequencies and monitoring at specific locations to track compliance with the TMDLs in Attachment E to the Tentative Order. The monitoring and assessment program in the Tentative Order is a question-driven monitoring approach largely designed to place monitoring resources where they are most needed. In order to answer the questions and accomplish efficiencies, the monitoring approach for non-storm water includes screenings, prioritization, and collection of data through visual observations. The Environmental Organizations call specific attention to the MS4 outfall screening required during the transitional monitoring period and monitoring the 10 highest priority non-storm water persistent flow MS4 outfall locations during the post transitional monitoring period. The San Diego Water Board considers this MS4 outfall screening approach necessary for the Copermittees to identify the highest priority non-storm water persistent flows and eliminate them. Elimination of non-storm water flows is a priority of the Tentative Order because eliminating non-storm water flows is consistent with the Clean Water Act requirement to effectively prohibit non-storm water discharges to the MS4. Elimination of non-storm water flows is the most effective way to prevent 100 percent of the pollutants in the non-storm water discharges from causing or contributing to exceedances in receiving water quality	

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D-5	PROVISION D: MONITORING AND ASSESSMENT PROGRAM REQUIREMENTS	
	standards. Therefore, the Tentative Order requires more attention (monitoring, screening, and sampling) at the outfalls to eliminate non-storm water flows. That attention is based on a prioritization to address the outfalls causing or contributing to the very highest priority water quality conditions first. The monitoring and assessment program is designed to be dynamic with collection of data during both wet and dry weather at the MS4 outfalls and in the receiving water. The San Diego Water Board has made revisions in response to comments to ensure the monitoring program in the Tentative Order will be sufficient to inform all stakeholders and the San Diego Water Board on the Copermittees' progress to effectively eliminate non-storm water flows, reduce pollutants in storm water to the maximum extent practicable, and protect conditions in the receiving waters from MS4 discharges. The monitoring and assessment program is adaptable through the Water Quality Improvement Plan to allow the Copermittees to address the highest water quality priorities in a focused manner, directing resources towards those areas or sources within their jurisdiction causing and contributing to the priority water quality conditions. To address the comment on public transparency, the San Diego Water Board has modified the Water Quality Improvement Plan Development process of Provision F.1.a to require the Copermittees to identify the opportunities for public involvement in the development of the Water Quality Improvement Plans. Provision F.4 requires Copermittees to place data and information available to the public on the Regional Clearinghouse. Additional public participation and notification requirements can be found in Provision F that address comments regarding the public access to information concerning the nexus between the health of the receiving waters and the water quality conditions of the discharges from the Copermittees' MS4s. The USEPA requested the Tentative Order to be more specific with regards to the monitoring required to determine compliance with the TMDLs in Attachment E. Provision D.2.c.(2) now requires wet weather outfall monitoring be conducted at least once per year (during the transitional monitoring the Copermittees are still required to sample twice per year), with a requirement that the Copermittees may need to increase the frequency of monitoring to identify pollutants in storm water discharges from the MS4s in order to, among other things, determine compliance with the WQBELs associated with the applicable TMDLs in Attachment E. Additionally, language in Provision D.2.b.(2)(b) has been modified to require the Copermittees to consider, notwithstanding all other priorities, compliance with applicable TMDLs in Attachment E when selecting MS4 outfall monitoring locations. The San Diego Unified Port District specifically requested additional jurisdictional outfall monitoring be required	

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D-5	PROVISION D: MONITORING AND ASSESSMENT PROGRAM REQUIREMENTS	
	to support the San Diego Water Board's and the Copermittees' ability to determine the sources of any exceedances(s) of water quality standard(s) in receiving waters. The San Diego Water Board modified Provisions D.2.b.(2)(b) and D.2.c.(1)-(2) in response to USEPA's comments, thereby specifying a minimum frequency for MS4 outfall monitoring during wet weather and requiring both MS4 outfall and receiving water monitoring station locations be suitable to determine compliance with TMDLs in Attachment E, as well as suitable to determine progress towards achieving the goals of the Water Quality Improvement Plans. Provision D.4.b requires the Copermittees to utilize a watershed model to calculate or estimate the total flow volume and pollutant loadings during wet weather and dry weather discharges from the Copermittee's jurisdiction within the Watershed Management Area. These modifications to Provision D, along with the newly revised Water Quality Improvement Plan development process, address the comments on requiring more monitoring to determine compliance. Additionally, the Tentative Order does not preclude a Copermittee from collecting additional monitoring above what is required, if they deem it necessary to demonstrate that the sources are outside of their jurisdictional legal authority to control.	

D-6: Provide the County of San Diego an alternative transitional monitoring and assessment program for the Santa Margarita River Watershed Management Area until the Riverside County Copermittees are covered under the permit.

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D-6	PROVISION D: MONITORING AND ASSESSMENT PROGRAM REQUIREMENTS	
	COMMENT: <i>Provide the County of San Diego an alternative transitional monitoring and assessment program for the Santa Margarita River Watershed Management Area until the Riverside County Copermittees are covered under the permit.</i> The monitoring and assessment program requirements should account for the phased coverage of the Riverside County Copermittees at a later date than the San Diego County Copermittees with regards to the Santa Margarita River Watershed Management Area.	Copermittees County of San Diego
	RESPONSE: The San Diego Water Board agrees with the commenter. Footnote 3 in Table B-1 of Provision B and Provision D.2.a.(3)(a)(iii), have been revised to allow the County of San Diego to delay development of the Water Quality Improvement Plan for the Santa Margarita River Watershed Management Area until the Riverside County Copermittees have been notified of coverage under the Tentative Order. Footnote 3 in Table B-1 of Provision B clarifies that the County of San Diego is not required to implement the requirements of Provision B until the Riverside County Copermittees have been notified of coverage, but are required to implement the requirements of Provision D and Attachment E for its jurisdiction within the Santa Margarita River Watershed Management Area. Additionally, Provision D.2.a.(3)(a)(iii) was added to specify that the County of San Diego must select at least two (2) wet weather MS4 outfall discharge monitoring stations, reduced from the 5 stations required in Provision D.2.a.(3)(a)(i), for the portion of the Santa Margarita River Watershed Management Area within its jurisdiction until the Riverside Copermittees are notified of coverage. After the Riverside Copermittees are notified of coverage, the County of San Diego in concert with the County of Riverside Copermittees must comply with Provision B requirements and prepare a Water Quality Improvement Plan and implement the monitoring and assessment requirements according to Provision D for the Santa Margarita River Watershed Management Area.	

PROVISION D.1: Receiving Water Monitoring Requirements

D1-1: Requests for "clarifications" of receiving water monitoring requirements.

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D1-1	PROVISION D.1: Receiving Water Monitoring Requirements	
	COMMENT: <i>Requests for "clarifications" of receiving water monitoring requirements.</i> The Riverside County Copermittees provided suggested changes to the language in Provision D to clarify that the receiving water monitoring required pursuant to Provision D.1.a.(3) and D.1.e must be conducted as applicable to the Watershed Management Area and the Copermittees' MS4 discharges. The Riverside County Copermittees want a distinction written into the requirements because some of the monitoring requirements only apply to MS4 discharges to certain water bodies and not all Copermittees within a Watershed Management Area will have discharges to that water body. The USEPA requested the Tentative Order be more specific with regards to the transitional and post transitional receiving water monitoring required (frequency and station location) to determine compliance with the TMDLs in Attachment E.	Copermittees Riverside County Copermittees State/Federal Government USEPA
	RESPONSE: The San Diego Water Board disagrees with the requested changes to Provisions D.1.a.(3) and D.1.e. The requested changes to Provision D.1.a.(3) were not incorporated because the intent is to require the Copermittees, during the transitional monitoring period, to participate in regional receiving water monitoring programs, as applicable to the Watershed Management Area, including participation in (a) Storm Water Monitoring Coalition Regional Monitoring, (b) Southern California Bight Regional Monitoring, and (c) Sediment Quality Monitoring. Provision D.1.a.(3) correctly conditions the requirement by stating, 'as applicable' to the Watershed Management Area. For example, the expectation is that the Riverside County Flood Control and Water Conservation District, a current member of the Southern California Stormwater Monitoring Coalition (SMC), participate in SMC monitoring within the Watershed Management Area(s), in which their jurisdiction lies. The SMC was formed in 2001 by cooperative agreement of the Phase I municipal storm water NPDES lead Copermittees (including the Riverside County Flood Control and Water Conservation District), the NPDES regulatory agencies in southern California (including the San Diego Water Board) and the Southern California Coastal Water Research Project. It is the goal of the SMC to develop the technical information necessary to better understand storm water mechanisms and impacts, and then develop the tools that will effectively and efficiently improve storm water management decision-making. The SMC develops and funds cooperative projects to improve knowledge of storm water quality management for all throughout the San Diego Region.	

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D1-1	PROVISION D.1: Receiving Water Monitoring Requirements	
	The requested changes to Provision D.1.e were not incorporated because the existing language is appropriate. Provision D.2.c.(2) has been revised to require wet weather MS4 outfall monitoring be conducted at least once per year after the Water Quality Improvement Plans are accepted, with a requirement that Copermittees may need to increase the frequency of monitoring in order to identify pollutants in storm water discharges from the MS4s in order to, among other things, determine compliance with the WQBELs associated with the applicable TMDLs in Attachment E. During the transitional monitoring period, the Copermittees are still required to conduct wet weather MS4 outfall monitoring twice per year. Additionally, the language in Provision D.2.b.(2)(b) has been modified to require the Copermittees to consider, notwithstanding all other priorities, compliance with applicable TMDLs in Attachment E when selecting MS4 outfall monitoring locations.	

D1-2: Requests for modifications to receiving water monitoring stations, frequency, and data collection requirements.

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D1-2	PROVISION D.1: Receiving Water Monitoring Requirements	
	COMMENT: <i>Requests for modifications to receiving water monitoring stations, frequency, and data collection requirements.</i> Comments submitted by the Copermittees ranged from a broad request to remove the entire coastal storm drain monitoring program from the receiving water monitoring requirements (San Diego County), adding an alternate compliance option in lieu of the receiving waters monitoring program previously adopted in their current permit (Orange County), to very specific additions to what is recorded during receiving water station field observations (Riverside County). Multiple Environmental Organizations supported the need to increase the amount of monitoring in order to 1) better inform the Copermittees of the nexus between the health of receiving waters and the water quality condition of their discharge, 2) be sufficient to fulfill the San Diego Water Board's need to assess compliance, and 3) be sufficient to fulfill the public's need to stay informed. The USEPA commented on the need for the receiving water requirements to include minimum monitoring frequencies and a minimum number of station locations to measure compliance with the WLAs and associated water quality based effluent limitations of the TMDLs in the Order. The Los Penasquitos Lagoon Foundation requested continuous flow monitoring at the base of tributaries to 303(d) listed water bodies and monitoring of groundwater seepages into 303(d) listed water bodies be added to the monitoring requirements of the Watershed Management Area including the Los Penasquitos Lagoon.	Copermittees Orange County Copermittees Riverside County Copermittees San Diego County Copermittees Environmental Organizations CERF, EHC, SDCK Los Penasquitos Lagoon Foundation State / Federal Government USEPA
	RESPONSE: The San Diego Water Board agrees with the request to discontinue the coastal storm drain monitoring program and has replaced it with the receiving water monitoring program of Provision D.1 along with the transitional outfall monitoring screening and post-transitional outfall monitoring program (Provision D.2). The San Diego Water Board disagrees with the requested changes to the field screening observations required in Tables D-1 and D-6. The requests included adding the requirement to record any observed connectivity between MS4 outfall discharges and flowing receiving waters during receiving water and outfall field screening efforts. This was not added to the required observations listed in Tables D-1 or D-6 because the observations are already required as part of the illicit connection and illegal discharge requirements of Provision E.2. Pursuant to Provision D.1.f Alternative Watershed Monitoring Requirements, the San Diego Water Board may	

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D1-2	PROVISION D.1: Receiving Water Monitoring Requirements
	direct the Copermittees to participate in an effort to develop alternative watershed monitoring with other regulated entities, other interested parties, and the San Diego Water Board to refine, coordinate, and implement regional monitoring and assessment programs to determine status and trends in receiving waters. This requirement calls attention to the San Diego Water Board's plan to involve the Copermittees in the development of regional monitoring and assessment programs. It further calls attention to the San Diego Waters Board's position that a regional monitoring and assessment program must include other regulated entities in addition to the Phase I Copermittees. The Draft Framework for Monitoring and Assessment in the San Diego Region lays out the San Diego Water Board's framework to develop a regional receiving water monitoring program. Prior to development and required implementation of a regional receiving water monitoring program, and to maintain historical water quality monitoring trends, the requirements of Provision D.1.a-f require Copermittees to continue the receiving water monitoring required by their current storm water permits until coverage under the Tentative Order commences, and the Water Quality Improvement Plans are accepted. The monitoring program in Provision D has been modified to include minimums (removing the language "as appropriate"). Required monitoring minimums also address concerns regarding the Copermittees' and the San Diego Water Board's ability to determine compliance with the requirements of the Tentative Order (including TMDLs). Additionally, the Water Quality Improvement Plan development process has been significantly changed to include more public participation. Furthermore, the Tentative Order recognizes that each Copermittee should evaluate the need to increase its monitoring above what is minimally required to the appropriate level necessary to achieve the goals of the Water Quality Improvement Plan. Within the process for a Copermittee to get a Water Quality Improvement Plan developed and accepted by the San Diego Water Board, the Environmental Organizations and the public at large will have opportunities to contribute their expertise and provide comments on the nature and extent of monitoring needed to measure progress towards achieving the goals of the Water Quality Improvement Plans. Each Copermittee must establish a public participation process to solicit data, information, and recommendations to be utilized in the development of the Water Quality Improvement Plan. The Tentative Order also requires the Copermittees to form a Water Quality Improvement Consultation Panel (Panel) to provide recommendations on the priorities, goals, and strategies of the Water Quality Improvement Plan. The Panel must include a member of the environmental community, a member of the development community, and a member of the San Diego Water Board staff. Any recommendations for monitoring specific to a particular Watershed Management Area, receiving water body, pollutant, or stressor could be provided by the Panel and

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D1-2	PROVISION D.1: Receiving Water Monitoring Requirements	
	addressed in the Water Quality Improvement Plan. The minimum monitoring required plus the monitoring needed to attain goals established in the Water Quality Improvement Plans will be sufficient to inform the Copermittees, the San Diego Water Board, the environmental groups, and the public on the nexus between the health of receiving waters and the water quality condition of the discharges, compliance with TMDLs, and progress towards achieving the goals of the Clean Water Act.	

D1-3: *Require Test of Significant Toxicity to be consistent with other recent MS4 permits.***RESPONSES TO COMMENTS RECEIVED ON TENTATIVE ORDER NO. R9-2013-0001**

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D1-3	PROVISION D.1: Receiving Water Monitoring Requirements	
	COMMENT: <i>Require Test of Significant Toxicity to be consistent with other recent MS4 permits.</i> The USEPA commented that the toxicity monitoring requirements should be modified and to be consistent with the requirements in MS4 permits recently issued by the State Water Resources Control Board (Caltrans MS4 Permit) and the Los Angeles Regional Water Quality Control Board (Los Angeles County MS4 Permit).	State/Federal Government USEPA
	RESPONSE: The San Diego Water Board agrees that the toxicity testing and data analysis requirements in the Tentative Orders should be consistent with other recently adopted MS4 Permits. The recently adopted Caltrans and Los Angeles County MS4 Permits include updated toxicity data collection procedures and data analysis methods that are consistent with the Draft State Water Resources Control Board Policy for Toxicity Assessment and Control, June 2012 (Draft State Board Toxicity Policy). Provision D has been updated to remove the acute toxicity test requirements, and only require chronic toxicity test biological endpoint data be analyzed using the Test of Significant Toxicity t-test approach specified in National Pollutant Discharge Elimination System Test of Significant Toxicity Document (USEPA, EPA 833-R-10-003, 2010), and other minor changes to make the Tentative Order consistent with recently adopted MS4 permits.	

PROVISION D.2: MS4 Outfall Discharge Monitoring Requirements

D2-1: Requests for "clarifications" of MS4 outfall discharge monitoring requirements.

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D2-1	PROVISION D.2: MS4 Outfall Discharge Monitoring Requirements	
	COMMENT: <i>Requests for "clarifications" of MS4 outfall discharge monitoring requirements.</i> The San Diego County and Riverside County Copermittees requested the dry weather MS4 outfall field screening language in Provision D.2.a.(2) be modified to clarify the number of visual inspections at major outfall locations required per jurisdiction per Watershed Management Area. The Riverside County Copermittees additionally requested that the field screening only apply to those MS4 outfalls in a Copermittee's inventory that are 'accessible,' and clarification to the definition of persistent flow. USEPA supports the Copermittees' comments to improve clarity with respect to identification of MS4 outfall monitoring locations. USEPA further requested language specific enough to assure MS4 outfall monitoring locations are selected to include compliance points for the TMDLs in Attachment E.	Copermittees Riverside County Copermittees San Diego County Copermittees State and Federal Government USEPA
	RESPONSE: The San Diego Water Board generally agrees with comments from the Copermittees and USEPA. Additional language has been added to improve the clarity of Provision D.2.a.(2) for those jurisdictions with equal to or greater than 500 major MS4 outfalls within their inventory that are located within multiple Watershed Management Areas. The San Diego Water Board specifically retained language to allow for the Copermittees to conduct more than the minimum amount of visual inspections of their major MS4 outfalls should increased inspections be a part of the strategies specified to meet the goals of any Water Quality Improvement Plan. The San Diego Water Board disagrees with the comments requesting modifications to the persistent flow definition in Footnote 19. The San Diego Water Board maintains that the definition, as written, accomplishes the intent of the requested revision and does not need to be explicitly stated. Existing language in Provision D.2.a.(1)(e) addresses the comment about field screening "accessible" inventoried MS4 outfalls. The Copermittees can field screen an MS4 outfall location by screening a manhole just upgradient of the discharge where access is safe. Provisions D.2.b.(2)(b)(i) and D.2.c.(1) were modified to require additional outfall monitoring locations if the 5 chosen MS4 outfall locations were not sufficient to determine compliance with the TMDLs in the Tentative Order.	

D2-2: Requests for modifications to MS4 outfall monitoring stations, frequency, and data collection requirements.

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D2-2	PROVISION D.2: MS4 Outfall Discharge Monitoring Requirements	
	COMMENT: <i>Requests for modifications to MS4 outfall monitoring stations, frequency, and data collection requirements.</i> The Orange County, Riverside County and San Diego County Copermittees each requested modifications to the MS4 outfall monitoring stations, frequency, and data collection requirements. The San Diego County Copermittees requested the MS4 outfall discharge monitoring requirements be changed for the Santa Margarita River Watershed Management Area until the Riverside County Copermittees become covered under the Tentative Order, a reduction to the frequency of outfall sampling during the transitional period from annually to once per 2-year transitional period, a modification to the requirement to sample the 'first flush' during wet weather, a reduction to the number of dry weather outfall monitoring locations from 10 to 5, and an allowance for analytical testing to be reduced if demonstrated by supporting data. The Orange County and Riverside County Copermittees supported most of San Diego County Copermittees' requested revisions. Additionally, the Riverside County Copermittees commented on the disproportionality of the persistent flow MS4 outfall monitoring requirements, and the need to de-emphasize MS outfall monitoring locations if the discharge does not reach a receiving water due to infiltration, evaporation, or treatment. Environmental Organizations supported the need to increase the amount of monitoring in order to better inform the Copermittees of the nexus between the health of receiving waters and the water quality condition of their discharge, be sufficient to fulfill the San Diego Water Board's need to assess compliance, and be sufficient to fulfill the public's need to stay informed. The USEPA commented on the need for the MS4 outfall monitoring requirements to include minimum monitoring frequencies and a minimum number of MS4 outfall locations to measure compliance with the TMDLs.	Copermittees Orange County Copermittees Riverside County Copermittees San Diego County Copermittees Environmental Organizations CERF, EHC, SDCK State / Federal Government USEPA
	RESPONSE: The San Diego Water Board agreed with several of the requested modifications. Revisions to Provision D.2 were made where appropriate. The requirement to monitor at least 10 major outfalls was reduced to monitoring at least 5 major outfalls with persistent flows. To address comments from the USEPA, this requirement was also modified to require additional MS4 outfall monitoring locations, if the 5 chosen outfall locations were not sufficient to determine compliance with the TMDLs. If a smaller jurisdiction has less than 5 major MS4 outfalls with persistent flow,	

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D2-2	PROVISION D.2: MS4 Outfall Discharge Monitoring Requirements
	they would be required to monitor all the MS4 outfalls with persistent flow until such time that they identify and terminate the discharge or met another criteria of Provision D.2.(2)(b)(ii). If any Copermittee eliminates all persistent flows from all of its MS4 outfalls, they would not be required to conduct dry weather MS4 outfall monitoring. The San Diego Water Board accepted most of the requested revisions from the Orange County Copermittees, except those concerning toxicity sampling and coliform sampling. Toxicity sampling was modified in response to comments provided by USEPA to make the toxicity requirements more consistent with recently adopted MS4 permits (i.e. Caltrans and Los Angeles County MS4 Permits). Please see the response to comment D1-3.

PROVISION D.3: Special Studies

D3-1: *Request to reduce the number of special studies required.***RESPONSES TO COMMENTS RECEIVED ON TENTATIVE ORDER NO. R9-2013-0001**

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D3-1	PROVISION D.3: Special Studies	
	<u>COMMENT:</u> <i>Request to reduce the number of special studies required.</i> The San Diego County Copermittees submitted a comment requesting a reduction in the number of required special studies from three to two per Watershed Management Area, and from two to one for the San Diego Region to account for the time and resources required to plan and develop the special studies, and integrate the plans for the special studies into the monitoring and assessment programs of the Water Quality Improvement Plans. This comment was supported by the Riverside County Copermittees.	Copermittees Riverside County Copermittees San Diego County Copermittees
	<u>RESPONSE:</u> The San Diego Water Board agrees with the commenters. Provision D.3 has been modified to reduce the number of required special studies from three to two per Watershed Management Area, and from two to one for the San Diego Region.	

D3-2: *Allow special studies initiated prior to the term of the Tentative Order to count toward required special studies.***RESPONSES TO COMMENTS RECEIVED ON TENTATIVE ORDER NO. R9-2013-0001**

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D3-2	PROVISION D.3: Special Studies	
	<u>COMMENT:</u> <i>Allow special studies initiated prior to the term of the Tentative Order to count toward the required special studies.</i> The San Diego County Copermittees submitted a comment requesting that the special studies initiated prior to the term of the Tentative Order be allowed to count towards the special studies required in Provision D.3, citing that special studies are typically multi-year efforts that require multi-stage planning, funding approval/allocation, and analysis. This comment was supported by the Riverside County Copermittees.	Copermittees Riverside County Copermittees San Diego County Copermittees
	<u>RESPONSE:</u> The San Diego Water Board agrees with the commenters. Provision D.3 has been modified to allow the use of special studies initiate prior to adoption of the Tentative Order to comply with the requirements of Provision D.3.	

PROVISION D.4: Assessment Requirements

D4-1: Requests for "clarifications" of assessment requirements.

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D4-1	PROVISION D.4: Assessment Requirements	
	COMMENT: <i>Requests for "clarifications" of assessment requirements.</i> The San Diego County and Riverside County Copermittees submitted comments requesting clarifications be made to the assessment requirements of Provisions D.4.b.(1)-(2). The Copermittees concurred that the timing of reporting be compatible with completion of the assessments. The Riverside County Copermittees requested specific revisions to Provision D.4.b.(1)(c)(iv) concerning extrapolation of calculated flow volumes and pollutant loads; and assessment of jurisdictional accountability.	Copermittees Riverside County Copermittees San Diego County Copermittees
	RESPONSE: The San Diego Water Board agrees with the commenters. The San Diego Water Board modified Provision D.4.b.(1)(a) to add an annual assessment of data collected during the transition period and reporting as part of the Transitional Monitoring and Assessment Program Annual Report (Provision F.3.b.2). Provision D.4.b.(2)(a) requires assessment of MS4 outfall data collected after the transitional period and reporting as part of the Water Quality Improvement Plan Annual Report (Provision F.3.b.(3)). Requiring an annual report during the transitional years before the acceptance of the Water Quality Improvement Plan will allow Copermittees to perform 'complete' assessments and report on the progress for that year, whether it be a year within the transitional monitoring period or a year in which monitoring is conducted in accordance with the Water Quality Improvement Plan. Provisions D.4.b.(2)(c)(iv)[a]-[b] were modified to address comments concerning extrapolation of calculated flow volume and pollutant loads to outfalls that were not actually monitored. The assessment now requires the use of a model or other method to calculate or estimate the non-storm water volumes and pollutant loads collectively discharged from all the major MS4 outfalls in its jurisdiction identified as having persistent dry weather flows. To address the issue of jurisdictional accountability, the Copermittees are now required to identify and quantify (i.e. volume and pollutant loads) sources of non-storm water not subject to the Copermittee's legal authority that are discharged from the Copermittee's major MS4 outfalls to downstream receiving waters. The San Diego Water Board generally disagrees with the comment to require calculation of pollutant loads only for those priority water quality constituents identified in the Water Quality Improvement Plan. Calculation of all pollutant loads are required until a Copermittee collects sufficient data or other supporting information pursuant to Provision D.2.b.(2)(e)(iii)[e] to demonstrate analysis of a constituent is not necessary.	

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D4-1	PROVISION D.4: Assessment Requirements	
	The San Diego Water Board agrees with the comment that MS4 outfall assessments are to be done for the area covered by each Copermittee and that the data to be used by each Copermittee would include the data collected from any Flood Control District MS4 operated within its jurisdiction. The San Diego Water Board has not modified any language within Provision D.4 to address this comment because the language adequately addresses the comment without further modifications.	

D4-2: *Requests for modifications to assessment requirements.***RESPONSES TO COMMENTS RECEIVED ON TENTATIVE ORDER NO. R9-2013-0001**

March 27, 2013

D4-2	PROVISION D.4: Assessment Requirements	
	COMMENT: <i>Requests for modifications to assessment requirements.</i> The San Diego County Copermittees commented on the need for a longer assessment term (once per permit term rather than annually) to provide meaningful analysis of the annual pollutant load and flow calculations from MS4 outfalls during dry weather. The Copermittees further commented on the need to modify the requirements to calculate jurisdictional loads during wet weather, as well as modifications to clarify assessments necessary to track jurisdictional accountability. The Riverside County Copermittees agreed in large part with the comments provided by the San Diego County Copermittees. The Riverside County Copermittees also expressed a desire to clarify MS4 outfall assessments are to be done by each municipal Copermittee and that the data to be used by each municipal Copermittee include the data collected from any flood control district within its jurisdiction. Additionally, the Riverside County Copermittees expressed concern that the assessment requirements were requiring evaluations beyond their expertise and suggested pollutant loads only be calculated for priority pollutants. The Los Penasquitos Lagoon Foundation requested that the Tentative Order require the Copermittees to work with local land managers to assess the status and trends of receiving water quality conditions.	Copermittees Riverside County Copermittees San Diego County Copermittees Environmental Organizations Los Penasquitos Lagoon Foundation
	RESPONSE: The San Diego Water Board generally agreed with the need for a longer assessment term (once per permit term rather than annually) to provide meaningful analysis of the annual pollutant load and flow calculations from MS4 outfalls during dry weather and the need to modify the requirements to calculate jurisdictional loads during wet weather to the added area-based jurisdictional computational approach. The San Diego Water Board generally modified the Tentative Order where there was agreement with the comments. The San Diego Water Board, however, disagrees with the requests regarding MS4 outfall assessments for flood control districts, assessment requirements related to critical receiving water beneficial uses, and the suggestion that pollutant loads only be calculated for priority pollutants. The San Diego Water Board agrees with the comments provided by the Los Penasquitos Lagoon Foundation and required increased public participation and formation of a Water Quality Improvement Plan Consultation Panel in Provision F.1.a.	

PROVISION E: JURISDICTIONAL RUNOFF MANAGEMENT PROGRAMS

E-1: *Align the Jurisdictional Runoff Management Program requirements with the Water Quality Improvement Plan requirements.***RESPONSES TO COMMENTS RECEIVED ON TENTATIVE ORDER NO. R9-2013-0001**

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E-1	PROVISION E: JURISDICTIONAL RUNOFF MANAGEMENT PROGRAMS	
	COMMENT: <i>Align the Jurisdictional Runoff Management Program requirements with the Water Quality Improvement Plan requirements.</i> The Orange County, Riverside County and San Diego County Copermittees each submitted comments requesting the requirements in Provision E be allowed to be modified based on what is proposed in the Water Quality Improvement Plans. The Copermittees assert that the requirements of Provision E are a “one size fits all” set of requirements, and the requirements of the Water Quality Improvement Plan become “additive” rather than “complimentary.” Several Copermittees submitted separate comment letters supporting the concept by requesting the San Diego Water Board align the development and implementation of the Water Quality Improvement Plan better with the jurisdictional runoff management program requirements. The BIA Regulated Community Coalition also submitted comments supporting the concept. The Environmental Groups submitted comments expressing concern with the flexibility of the jurisdictional runoff management program requirements and requested that the Water Quality Improvement Plan include a detailed list of activities and what activities each Copermittee will implement within its jurisdiction. The Environmental Groups are concerned that without this specificity in the Water Quality Improvement Plans, and the flexibility that is provided in the jurisdictional runoff management program requirements would result in the burden of achieving water quality improvement within a watershed falling to only one or two Copermittees. The Environmental Groups would like to see a clearer commitment of what will be implemented by each Copermittee either in the Water Quality Improvement Plan or in the jurisdictional runoff management program documents for each Copermittee. The USEPA is also concerned with the flexibility that is provided by the requirements of Provision E. The USEPA prefers jurisdictional runoff management program requirements that include specific inspection frequencies.	Building Industry / Industry BIA Regulated Community Coalition Copermittees City of Dana Point City of Laguna Hills City of Lake Forest City of Mission Viejo City of Rancho Santa Margarita City of San Juan Capistrano Orange County Copermittees Riverside County Copermittees San Diego County Copermittees Environmental Organizations Environmental Groups State/Federal Government USEPA
	RESPONSE: The San Diego Water Board agrees that the Water Quality Improvement Plans and jurisdictional runoff management program requirements should be better aligned and clearly present the water quality improvement strategies that each Copermittee will implement within its jurisdiction. The San Diego Water Board does not agree that the jurisdictional runoff management program requirements of Provision E should be allowed to be modified by the Water Quality Improvement Plan.	

RESPONSES TO COMMENTS RECEIVED ON TENTATIVE ORDER NO. R9-2013-0001

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E-1	PROVISION E: JURISDICTIONAL RUNOFF MANAGEMENT PROGRAMS
	The San Diego Water Board has revised Provision B.3.b in the revised Tentative Order (formerly Provision B.3.a in the Tentative Order) to require the Copermittees to specify which water quality improvement strategies each Copermittee will commit to implementing within its jurisdiction as part of its jurisdictional runoff management program requirements under Provisions E.2-E-7, and the optional water quality improvement strategies that will be implemented by the Copermittee within its jurisdiction when necessary to achieve the numeric goals. The optional water quality improvement strategies are to be implemented by the Copermittee as necessary to contribute toward achieving the numeric goals. Provision B.3.b in the revised Tentative Order also includes requirements for the Copermittees to identify optional Watershed Management Area strategies that the Copermittees will implement when necessary to achieve the numeric goals. Each Copermittee must specify BMPs, education programs, inspection frequencies, incentive and enforcement programs that will be implemented within its jurisdiction as part of its jurisdictional runoff management program requirements under Provisions E.2-E-7. Provisions E.2.e, E.3.g, E.4.f, E.5.e.(1), and E.7.c were removed in the revised Tentative Order, and the introductory paragraphs of Provisions E.2-E.7 were revised to state that each component must be implemented in accordance with the jurisdictional strategies identified in the Water Quality Improvement Plan. These revisions were made to better align the requirements of the Water Quality Improvement Plans and the jurisdictional runoff management programs, and provide an additional layer of transparency to the public for the strategies that the Copermittees will be committing to implement versus those strategies that will be implemented only when necessary to achieve the numeric goals. The San Diego Water Board has not modified the inspection frequency requirements in Provisions E.2-E.7. The inspection frequency requirements provide a sufficient level of guidance and flexibility for allowing the Copermittees to develop appropriate inspection frequencies that will be committed to in the Water Quality Improvement Plans, and a minimum level of effort that is expected for areas associated with the highest priority water quality conditions. The inspection frequencies that the Copermittees commit to implementing as part of the Water Quality Improvement Plans will be utilized by the San Diego Water Board during its audits of the Copermittees' programs to determine compliance with the requirements of the Tentative Order.

E-2: Allow San Diego County to use WURMP to guide jurisdictional runoff management program for the Santa Margarita River Watershed Management Area until the Riverside County Copermittees are covered under the permit.

RESPONSES TO COMMENTS RECEIVED ON TENTATIVE ORDER NO. R9-2013-0001

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E-2	PROVISION E: JURISDICTIONAL RUNOFF MANAGEMENT PROGRAMS	
	COMMENT: <i>Allow San Diego County to use the Watershed Urban Runoff Management Plan (WURMP) to guide its jurisdictional runoff management program for the Santa Margarita River Watershed Management Area until the Riverside County Copermittees are covered under the Tentative Order.</i> The County of San Diego and the San Diego County Copermittees requested that the requirement to develop a Water Quality Improvement Plan and implementation of the requirements of Provision E for the Santa Margarita River Watershed Management Area be postponed until the Riverside County Copermittees become covered under the Tentative Order.	Copermittees County of San Diego San Diego County Copermittees
	RESPONSE: The San Diego Water Board agrees with the request. The second introductory paragraph of Provision E states, “<i>Until the Copermittee has updated its jurisdictional runoff management program document with the requirements of Provision E, the Copermittee must continue implementing its current jurisdictional runoff management program.</i>” The County of San Diego will continue to implement the jurisdictional runoff management program requirements of Order No. R9-2007-0001 until the Riverside County Copermittees are notified of coverage under the Order and a Water Quality Improvement Plan is developed pursuant to the requirements of this Order. The County of San Diego may use its WURMP for the Santa Margarita River Watershed to guide its jurisdictional runoff management program until the Water Quality Improvement Plan is developed and accepted. Please also see the response to comment B1-1.	

PROVISION E.1: Legal Authority Establishment and Enforcement

E1-1: Specify that the legal authority established by Copermittees only applies to the Copermittees' jurisdictions.

RESPONSES TO COMMENTS RECEIVED ON TENTATIVE ORDER NO. R9-2013-0001

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E1-1	PROVISION E.1: Legal Authority Establishment and Enforcement	
	COMMENT: <i>Specify that the legal authority established by the Copermittees only applies to the Copermittees' jurisdictions.</i> The Orange County, Riverside County and San Diego County Copermittees each submitted comments requesting that the requirements of Provision E.1 be modified to specify that the legal authority established by the Copermittees only apply "to the extent allowable by law" and only applies to discharges within their jurisdiction. The Julian Community Planning Group also commented that there are jurisdictions that a Copermittee has no authority to require compliance.	Community Planning Groups Julian Community Planning Group Copermittees Orange County Copermittees Riverside County Copermittees San Diego County Copermittees
	RESPONSE: The San Diego Water Board disagrees that it is necessary to specify that the legal authority established by the Copermittees is only applicable to their jurisdictions. The requirements of Provision E.1 are consistent with the requirements under 40CFR122.26(d)(2)(i)(A)-(F) and do not go beyond those requirements. The legal authority that each Copermittee is required to establish for its jurisdiction is logically only expected to apply to its jurisdiction. Provision E.1.a.(2) is consistent with 40CFR122.26(d)(2)(i)(A), which requires the Copermittee to "Control through ordinance, permit, contract, order or similar means, the contribution of pollutants to the municipal storm sewer by storm water discharges associated with industrial activity and the quality of storm water discharged from sites of industrial activity." 40CFR122.26(d)(2)(i)(A) does not make a distinction between industrial activity (which includes construction activity according to 40 CFR 122.26(b)(14)(x)) that is regulated by an NPDES permit, such as the Statewide Industrial and Construction General Permits, and those that are not. Even if there are industrial and construction sites regulated by the Statewide Industrial or Construction General Permits, those sites are still subject to the Copermittees ordinances and the Copermittee must have the legal authority to control discharges from those sites. Provisions E.1.a.(4) is consistent with 40CFR122.26(d)(2)(i)(D), which requires the Copermittee to "Control through interagency agreements among coapplicants the contribution of pollutants from one portion of the municipal system to another portion of the municipal system." The federal regulations require the Copermittees to enter into interagency agreements to control pollutants from one Copermittee's jurisdiction to another Copermittee's jurisdiction. Provision E.1.a.(4) does not require anything outside of the federal requirements.	

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E1-1	PROVISION E.1: Legal Authority Establishment and Enforcement
	Provision E.1.a.(5) is consistent with the requirements in the Order Nos. R9-2007-0001, R9-2009-0002, and R9-2010-0016. The Copermittees should be working with other entities outside of their jurisdiction to reduce or eliminate pollutants being discharged into their jurisdictions and MS4s, especially if those are significant sources of pollutants. The “where possible” qualifier in the requirement gives the Copermittees some flexibility in working with other entities, but Provision E.1.a.(5) does not require the Copermittees to impose their legal authority upon entities outside their jurisdictions. Provision E.1.a.(10) is consistent with 40CFR122.26(d)(2)(i)(F), which requires the Copermittee to “<i>Carry out all inspection, surveillance and monitoring procedures necessary to determine compliance and noncompliance with permit conditions including the prohibition on illicit discharges to the municipal separate storm sewer.</i>” The San Diego Water Board did not make revisions to the requirements of Provision E.1 requested by the Copermittees.

E1-2: Requests for "clarifications" for legal authority requirements.

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E1-2	PROVISION E.1: Legal Authority Establishment and Enforcement	
	COMMENT: Requests for "clarifications" for legal authority requirements. The Orange County, Riverside County and San Diego County Copermittees each submitted comments requesting several "clarification" to requirements of Provision E.1.a to be "consistent" with the requirements under 40CFR122.26(d)(2)(i)(A)-(F).	Copermittees Orange County Copermittees Riverside County Copermittees San Diego County Copermittees
	RESPONSE: The San Diego Water Board disagrees that the legal authority requirements under Provision E.1.a are not consistent with the requirements under 40CFR122.26(d)(2)(i)(A)-(F). The requirements of Provision E.1.a are consistent with the requirements under 40CFR122.26(d)(2)(i)(A)-(F) and do not go beyond those requirements. The requirements under 40CFR122.26(d)(2)(i)(A)-(F) apply to both non-storm water discharges <i>to</i> the MS4 and pollutants in storm water discharges <i>from</i> the MS4. Provision E.1.a.(1) is consistent with 40CFR122.26(d)(2)(i)(B), which requires the Copermittee to "[operate pursuant to legal authority established...which authorizes or enables the applicant at a minimum to...] Prohibit through ordinance, order or similar means, illicit discharges to the municipal separate storm sewer." The requirement under 40CFR122.26(d)(2)(i)(B) does not include the term "effectively prohibit" only "prohibit" illicit discharges to the MS4. Provision E.1.a.(2) is consistent with 40CFR122.26(d)(2)(i)(A), which requires the Copermittee to "[operate pursuant to legal authority established...which authorizes or enables the applicant at a minimum to...] Control through ordinance, permit, contract, order or similar means, the contribution of pollutants to the municipal storm sewer by storm water discharges associated with industrial activity and the quality of storm water discharged from sites of industrial activity." The requirement under 40CFR122.26(d)(2)(i)(A) does not make a distinction between industrial activity (which includes construction activity according to 40 CFR 122.26(b)(14)(x)) that is regulated by an NPDES permit, such as the Statewide Industrial and Construction General Permits, and those that are not. Provision E.1.a.(3) is consistent with 40CFR122.26(d)(2)(i)(C), which requires the Copermittee to "[operate pursuant to legal authority established...which authorizes or enables the applicant at a minimum to...] Control through ordinance, order or similar means the discharge to a municipal separate storm sewer of spills, dumping or disposal of materials other than storm water."	

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E1-2	PROVISION E.1: Legal Authority Establishment and Enforcement
	Provisions E.1.a.(6)-(9) are consistent with 40CFR122.26(d)(2)(i)(E), which requires the Copermittee to “[operate pursuant to legal authority established...which authorizes or enables the applicant at a minimum to...] Require compliance with conditions in ordinances, permits, contracts or orders.” Provisions E.1.a.(6)-(9) provide more specificity about what “compliance with conditions in ordinances, permits, contracts or orders” includes. Provision E.1.a.(10) is consistent with 40CFR122.26(d)(2)(i)(F), which requires the Copermittee to “[operate pursuant to legal authority established...which authorizes or enables the applicant at a minimum to...] Carry out all inspection, surveillance and monitoring procedures necessary to determine compliance and noncompliance with permit conditions including the prohibition on illicit discharges to the municipal separate storm sewer.” The San Diego Water Board did not make revisions to the requirements of Provision E.1.a requested by the Copermittees.

PROVISION E.2: Illicit Discharge Detection and Elimination

E2-1: *Non-storm water discharges must be addressed because of the impacts dry weather flows have on receiving waters.***RESPONSES TO COMMENTS RECEIVED ON TENTATIVE ORDER NO. R9-2013-0001**

March 27, 2013

E2-1	PROVISION E.2: Illicit Discharge Detection and Elimination	
	COMMENT: <i>Non-storm water discharges must be addressed because of the impacts dry weather flows have on receiving waters.</i> The Los Penasquitos Lagoon Foundation and the South Laguna Civic Association each submitted comments expressing concerns about the impacts on receiving water due to dry weather flows. The Los Penasquitos Lagoon Foundation noted that dry weather discharges can create serious impacts to the beneficial uses of receiving waters that support salt marsh habitats. The South Laguna Civic Association noted that elevated creek flows originating from over-irrigation result in the discharge of several pollutants to protected creek, estuary and coastal receiving waters. The Los Penasquitos Lagoon Foundation requested that the Tentative Order provide mechanisms to allow the Copermittees to address dry weather flows regardless of whether or not constituents of concern are present in the flows. The South Laguna Civic Association advocated for effective enforcement measures by the San Diego Water Board to reduce discharges generated by over-irrigation.	Environmental Organizations Los Penasquitos Lagoon Foundation South Laguna Civic Association
	RESPONSE: The San Diego Water Board agrees that non-storm water discharges must be addressed. The approach to regulating non-storm water discharges in the Tentative Order has been modified compared to earlier permits. The Tentative Order focuses on “effectively prohibiting” or preventing and eliminating all non-NPDES-permitted non-storm water discharges to the MS4. The Tentative Order also requires the Copermittees to prohibit non-storm discharges associated with over-irrigation to the MS4. These two changes are expected to result in more actions implemented by the Copermittees to “effectively prohibit” non-storm water discharges to the MS4s and thereby non-storm water and pollutants from the MS4s to receiving waters. The San Diego Water Board agrees that the San Diego Water Board must enforce permit requirements more effectively. By issuing the Tentative Order, the San Diego Water Board expects to be able to reallocate its resources to better enforce permit requirements instead of developing permits and permit requirements. However, the San Diego Water Board also expects the public to provide data, information and evidence that will allow the San Diego Water Board to enforce the requirements of the Tentative Order.	

E2-2: Requests for "clarifications" of illicit discharge detection and elimination requirements.

RESPONSES TO COMMENTS RECEIVED ON TENTATIVE ORDER NO. R9-2013-0001

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E2-2	PROVISION E.2: Illicit Discharge Detection and Elimination	
	COMMENT: <i>Requests for "clarifications" of illicit discharge detection and elimination requirements.</i> The Riverside County and San Diego County Copermittees, the Industrial Environmental Association, the BIA Regulated Community Coalition, and the Los Penasquitos Lagoon Foundation each submitted comment letters recommending minor revisions to the language under Provision E.2 to "clarify" the requirements, or to be consistent the comments regarding non-storm water discharges (see comment Gnl-13).	Building Industry / Industry Industrial Environmental Association BIA Regulated Community Coalition Copermittees Riverside County Copermittees San Diego County Copermittees Environmental Organizations Los Penasquitos Lagoon Foundation
	RESPONSE: The San Diego Water Board reviewed and considered the requests for minor revisions to "clarify" the requirements under Provision E.2. Where the San Diego Water Board determined a revision requested by a commenter was appropriate and necessary to clarify a requirement, clarify a linkage to another requirement, or make it consistent with other revisions made in the Tentative Order, the San Diego Water Board made a revision under Provision E.2. In many cases, the requested revision was not appropriate, not necessary, or both. In such cases, the San Diego Water Board did not revise the language as requested. Please see Provision E.2 in the revised Tentative Order to see where revisions were made. Please also see the responses to the comments that follow, associated with Provision E.2, for revisions that were made for specific parts under Provision E.2.	

E2-3: Requests to more clearly define the responsibility of each Copermittee to address sources non-storm water discharges originating outside of a Copermittee's jurisdiction or control.

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E2-3	PROVISION E.2: Illicit Discharge Detection and Elimination	
	COMMENT: <i>Requests to more clearly define the responsibility of each Copermittee to address sources non-storm water discharges originating outside of a Copermittee's jurisdiction or control.</i> The Riverside County and San Diego County Copermittees each submitted comments requesting modifications to the language under Provisions E.2.b and E.2.d to better define or more clearly define the responsibilities of each Copermittee to address sources of non-storm water discharges originating outside of a Copermittee's jurisdiction or control. The San Diego County Copermittees requested a minor revision to Provision E.2.b.(6) changing "must" to "shall." The San Diego County Copermittees also requested a minor revision to Provision E.2.d.(1)(d) to include a consideration for natural sources in its prioritization of investigations. The Riverside County Copermittees did not include the comments in their comment letter, but did include similar revisions in a track changes version of the Tentative Order provided with their comments. The Riverside County Copermittees requested additions to Provision E.2.d.(3) to specify that a Copermittee is no longer responsible for eliminating a non-storm water discharge to its jurisdiction if the source is in an upstream jurisdiction, and allowing the Copermittee to charge the San Diego Water Board for identifying non-storm water discharges subject to the regulatory authority of the San Diego Water Board.	Copermittees Riverside County Copermittees San Diego County Copermittees
	RESPONSE: The San Diego Water Board disagrees with the requests. Revision of Provision E.2.b.(6) to change "must" to "shall" is unnecessary. In either case, the San Diego Water Board would interpret the language as the Copermittee is required to implement Provision E.2.b.(6). Revision of Provision E.2.d.(1)(d) is unnecessary. Provisions E.2.d.(1)(a)-(e) are the criteria that the Copermittee must consider in its prioritization of follow-up investigations. Nothing in Provisions E.2.d.(1)(a)-(e) prohibit the Copermittee from considering natural sources as part of its prioritization of follow-up investigations. The recommended revisions to Provision E.2.d.(3) are not necessary or appropriate. Provision E.2.b.(6) already requires the Copermittee to coordinate with upstream Copermittees to prevent illicit discharges to the MS4 within its jurisdiction. In addition, Provision E.1.a.(4) requires the Copermittee to "Control through interagency agreements among coapplicants the contribution of pollutants from one portion of the municipal system to another portion of the municipal system." The federal regulations require the Copermittees to enter into	

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E2-3	PROVISION E.2: Illicit Discharge Detection and Elimination	
	interagency agreements to control pollutants from one Copermittee's jurisdiction to another Copermittee's jurisdiction. The request to allow a Copermittee to charge the San Diego Water Board for implementing an investigation of non-storm water discharges to its MS4 is inappropriate. Each Copermittee is required to effectively prohibit non-storm water discharges to their MS4s by enforcing its legal authority, unless a non-storm water discharge is authorized under an NPDES permit. If a non-storm water discharge originates from a source that is subject to the San Diego Water Board's authority and requires an NPDES permit, then the Copermittee is still responsible for identifying the source if it is resulting in a non-storm water discharge into and from the Copermittee's MS4. If the non-storm water discharge is not authorized under an NPDES permit, then it is an illicit discharge. The Copermittee must either eliminate the illicit discharge or require the discharger to obtain authorization from the San Diego Water Board under an NPDES permit. If a non-storm water discharge to the Copermittee's MS4 is an NPDES permitted discharge, then the Copermittee is responsible for demonstrating that the non-storm water discharge is not an illicit discharge by identifying the source as an NPDES permitted discharge. The Copermittee must provide the data and documentation to demonstrate that non-storm water discharges from its MS4 are authorized under separate NPDES requirements. Until the Copermittee demonstrates that a non-storm water discharge is an NPDES-permitted discharge, the Copermittee is responsible for the non-storm water discharge. The non-storm water source investigation and identification are part of the Copermittee's responsibility to demonstrate compliance with the requirements in the Tentative Order. The San Diego Water Board did not revise Provisions E.2.b or E.2.d.	

PROVISION E.2.a: Non-Storm Water Discharges

E2a-1: Request to allow the Copermittees to "encourage" instead of "require" air conditioning condensate non-storm water discharges be directed to landscaped areas or other impervious surfaces.

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E2a-1	PROVISION E.2.a: Non-Storm Water Discharges	
	COMMENT: Request to allow the Copermittees to "encourage" instead of "require" air conditioning condensate non-storm water discharges be directed to landscaped areas or other impervious surfaces. The City of National City, the San Diego County Copermittees, the San Diego Unified Port District, and the San Diego Port Tenants Association each submitted comments expressing concerns with requiring air conditioning condensate non-storm water discharges to be directed to landscaped areas or other permeable surfaces, if feasible. The City of National City, the San Diego County Copermittees, and the San Diego Unified Port District requested the language of Provision E.2.a.(4)(a) be revised to encourage instead of require air conditioning condensate non-storm water discharges be directed to landscaped areas or other permeable surfaces. The San Diego County Copermittees also requested the addition of "or to the sanitary sewer" at the end of the requirement. The City of National City opposed this addition. The San Diego Port Tenants Association requested that the requirement be limited to development or re-development projects.	Copermittees City of National City San Diego County Copermittees San Diego Unified Port District Societies/Associations/Coalitions San Diego Port Tenants Association
	RESPONSE: The San Diego Water Board agrees to revise the requirements to encourage instead of require air conditioning condensate non-storm water discharges be directed to landscaped areas or other permeable surfaces. The San Diego Water Board also agrees to add "to the sanitary sewer" as an additional option. The San Diego Water Board disagrees with limiting the requirement to development or re-development projects. Air conditioning condensate non-storm water discharges originate primarily from existing development, and the Clean Water Act requires the Copermittees to effectively prohibit non-storm water discharges to the MS4. Please see Provision E.2.a.(4)(a) in the revised Tentative Order to see the revisions.	

E2a-2: Requests for modifications to requirements of fire-fighting non-storm water discharges.

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E2a-2	PROVISION E.2.a: Non-Storm Water Discharges	
	COMMENT: <i>Requests for modifications to requirements of fire-fighting non-storm water discharges.</i> The Orange County, Riverside County, and San Diego County Copermittees each submitted comments objecting to the requirement to encourage the implementation of BMPs for emergency firefighting discharges and/or the requirement to address non-emergency firefighting discharges from building fire suppression systems as illicit discharges. The County of San Diego and San Diego County Fire Authority also objected to the requirement to encourage implementation of BMPs for emergency firefighting discharges. San Diego Gas and Electric, the Southern California Gas Company, and the San Diego Port Tenants Association also objected to the requirement to address non-emergency firefighting discharges from building fire suppression systems as illicit discharges. The Orange County and Riverside County Copermittees recommended removing Provision E.2.a.(5)(b) and specifying that emergency firefighting non-storm water discharges do not require BMPs and are not prohibited. The San Diego County Fire Authority recommended maintaining the existing requirements in Order No. R9-2007-0001, which is supported by the County of San Diego. The San Diego County Copermittees recommended revising Provision E.2.a.(5)(a)(i) to require the Copermittees to address non-emergency firefighting discharges from building fire suppression systems as illicit discharges “unless BMPs are implemented to prevent the discharge of pollutants to the MS4.” The Riverside County Copermittees, County of San Diego, San Diego County Fire Authority, San Diego Gas and Electric, Southern California Gas Company, and San Diego Port Tenants Association supported the recommendation. The Orange County Copermittees did not provide a similar comment, but recommended that other non-emergency firefighting discharges be addressed by a program developed and implemented by the Copermittee “in conjunction with the local Fire Authority/District.”	Building Industry / Industry San Diego Gas and Electric Southern California Gas Company Copermittees County of San Diego Orange County Copermittees Riverside County Copermittees San Diego County Copermittees San Diego County Fire Authority Societies/Associations/Coalitions San Diego Port Tenants Association
	RESPONSE: The San Diego Water Board has review and considered the recommendations from the commenters. The San Diego Water Board disagrees that the language in Provision E.2.a.(5)(b) requires the implementation of BMPs for emergency fire fighting discharges, or prohibits emergency fire fighting discharges to the MS4. Provision E.2.a.(5)(b) only requires the Copermittees to “encourage” the implementation of BMPs. Provision E.2.a.(5)(b) is a recommendation for the Copermittees to implement, not a requirement for compliance.	

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E2a-2	PROVISION E.2.a: Non-Storm Water Discharges	
	The San Diego Water Board agrees to the recommended revision to Provision E.2.a.(5)(a)(i). The San Diego Water Board does not agree that the recommended revision to Provision E.2.a.(5)(a)(ii) is necessary. The Copermittees would have to develop and implement the program to address non-emergency fire fighting discharges in conjunction or coordination with the local fire authority or fire district. Please see Provision E.2.a.(5) in the revised Tentative Order to see the revisions.	

E2a-3: Clarify that non-storm water discharges authorized by a separate NPDES permit are authorized to be discharged to the MS4.

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E2a-3	PROVISION E.2.a: Non-Storm Water Discharges	
	COMMENT: <i>Clarify that non-storm water discharges authorized by a separate NPDES permit are authorized to be discharged to the MS4.</i> The San Diego Port Tenants Association, San Diego Gas and Electric, and the Southern California Gas Company each submitted comments requesting language in the Tentative Order to specify that non-storm water discharges authorized by separate NPDES permits are authorized to discharge to the MS4.	Building Industry / Industry San Diego Gas and Electric Southern California Gas Company Societies/Associations/Coalitions San Diego Port Tenants Association
	RESPONSE: The San Diego Water Board disagrees that revision to the language in the Tentative Order are necessary or appropriate. Provision A.1.b has been revised to refer to Provision E.2, which is the illicit discharge detection and elimination program requirements that must be implemented by each Copermittee within its jurisdiction to effectively prohibit non-storm water discharges to its MS4. Provision A.1.b also specifies that the Copermittees are required to effectively prohibit non-storm water discharges to the MS4 <i>unless</i> such discharges are authorized by a separate NPDES permit. The San Diego Water Board did not revise the Tentative Order to include additional language.	

E2a-4: Objections to addressing non-storm water discharges related to extraction of groundwater as illicit discharges.

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E2a-4	PROVISION E.2.a: Non-Storm Water Discharges	
	COMMENT: <i>Objections to addressing non-storm water discharges related to extraction of groundwater as illicit discharges.</i> The Orange County, Riverside County, and San Diego County Copermittees each submitted comments objecting to the requirements to address non-storm water discharges related to extraction of groundwater as illicit discharges if they are not identified as sources of pollutants. The City of National City also submitted a comment with a similar objection. The Copermittees also objected to requiring non-storm water discharges related to extraction of groundwater to be enrolled under the General Groundwater Extraction NPDES Permits issued by the San Diego Water Board. The Copermittees recommended several revisions to Provisions E.2.a.(1) and E.2.a.(3) to modify, remove, and/or reorganize the requirements pertaining to non-storm water discharges related to groundwater extraction.	Copermittees City of National City Orange County Copermittees Riverside County Copermittees San Diego County Copermittees
	RESPONSE: The San Diego Water Board disagrees with the recommendations. The Clean Water Act requires NPDES permit for MS4s to effectively prohibit non-storm water discharges to the MS4. As explained in the Fact Sheet, the Phase I Final Rule clarifies that non-storm water discharges through an MS4 are not authorized under the CWA (55 FR 47995): <i>"Today's rule defines the term "illicit discharge" to describe any discharge through a municipal separate storm sewer system that is not composed entirely of storm water and that is not covered by an NPDES permit. Such illicit discharges are not authorized under the Clean Water Act. Section 402(p)(3)(B) requires that permits for discharges from municipal separate storm sewers require the municipality to "effectively prohibit" non-storm water discharges from the municipal separate storm sewer...Ultimately, such non-storm water discharges through a municipal separate storm sewer must either be removed from the system or become subject to an NPDES permit."</i> Thus, all non-storm water discharges that do not have authorization under an NPDES permit must ultimately be removed (i.e. prevented or eliminated) from the MS4 or become subject to an NPDES permit. The requirements under Provisions E.2.a.(1) and E.2.a.(3) are consistent with the Clean Water Act, the Code of Federal Regulations and the clarification in the Phase I Final Rule for non-storm water discharges. The non-storm water categories listed under Provision E.2.a.(1) can be authorized by an NPDES permit because they are extracting groundwater for the purpose of dewatering, and the San Diego Water Board has two NPDES permits that can authorize these types of non-storm water discharges. These are not "conditionally exempt"	

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E2a-4	PROVISION E.2.a: Non-Storm Water Discharges	
	non-storm water discharges as the Copermittees have asserted. If there are non-storm water discharges that result from groundwater extraction for dewatering and do not have authorization under an NPDES permit, the discharge is an illicit discharge. The non-storm water categories listed under Provision E.2.a.(3) generally are expected to be discharged from natural, uncontrollable, or unanticipated sources. Non-storm water discharges from foundation drains and footing drains designed to be above the groundwater table are not generally expected to occur. If they do occur, the Copermittee is expected to implement its illicit discharge detection and elimination program to determine if the discharge is transient or persistent, a source of pollutants or not, and whether the discharge must be eliminated in accordance with its priorities. In general, the requirements under Provision E.2 are focused on the ultimate removal of unauthorized non-storm water discharges to the MS4 to “effectively prohibit” non-storm water discharges to the MS4, as required by the Clean Water Act. The San Diego Water Board is not requiring the Copermittee to enforce any NPDES permits issued by the San Diego Water Board or State Water Board. The Copermittees are only required to enforce their legal authority to prohibit illicit discharges to their MS4s established pursuant to Provision E.1.a.(1). The San Diego Water Board did not revise Provisions E.2.a.(1) or E.2.a.(3).	

E2a-5: Request to allow the Copermittees to focus on elimination of "non-storm water discharges that are a source of pollutants" not "non-storm water discharges."

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E2a-5	PROVISION E.2.a: Non-Storm Water Discharges	
	COMMENT: Request to allow the Copermittees to focus on elimination of "non-storm water discharges that are a source of pollutants" not "non-storm water discharges." The Orange County and Riverside County Copermittees each requested that the requirements under Provision E.2.a be revised to allow the Copermittees to focus on eliminating non-storm water discharges that are a source of pollutants and not require the elimination of all non-storm water discharges. In contrast, the Los Penasquitos Lagoon Foundation requested that the requirements under Provision E.2 provide the Copermittees a mechanism to address illicit discharges regardless of whether or not constituents of concern are present within the flows.	Copermittees Orange County Copermittees Riverside County Copermittees Environmental Organizations Los Penasquitos Lagoon Foundation
	RESPONSE: The San Diego Water Board disagrees with the Copermittees' request. Provision E.2 does provide the Copermittees a mechanism to address illicit discharges regardless of whether or not constituents of concern are present within the flows. However, the Copermittees are required to prioritize the non-storm water discharges that they will address, and eliminate the highest priority non-storm water discharges first. Please see the response to comment E2a-4.	

E2a-6: Request to allow the Copermittees to encourage the control of residential car washing non-storm water discharges through public education.

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E2a-6	PROVISION E.2.a: Non-Storm Water Discharges	
	COMMENT: Request to allow the Copermittees to encourage the control of residential car washing non-storm water discharges through public education. The San Diego County Copermittees submitted a comment requesting the requirements of Provision E.2.a.(4)(b) be revised to allow the Copermittees to encourage the control of residential car washing non-storm water discharges through public education.	Copermittees San Diego County Copermittees
	RESPONSE: The San Diego Water Board reviewed and considered the requested revisions. The San Diego Water Board did not revise Provision E.2.a.(4)(b) as requested, but did make revisions to provide the flexibility to encourage the control of residential car washing non-storm water discharges through public education.	

E2a-7: Request for modification to requirements for swimming pool non-storm water discharges.

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E2a-7	PROVISION E.2.a: Non-Storm Water Discharges	
	<u>COMMENT:</u> <i>Request for modification to requirements for swimming pool non-storm water discharges.</i> The San Diego County Copermittees requested a minor modification to Provision E.2.a.(4)(c) to add the phrase “should be managed as to:” for the non-storm water discharge requirements related to dechlorinated swimming pool discharges.	Copermittees San Diego County Copermittees
	<u>RESPONSE:</u> The San Diego Water Board reviewed and considered the requested revision. The revision to Provision E.2.a.(4)(c) does not provide any additional clarify and is not necessary. The San Diego Water Board did not revise Provision E.2.a.(4)(c) as requested.	

E2a-8: Objections to requiring the prohibition of over-irrigation non-storm water discharges.

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E2a-8	PROVISION E.2.a: Non-Storm Water Discharges	
	COMMENT: <i>Objections to requiring the prohibition of over-irrigation non-storm water discharges.</i> The Riverside County Copermittees and the County of San Diego each submitted comments objecting to eliminating the non-storm water discharge categories associated with over-irrigation, which results in requiring the Copermittees to prohibit over-irrigation non-storm water discharges to the Copermittees' MS4s. The Copermittees requested that the non-storm water discharge categories associated with over-irrigation be put back into Provision E.2.a. In contrast, the Los Penasquitos Lagoon Foundation and the South Laguna Civic Association each submitted comments expressing concerns about the impacts on receiving water due to dry weather flows associated with over-irrigation. The Los Penasquitos Lagoon Foundation noted that dry weather discharges can create serious impacts to the beneficial uses of receiving waters that support salt marsh habitats. The South Laguna Civic Association noted that elevated creek flows originating from over-irrigation result in the discharge of several pollutants to protected creek, estuary and coastal receiving waters.	Copermittees County of San Diego Riverside County Copermittees Environmental Organizations Los Penasquitos Lagoon Foundation South Laguna Civic Association
	RESPONSE: The San Diego Water Board disagrees with the Copermittees' request. The Riverside County Copermittees assert that the Copermittees must identify the categories that are sources of pollutants that should be prohibited, not the San Diego Water Board. The San Diego Water Board disagrees. This is the responsibility of both the San Diego Water Board and/or the discharger. Either the San Diego Water Board or the discharger may identify categories that should be prohibited. The Phase I Rule (55 FR 48037) specifies that "<i>the Director [i.e. San Diego Water Board] may include permit conditions that either require municipalities to prohibit or otherwise control any of these types of discharges where appropriate.</i>" In this case, the San Diego Water Board has identified non-storm water runoff from landscape irrigation, irrigation water, and lawn watering (collectively, "over-irrigation") as a significant source of pollutants discharging to the MS4. The Fact Sheet cites a number of documents, from the state and all three counties of the San Diego Region, to justify the removal of these categories from the list of categories of non-storm water discharges into the MS4 not required to be prohibited. The San Diego Water Board maintains that the documentation cited in the Fact Sheet supports that removal of these categories. However, the comments from the Los Penasquitos Lagoon Foundation and the South Laguna Civic Association also support this conclusion. In addition, the removal of the non-storm water discharge categories associated with over-irrigation has already	

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E2a-8 PROVISION E.2.a: Non-Storm Water Discharges
been adopted in the Orange County and Riverside County MS4 Permits (Order Nos. R9-2009-0002 and R9-2016-0016). The Riverside County Copermittees are already subject to the requirement to prohibit non-storm water discharge categories associated with over-irrigation, so the removal of these categories in the Tentative Order is consistent with their current requirements. Furthermore, the removal of the non-storm water discharge categories associated with over-irrigation is consistent with what is already required to be implemented by the Copermittees. The prohibition is consistent with the Water Conservation in Landscaping Act (AB1881), which required cities and counties to adopt landscape water conservation ordinances prohibiting runoff from inefficient landscape irrigation by January 1, 2010. The cities and counties were required to adopt ordinances that prohibit runoff from "the target landscape" to "adjacent property, non-irrigated areas, walks, roadways, parking lots, or structures." The Copermittees should have already adopted these ordinances and are required to enforce these ordinances to prohibit runoff associated with over-irrigation. The San Diego Water Board did not revise Provision E.2.a to include the non-storm water discharge categories associated with over-irrigation.

E2a-9: *Objection to requirement to reduce or eliminate non-storm water discharges whether or not a non-storm water discharge has been identified as an illicit discharge.***RESPONSES TO COMMENTS RECEIVED ON TENTATIVE ORDER NO. R9-2013-0001**

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E2a-9	PROVISION E.2.a: Non-Storm Water Discharges	
	COMMENT: <i>Objection to requirement to reduce or eliminate non-storm water discharges whether or not a non-storm water discharge has been identified as an illicit discharge.</i> The Orange County, Riverside County, and San Diego County Copermittees each submitted comments objecting the requirement under Provision E.2.a.(7) to reduce or eliminate non-storm water discharges whether or not a non-storm water discharge has been identified as an illicit discharge. The San Diego County Copermittees recommended removing the phrase “whether or not the non-storm water discharge has been identified as an illicit discharge” and the Orange County and Riverside County Copermittees recommended removing Provision E.2.a.(7). In contrast, the Los Penasquitos Lagoon Foundation requested that the requirements under Provision E.2 provide the Copermittees a mechanism to address illicit discharges regardless of whether or not constituents of concern are present within the flows. The Los Penasquitos Lagoon Foundation noted that dry weather freshwater flows themselves can create serious impacts to the beneficial uses of receiving waters that support salt marsh habitats, especially when those flows have been changed from ephemeral to perennial.	Copermittees Orange County Copermittees Riverside County Copermittees San Diego County Copermittees Environmental Organizations Los Penasquitos Lagoon Foundation
	RESPONSE: The San Diego Water Board disagrees with the request to remove Provision E.2.a.(7), but agrees to modify the language. Provision E.2.a.(7) is consistent with Clean Water Act, the Code of Federal Regulations and the clarification in the Phase I Final Rule for non-storm water discharges. Please see response to comment E2a-4. The San Diego Water Board has revised Provision E.2.a.(7). Please see the revisions in the revised Tentative Order.	

E2a-10: Request for modifications to the requirements for water line flushing and water main breaks non-storm water discharges.

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E2a-10	PROVISION E.2.a: Non-Storm Water Discharges	
	COMMENT: <i>Request for modifications to the requirements for water line flushing and water main breaks non-storm water discharges.</i> The Metropolitan Water District of Southern California submitted a request to modify Provision E.2.a.(2) to specify that non-storm water discharges from water purveyors and community water systems are authorized discharges and not illicit discharge if enrolled or regulated under NPDES Permit No. CAG 679001 (Order No. R9-2010-0003).	Other Entities Metropolitan Water District of Southern California
	RESPONSE: The San Diego Water Board disagrees with the request. Provision E.2.a.(2) is specific to the requirement for the Copermittees to identify whether or not a non-storm water discharge resulting from water line flushing or water main breaks are illicit discharges. These are two non-storm water discharge categories specifically identified in the Code of Federal Regulations that the Copermittees are required to address as illicit discharges if they are identified as a source of pollutants. The introductory paragraph to Provision E.2.a already specifies that non-storm water discharges authorized by a separate NPDES permit is not required to be addressed as an illicit discharge. Provision E.2.a.(2) further specifies that water line flushing and water main breaks covered under NPDES Permit No. CAG 679001 (Order No. R9-2010-0003) are not illicit discharges. The San Diego Water Board did not revise Provision E.2.a.(2).	

E2a-11: Request to allow the Copermittees to designate BMPs to be implemented if a category of non-storm water discharges is found to be a source of pollutants instead of requiring a prohibition of the category of non-storm water discharges.

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E2a-11 PROVISION E.2.a: Non-Storm Water Discharges	
COMMENT: <i>Request to allow the Copermittees to designate BMPs to be implemented if a category of non-storm water discharges is found to be a source of pollutants instead of requiring a prohibition of the category of non-storm water discharges.</i> San Diego Gas and Electric and the Southern California Gas Company each submitted comments requesting Provision E.2.a.(6) be modified to provide an alternative that would allow the Copermittees to designate BMPs to be implemented if a category of non-storm water discharges is found to be source of pollutants, instead of requiring a prohibition of the category of non-storm water discharges.	Building Industry / Industry San Diego Gas and Electric Southern California Gas Company
RESPONSE: The San Diego Water Board reviewed and considered the requested revision. The San Diego Water Board has revised Provision E.2.a.(6) to allow the Copermittees to propose controls to be implemented if a category of non-storm water discharges is found to be a source of pollutants. Please see Provision E.2.a.(6) in the revised Tentative Order.	

PROVISION E.3: Development Planning

E3-1: Requests for "clarifications" for development planning requirements.

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E3-1	PROVISION E.3: Development Planning	
	COMMENT: <i>Requests for "clarifications" for development planning requirements.</i> The Copermittees and others have submitted numerous recommendations for revisions to provide "clarity," improve readability, or correct the language in Provision E.3 of the Tentative Order.	Building Industry / Industry Building Industry Association of Southern California San Diego Green Building Council Copermittees City of Chula Vista Orange County Copermittees Riverside County Copermittees San Diego County Copermittees Engineering/Design Consultants Contech Engineered Solutions
	RESPONSE: The San Diego Water Board has reviewed and considered all the recommendations submitted by the commenters. In cases where the San Diego Water Board agreed that the recommendations would improve readability and were consistent with the intent of language or requirement, the recommendations were incorporated. In instances where the San Diego Water Board disagreed with the recommendations, the language in the Tentative Order was not changed.	

E3-2: *Requests for revisions to allow the construction of BMPs in waters of the state.***RESPONSES TO COMMENTS RECEIVED ON TENTATIVE ORDER NO. R9-2013-0001**

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E3-2	PROVISION E.3: Development Planning	
	COMMENT: <i>Requests for revisions to allow the construction of BMPs in waters of the state.</i> The San Diego County Copermittees and the BIA Regulated Community Coalition have requested that Provision E.3.a.(1)(b) be revised to allow the implementation of structural BMPs within waters of the state, since the definition of waters of the state is broad and could be interpreted to prohibit storm drain inserts and other common BMPs. The requested revision that “BMPs must not be constructed within a waters of the U.S. unless authorized by the San Diego Water Board Executive Officer” is consistent with the San Diego Water Board’s 401 Certification Program and would protect natural receiving waters from construction and the use of such waters to transport pollutants.	Building Industry / Industry BIA Regulated Community Coalition Copermittees City of Chula Vista San Diego County Copermittees
	RESPONSE: The San Diego Water Board agrees with this comment and has modified the language in the Tentative Order accordingly.	

E3-3: Requests for revisions to *Priority Development Project inventory requirements***RESPONSES TO COMMENTS RECEIVED ON TENTATIVE ORDER NO. R9-2013-0001**

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E3-3	PROVISION E.3: Development Planning	
	<u>COMMENT:</u> <i>Requests for revisions to Priority Development Project inventory requirements.</i> The San Diego County Copermittees have requested that the Tentative Order be revised such that updates to Priority Development Project databases occur “regularly” instead of “at least annually.” Additionally, the City of Chula Vista requested the start date for Priority Development Project inventory begin December 2002 instead of January 2002, to reflect the start date for the San Diego County Copermittees’ regulatory oversight process pursuant to Order No. 2001-01.	Copermittees City of Chula Vista San Diego County Copermittees
	<u>RESPONSE:</u> The San Diego Water Board disagrees that the frequency of updates to project inventories should be less frequent than on an annual basis. However, the San Diego Water Board agrees with the request that the start date be changed for San Diego County Copermittees and has revised the language in the Tentative Order appropriately.	

PROVISION E.3.b: Priority Development Projects

E3b-1: Requests for revisions to development planning requirements to include different requirements for transportation projects.

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E3b-1	PROVISION E.3.b: Priority Development Projects	Building Industry / Industry San Diego Green Building Council Copermittees City of Dana Point City of Imperial Beach Orange County Copermittees Riverside County Transportation Department
	COMMENT: <i>Requests for revisions to development planning requirements to include different requirements for transportation projects.</i> The San Diego County and Orange County Copermittees, the Riverside County Transportation Department, and others commented that transportation projects should be exempt from the requirement to implement pollutant control and hydromodification management BMPs set forth in the Tentative Order. Commenters contend that transportation projects should be allotted special consideration because, unlike other types of projects, they must also consider various design constraints having to do with limited right-of-way, utilities, street trees, fire truck access, and general public safety. Commenters recommended that transportation projects be held to USEPA Green Streets guidance as the design requirement.	
	RESPONSE: The San Diego Water Board generally agrees with the commenters regarding the unique constraints associated with existing roadways. The Tentative Order has been revised to provide an exemption from the Priority Development Project designation for projects where retrofitting of existing paved alleys, streets, or roads are designed and constructed in accordance with USEPA Green Street guidance. However, this exemption is only allowed for existing road and not new ones. This is because new roads are not yet spatially constrained and should be able to incorporate the pollutant control and hydromodification management BMPs during the planning stages. The Tentative Order also allows the Copermittees to incorporate alternative compliance options during the planning stages of the new road projects. The San Diego Water Board maintains that controlling pollutants and managing flows coming from roads is critical because roads are significant sources of pollutants and add significant new impervious surfaces. Commenters should also note that routine maintenance activities associated with transportation projects such as maintaining original line and grade, or repairing potholes, is not considered a Priority Development Project and is not subject to any structural BMP requirements.	

E3b-2: Request for a clear definition of "directly discharges to" an Environmentally Sensitive Area (ESA).

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E3b-2	PROVISION E.3.b: Priority Development Projects	
	<u>COMMENT:</u> Request for a clear definition of "directly discharges to" an Environmentally Sensitive Area (ESA). The San Diego County Copermittees and the City of Imperial Beach have requested that Provision B.3.b.(1) be revised to clearly define "directly discharges to" an ESA. The Copermittees are concerned that language in the Tentative Order is confusing and can be misinterpreted.	Copermittees City of Imperial Beach San Diego County Copermittees
	<u>RESPONSE:</u> The San Diego Water Board agrees with the comment. The San Diego Water Board revised the language in Provision B.3.b.(1) to more clearly define "directly discharges to."	

E3b-3: Requests for modifications to the types of projects defined as Priority Development Projects and subject to the storm water pollutant control and hydromodification management structural BMP requirements.

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E3b-3	PROVISION E.3.b: Priority Development Projects	
	COMMENT: <i>Requests for modifications to the types of projects defined as Priority Development Projects and subject to the storm water pollutant control and hydromodification management structural BMP requirements.</i> The San Diego County, Orange County, and Riverside County Copermittees, several individual Copermittees, members of the Building Industry, Industry, Clean Water Now, and Engineering/Design Consultants submitted comments regarding the types of projects defined as Priority Development Projects. Clean Water Now expressed concern with the types of projects that are considered Priority Development Projects. The Copermittees, Building Industry, and Engineering/Design Consultants provided recommendations for the types of projects that should be defined as Priority Development Projects and therefore subject to the storm water pollutant control and hydromodification management structural BMP requirements, and the types of projects that should be exempt from those requirements. The Copermittees made several comments on this topic, which are summarized below: • Single family residences should be exempt because the requirements are complex and difficult for the regular homeowner to understand, and that the potential for pollutant generation is considerably less than an industrial or commercial site; • Driveways should not be included as Priority Development Projects because, unlike roads, driveways experience low daily trips. The Copermittees suggest implementing a lower performance standard for BMPs implemented on driveways than other Priority Development Projects; • The Tentative Order should include qualifiers for parking lots that would trigger Priority Development Project status only if they were uncovered; • Maintenance access roads should be exempt; • The Tentative Order should allow exemptions for parking lots and other projects that are constructed with permeable surfaces; • The Tentative Order should allow exemptions for flood control and emergency projects; • The exemptions allowed for LEED certified single family residences is inappropriate because the program encompasses other environmental considerations, and are outside the scope of storm water permitting; • Triggers for Priority Development status should be simultaneously based on soil type and square footage of impervious surface; • The Tentative Order should allow exemptions for "Watershed Protection Projects" that are undertaken to rehabilitate or prevent environmental, social, and economic damage to the watershed;	Building Industry / Industry American Society of Landscape Architects San Diego Green Building Council San Diego Gas and Electric Company Southern California Gas Company Copermittees City of Chula Vista City of Imperial Beach City of Poway Orange County Copermittees Riverside County Copermittees San Diego County Copermittees Environmental Organizations Clean Water Now Engineering/Design Consultants Contech Engineered Solutions Project Design Consultants

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E3b-3	PROVISION E.3.b: Priority Development Projects	
	The hillside development category should be removed because it is not needed. Some Engineering/Design Consultants suggested that Priority Development Projects be exempt if they are designed and constructed with specific materials or a voluntary certification program. San Diego Gas and Electric and the Southern California Gas Company commented that linear underground/overhead (utility) projects should be exempt from Priority Development Project status due to the nature of their construction.	
	RESPONSE: The San Diego Water Board generally disagrees with the requests to remove some project categories from Provision E.3.b, or to exempt certain types of projects from the requirement to implement storm water pollutant control and hydromodification management BMPs. Such BMPs are needed to protect water quality. The list of project categories in Provision E.3.b represents projects that result in the creation of significant areas of impervious surface and/or are pollutant generating in nature, which in turn contributes to pollutants in storm water discharges and altered flow regimes that cause accelerated erosion of channel bed and banks, and consequently degraded stream conditions. With the exception of driveways, the Priority Development Project categories have not changed substantially in San Diego Water MS4 permits. Provision E.3.b of the Tentative Order is consistent with the Fourth Term MS4 permits adopted by the San Diego Water Board for Orange County and Riverside County. Driveways were added as to the Priority Development Project categories because, although they experience much less traffic than roads, they still generate pollutants and create significant impervious surfaces that can impact downstream receiving waters, and must be mitigated. Similarly, even covered parking lots cause impacts for which mitigation is needed because rooftops also add to the impervious surface footprint. Research shows that even incremental increases in impervious surface, as low as 3-5 percent of the watershed area in the semi-arid climate of southern California, can result in degradation of receiving streams (Stein, E. and Zaleski, S., 2005. Technical Report 475, Managing Runoff to Protect Natural Streams: The Latest Development on Investigation and Management of Hydromodification in California. December 30, 2005.). Creation of impervious surface is a concern to the San Diego Water Board and construction with pervious materials that allow infiltration and other natural hydrologic processes are preferred. There is no need to exempt parking lots and other projects constructed with pervious materials from Priority Development Project status because they are not considered Priority Development Projects in the first place. Similarly, maintenance access roads as well as the majority of linear utility projects are not Priority Development Projects because they do not necessarily result in the placement of impervious surfaces above the threshold square footages	

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E3b-3	PROVISION E.3.b: Priority Development Projects	
	associated with Priority Development Projects. Priority Development Project status is based on both the type of project being built and associated pollutants anticipated to be generated, and a threshold for the creation or replacement of impervious surface. Soil type comes into play in terms of meeting the retention requirement, which is discussed in the response to comment E3c1-1. The San Diego Water Board disagrees with the recommendation to define Priority Development Projects by soil type because this is accounted for in the size and type of BMPs as dictated by the retention requirement. The San Diego Water Board disagrees that hillside development projects should be exempt. These projects are susceptible to causing accelerated erosion and therefore must implement structural BMPs. The San Diego Water Board further disagrees that there should be exemptions for emergency projects or flood control projects. Provision E.3 describes requirements that pertain to development planning. Emergency situations, by definition, are not planning exercises and therefore do not involve the design and construction of a building or structure. The San Diego Water Board believes that it may be suitable to relax the structural BMP standards for, or exempt flood control projects, but not before projects are evaluated on a case-by-case basis. In many instances, environmentally friendly practices may be appropriate for implementation in flood control projects, but a variety of options would not be evaluated if the Tentative Order provided a blanket exemption. The San Diego Water Board disagrees that an exemption from the Priority Development Project structural BMP requirements should be provided for all single family residences. The definition of Priority Development Projects in the Tentative Order already excludes a majority of single family residences that may be developed or redeveloped. New single family residences must create 10,000 square feet or more of impervious surface, or 5,000 square feet or more of impervious surface as a Hillside Development, or 2,500 square feet or more of impervious surface if discharging directly to an Environmental Sensitive Area to be defined as a Priority Development Project. Redevelopment single family residence projects must create or replace 5,000 square feet or more of impervious surface, or 2,500 square feet or more of impervious surface if discharging directly to an Environmental Sensitive Area to be defined as a Priority Development Project. Single family residences that are defined as Priority Development Projects can have a significant impact on receiving water quality and it is appropriate for these projects to implement the Priority Development Project structural BMP requirements. The San Diego Water Board removed language pertaining to the option for single family residences to be designed and constructed with LEED certification to qualify as exempt from Priority Development Project status.	

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E3b-3	PROVISION E.3.b: Priority Development Projects	
	This is because several commenters stated that including this requirements was outside the scope of water quality regulation, and that the LEED program was too specific of a certification requirement. To avoid any inconsistency regarding equivalent certification programs and for more streamlined requirements, this option, and hence the exemption allowed for single family residences, was removed. Single family residences large enough to trigger the size thresholds associated with Priority Development Projects are a source of pollutants and altered flow regimes, and therefore must be required to implement structural BMPs. The Copermittees must inspect such BMPs as part of their oversight programs to ensure that homeowners are properly maintaining the BMPs and the BMPs continue to operate as designed in order for the Copermittees to meet the MEP standard of the Clean Water Act. Finally, the San Diego Water Board disagrees that there should be an exemption for "Watershed Protection Projects." The commenters should note that Priority Development Projects are not only defined by square footage of impervious surface, but also the type of project being constructed. The types of projects described in the comment, such as erosion mitigation, restoration of rivers and ecosystems, or groundwater recharge, do not need to be explicitly provided exemptions because they would not be considered Priority Development Projects in the first place if they do not create or replace impervious surface in exceedance of the thresholds in the Tentative Order. The San Diego Water Board has also revised the Tentative Order to allow the Copermittees to provide exemptions for all types of projects. The Copermittees have the ability to exempt projects from meeting the hydromodification management requirements in areas where they have deemed it appropriate to do so. However, in order to utilize this option, Copermittees must first perform the optional Watershed Management Area Analysis described in Provision B.3.b.(4). Please see the response to Comment E3c-2 for further discussion of this option.	

E3b-4: *Redevelopment Priority Development Projects that were subject to previous structural BMP requirements should not be subject to new structural BMP requirements.***RESPONSES TO COMMENTS RECEIVED ON TENTATIVE ORDER NO. R9-2013-0001**

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E3b-4	PROVISION E.3.b: Priority Development Projects	
	COMMENT: <i>Redevelopment Priority Development Projects that were subject to previous structural BMP requirements should not be subject to new structural BMP requirements.</i> The San Diego County, Orange County, and Riverside County Copermittees each submitted comments requesting that language be added to the Tentative Order that would specify structural BMP requirements are not applicable to Priority Development Projects (or portions thereof) if the project already has implemented structural BMPs pursuant to requirements of prior MS4 permits.	Copermittees Orange County Copermittees Riverside County Copermittees San Diego County Copermittees
	RESPONSE: The San Diego Water Board disagrees in concept with the Copermittees' request. Although some projects may already have structural BMPs onsite, the performance requirements of those BMPs do not necessarily meet the requirements of the Tentative Order. Order No. R9-2007-0001 does not have the numerical storm water pollutant control retention performance standard, therefore redevelopment sites that were subject to Order No. R9-2007-0001 must update their BMPs during the design phase. In some cases, redevelopment projects will already have BMPs that meet the storm water pollutant control and hydromodification management BMP requirements. In these instances, the requirements of the Tentative Order are met and there is no need to change the language.	

PROVISION E.3.c: Priority Development Project Structural BMP Performance Requirements

E3c-1: The Tentative Order ignores regional comprehensive plans developed by municipalities and SANDAG.

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E3c-1	PROVISION E.3.c: Priority Development Project Structural BMP Performance Requirements	
	COMMENT: <i>The Tentative Order ignores regional comprehensive plans developed by municipalities and SANDAG.</i> The Jamul Dulzura Community Planning Group and Julian Community Planning Group assert that the requirements in the Tentative Order are contradictory to plans developed by SANDAG and subsequently included in General Plans that include sound principles such as encouraging redevelopment. The Tentative Order's requirements amount to punishing or dis-incentivizing urban infill projects.	Community Planning Groups Jamul Dulzura Community Planning Group Julian Community Planning Group
	RESPONSE: The San Diego Water Board strongly disagrees that the requirements in the Tentative Order are contradictory to principles advocated in regional planning documents. In fact, the Tentative Order is heavily based on planning at the watershed scale, as represented in the Water Quality Improvement Plan requirements. The Tentative Orders increases flexibility for the Copermittees to address urban infill and redevelopment projects by not mandating only on-site BMPs. Redevelopment projects will be required to implement structural BMP requirements that are needed to protect downstream water quality. However, if a Copermittee finds that implementation of the required BMPs fully onsite will not result in meaningful improvements in either pollutant control or hydromodification management, then that Copermittee has the option to allow compliance elsewhere in the watershed where more substantial improvements can take place. There are no additional requirements for redevelopment projects versus new projects, therefore redevelopment projects are not being penalized, as suggested by the commenters. Furthermore, the Tentative Order has been revised to include an exemption from hydromodification management BMP requirements for Priority Development Projects that discharge to conveyance channels whose bed and bank are concrete lined all the way from the point of discharge to water storage reservoirs, lakes, enclosed embayments, or the Pacific Ocean. Additionally, more exemptions could be included on a watershed-specific basis if the Copermittees in the Watershed Management Area elect to perform the optional Watershed Management Area Analysis as described in Provision B.3.b.(4). Please see the response to Comment E3c-2 for further discussion of these options.	

E3c-2: Request for requirements that allow development of watershed-specific structural BMP performance standards in Water Quality Improvement Plans.

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E3c-2	PROVISION E.3.c: Priority Development Project Structural BMP Performance Requirements	
	COMMENT: Request for requirements that allow development of watershed-specific structural BMP performance standards in Water Quality Improvement Plans. The Orange County and San Diego County Copermittees assert that the Tentative Order requires a “one-size-fits-all” approach and request that the Tentative Order allows for watershed-specific performance requirements for structural BMPs. Members of the Building Industry, the City of Imperial Beach, Engineering/Design Consultants, Societies/Associations/Coalitions, and Other Entities requested or expressed support for a similar concept. The Environmental Groups support including alternative compliance options that provide “off-ramps” for the baseline “one size fits all” structural BMP performance requirements.	Building Industry / Industry American Society of Landscape Architects Copermittees City of Imperial Beach Orange County Copermittees San Diego County Copermittees Environmental Organizations Environmental Groups Engineering/Design Consultants Latitude 33 Planning and Engineering Project Design Consultants Societies/Associations/Coalitions BIOCOM Other Entities Carol Crossman Gable PR Hughes Marino Marston+Marston Nuffer, Smith, and Tucker San Diego Regional Chamber of Commerce Sheppard, Mullin, Richter & Hampton LLP Southern Cross Property Consultants Transition IT
	RESPONSE: The San Diego Water Board disagrees that the Tentative Order requires a “one-size-fits-all” approach for the implementation of structural BMPs. For the Priority Development Project structural BMP performance requirements, site specific conditions must be taken into account upon selecting appropriate BMPs. Provision E.3.c.(1)(a), which describes requirements for storm water pollutant control, the Tentative Order states that: “Each Priority Development Project must be required to implement LID BMPs that are designed to retain (i.e. intercept, store, infiltrate, evaporate, and evapo-transpire) onsite the volume of storm water runoff produced from a 24-hour 85th percentile storm event (design capture volume).” While each Priority Development Project must retain the volume of storm water runoff produced from the 24-hour 85th percentile storm, the actual volume retained will vary based on site specific factors, namely soil type and associated infiltration rates. The requirement to retain the volume of water associated with this size storm is appropriate for the reasons stated in the response to comment E3c1-1.	

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E3c-2	PROVISION E.3.c: Priority Development Project Structural BMP Performance Requirements	
	Similarly, Provision E.3.c.(2)(a), which describes requirements for hydromodification management, states that: <i>“Post-project runoff flow rates and durations must not exceed pre-development runoff flow rates and durations by more than 10 percent (for the range of flows that result in increased potential for erosion, or degraded instream habitat conditions downstream of Priority Development Projects).”</i> This requirement involves implementing BMPs for “the range of flows that result in increased potential for erosion,...” which is necessarily a site-specific requirement. The range of flows that cause downstream erosion from one Priority Development Project may be different than the range of flows that cause erosion from another Priority Development Project located in a different area in the watershed. Therefore, very different BMPs might be required from the two sites. The San Diego Water Board agrees that greater improvements to water quality in the watersheds may be realized if Priority Development Projects were allowed to implement some requirements offsite, as opposed to strictly onsite. For this reason, the Tentative Order allows for “alternative compliance” in instances where the Copermittee determines that offsite measures will have a greater overall water quality benefit for the Watershed Management Area than if the Priority Development Project were to implement structural BMPs onsite. Consequently, watershed-specific structural BMP requirements are present in the Tentative Order in the form of allowable compliance offsite. The “alternative compliance program” has been substantially re-written for simplicity, and also to better align this program with the planning efforts of the Copermittees in the Water Quality Improvement Plans. The alternative compliance program, which is described in Provision E.3.c.(3), is an option for Priority Development Projects where the Copermittee has participated in the development of a Watershed Management Area Analysis as part of the Water Quality Improvement Plan (described in Provision B.3.b.(4)). Such an approach is consistent with the latest findings in hydromodification management by the scientific community. In the Southern California Coastal Water Research Project (SCCWRP) Technical Report No. 667, authors state: <i>“An effective [hydromodification] management program will likely include combinations of on-site measures (e.g., low-impact development techniques, flow-control basins), in-stream measures (e.g., stream habitat restoration), floodplain and riparian zone actions, and off-site measures. Off-site measures may include compensatory mitigation measures at upstream locations that are designed to help restore and manage flow and sediment yield in the watershed.”</i> Consistent with the ideas brought forth by the SCCWRP report, in the Watershed Management Area Analysis of Provision B.3.b.(4), which is optional, the Copermittees will develop watershed maps that include as much detail	

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E3c-2	PROVISION E.3.c: Priority Development Project Structural BMP Performance Requirements
	about factors that affect the hydrology of the watersheds as is available. Such factors included identification of areas suitable for infiltration, coarse sediment supply areas, and locating stream channel structures and constrictions. Once these factors are mapped and studied, the Copermittees can identify areas in the watersheds where “candidate projects” may be implemented that are expected to improve water quality in the watershed by providing more opportunity for infiltration, slowing down storm water flows, or attenuation of pollutants naturally via healthy stream habitat. These projects may be in the form of retrofitting existing development, rehabilitating degraded stream segments, identifying regional BMPs, purchasing land to preserve valuable floodplain functions, and any other projects that the Copermittees identify. Under the alternative compliance program, Priority Development Projects may be allowed to fund, partially fund, or implement a candidate project, in lieu of implementing structural BMPs onsite, if they enter into a voluntary agreement with the Copermittee permitting this arrangement. If compliance involves funding or implementing a project that is outside the jurisdiction of the Copermittee, then that Copermittee may enter into an inter-agency agreement with the appropriate jurisdiction(s). In response to several comments, the Tentative Order has been revised to include an exemption from hydromodification management BMP requirements for Priority Development Projects that discharge to conveyance channels whose bed and bank are concrete lined all the way from the point of discharge to water storage reservoirs, lakes, enclosed embayments, or the Pacific Ocean. Provision B.2.b.(4) provides an optional Watershed Management Area Analysis that may allow the Copermittees to identify additional areas within the watershed where it is appropriate to exempt Priority Development Projects from implementing hydromodification management BMPs. Exemptions other than the ones specified in the Tentative Order, then, would be applicable on a watershed basis, and would require supporting rationale. In summary, the Tentative Order includes requirements for site-specific structural BMP requirements and exemptions. In order for them to be realized, the Copermittees must perform up-front analysis to support both the alternative compliance program and watershed-specific hydromodification management BMP exemptions. The San Diego Water Board believes that this approach will allow for meaningful improvement to water quality in the watersheds, as well as the efficient use of resources for innovative projects, as opposed to requiring structural BMPs to be fully implemented on all sites.

E3c-3: Request for modifications to Priority Development Project structural BMP infiltration and groundwater protection pre-treatment requirements.

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E3c-3	PROVISION E.3.c: Priority Development Project Structural BMP Performance Requirements	
	COMMENT: Request for modifications to Priority Development Project structural BMP infiltration and groundwater protection pre-treatment requirements. The San Diego County Copermittees and the City of National City commented that pre-treatment for infiltration BMPs on areas of industrial or light industrial activity should only be required if significant pollutant levels are present or if source control BMPs will not provide pre-treatment. Contech Engineer Solutions expressed concern that without clear and specific pre-treatment standards for infiltration BMPs, the Copermittees will accept pre-treatment systems that will require significant maintenance to ensure proper operation. Contech Engineer Solutions recommended very specific design standards for pre-treatment systems.	Copermittees City of National City San Diego County Copermittees Engineering/Design Consultants Contech Engineered Solutions
	RESPONSE: The San Diego Water Board agrees with the Copermittees comments. The San Diego Water Board conceptually agrees with Contech Engineered Solutions, but disagrees that including such specific design standards are necessary. The San Diego Water Board has revised Provision E.3.c.(5)(a)(vi) to allow infiltration BMPs on industrial or light industrial areas if source control BMPs will not expose groundwater to activities that are a high threat. The San Diego Water Board did not revise Provision E.3.c.(5)(a)(i). The Copermittees are required to inspect BMPs at Priority Development Projects to confirm they continue to operate as designed. If structural BMPs on Priority Development Projects are not properly maintained, the Copermittees must enforce its ordinances to achieve compliance with its ordinances and the requirements of the Tentative Order.	

E3c-4: General concerns associated with development planning structural BMP performance requirements.

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E3c-4	PROVISION E.3.c: Priority Development Project Structural BMP Performance Requirements	
	COMMENT: <i>General concerns associated with the development planning structural BMP performance requirements.</i> Comments from members of the Building Industry, Community Planning Groups, the Copermittees, Environmental Organizations, State Government, Societies/Associations/Coalitions, and Other Entities expressed various concerns about the development planning structural BMP performance requirements for Priority Development Projects. Several commenters expressed concerns with the potential costs associated with enforcing and implementing the changing requirements for development projects, or the uncertainty of the impacts of those new requirements. The South Laguna Civic Association expressed concern that the current development planning requirements are already resulting in the degradation and destruction of creeks, wetlands, and coastal habitats. David Akers, P.E., expressed concern with current practices and supports requirements that will result in sustainable development. The City of Chula Vista questioned what should be done water collected in rain barrels and other retention facilities if there is a lack of demand during the rainy season.	Building Industry / Industry Associated General Contractors of America Community Planning Groups Julian Community Planning Group Ramona Community Planning Group Copermittees City of Chula Vista County of San Diego Orange County Copermittees Environmental Organizations Clean Water Now South Laguna Civic Association Engineering/Design Consultants David J. Akers, P.E. State/Federal Government Senator Mark Wyland Societies/Associations/Coalitions San Diego Association of Realtors South County Economic Development Council Other Entities Carol Crossman Continental Maritime of San Diego Nuffer, Smith, and Tucker Sheppard, Mullin, Richter & Hampton LLP Southern Cross Property Consultants
	RESPONSE: The San Diego Water Board understands the concerns that have been expressed by the commenters. Most of the requirements in the Tentative Order are not new to the San Diego Region. The Tentative Order incorporates many existing requirements from the MS4 permits in Orange and Riverside Counties. However, the Tentative Order also provides the Copermittees with more flexibility to use their limited resources in the most effective and efficient manner to protect the quality of the San Diego Region's receiving waters. The commenters generally are concerned with the costs of implementing the development planning structural BMP performance requirements, but do not consider the costs of not addressing impacts that have been caused by existing development, and may be caused by future development. The San Diego Water Board has significantly modified the structure and focus of the requirements in the Tentative Order to allow the	

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E3c-4	PROVISION E.3.c: Priority Development Project Structural BMP Performance Requirements	
	Copermittees to more efficiently and cost effectively utilize their resources, which is expected to result in the realization of significant cost savings that could not be realized in the existing MS4 permits. The development planning structural BMP performance requirements have also evolved significantly since 2001 because of the degradation and destruction of creeks, wetlands, and coastal habitats that have been observed as developed areas have expanded. Thus, the Tentative Order not only includes development planning requirements to protect against impacts to receiving waters that may be caused by future development, but also includes requirements that begin to address impacts that are being caused by existing development. The Tentative Order will allow the Copermittees to address existing development and new develop with a watershed-scale approach that is expected to lead to more sustainable configurations of the watersheds in the San Diego Region over the long term. The question posed regarding the use of retained storm water if there is a lack of demand is not new. The municipalities and several agencies in the San Diego Region have also posed questions about what can be done to address the sustainable water supply concerns that are being expressed as the population grows and demand for water increases. There may be ways to potentially link the two issues to create solutions to address the problems. The Tentative Order was developed to provide the flexibility that will allow the Copermittees to work with other agencies to perhaps identify solutions with mutual benefits.	

PROVISION E.3.c.(1): Storm Water Pollutant Control BMP Requirements

E3c1-1: Objections with storm water pollutant control retention BMP performance requirements for Priority Development Projects.

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E3c1-1	PROVISION E.3.c.(1): Storm Water Pollutant Control BMP Requirements	
	COMMENT: <i>Objections with storm water pollutant control retention BMP performance requirements for Priority Development Projects.</i> The San Diego County, Orange County, and Riverside County Copermittees and Engineering/Design Consultants contend that the storm water pollutant control retention requirement is infeasible for many Priority Development Projects due to poor soil types and other factors. The Industrial Environmental Association asserts that the Tentative Order does not provide sufficient detail for consistency among Copermittees in evaluating conditions for technical infeasibility. The Copermittees have requested that the term “runoff” be included in the description of “design capture volume.” Other commenters stated that the retention standard will result in runoff “starved” receiving waters. Commenters also stated that the requirement to increase bioretention by 25 percent is arbitrary and without basis. Conversely, Natural Resources Defense Council argues that retention of the 85th percentile storm event is an appropriate performance standard and should be required at all sites, regardless of the specific site conditions. David Aker, P.E., also supports the requirement to retain storm water and contends that it is essential for sustainable development.	Building Industry / Industry BIA Regulated Community Coalition Building Industry Association of Southern California, Inc. Industrial Environmental Association Otay Land Company Otay Ranch New Homes San Diego Green Building Council Copermittees City of Chula Vista City of Vista County of San Diego Orange County Copermittees Riverside County Copermittees San Diego County Copermittees San Diego Unified Port District Environmental Organizations Natural Resources Defense Council Engineering/Design Consultants Contech Engineered Solutions David J. Akers, P.E. State/Federal Government USEPA
	RESPONSE: The San Diego Water Board disagrees with the Copermittees that the retention standard, as written in the Tentative Order, is inappropriate. The San Diego Water Board has recognized that the retention of the 85th percentile storm event is MEP, and already incorporated the performance standard in both the Orange County and Riverside County MS4 permits. Other MS4 permits in southern California (e.g., Ventura County, Los Angeles County) incorporate similar performance standards, and it is supported by USEPA. Commenters should note that under the Alternative Compliance Program described in Provision E.3.c.(3), Priority Development Projects will have the option to perform mitigation offsite <i>“if the Copermittee determines that the offsite project will have a greater overall water quality benefit for the Watershed Management Area than implementing BMPs onsite.”</i> Theoretically, a Priority Development Project could make the case that retention of the design capture storm is not feasible, or that doing so would result in an unnatural water balance, therefore	

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E3c1-1 PROVISION E.3.c.(1): Storm Water Pollutant Control BMP Requirements
offsite compliance is preferred. This option is only available to the Priority Development Project if the Copermittee elects to offer it. The San Diego Water Board disagrees that the Tentative Order should provide detail on what constitutes infeasibility because the Copermittees have the experience to make these determinations, and are free to develop consistency standards if the need arises. Language regarding the application of a site specific retention standard was removed because several commenters argued, and the San Diego Water Board agreed, that the analyses could be subjective and introduce uncertainty for the Copermittees in terms of determining compliance. Moreover, comparing the volume of runoff produced from an undeveloped site to that of a Priority Development Project would not be comparing equivalent pollutant levels, because the pollutants expected to be generated from a Priority Development Project would not have been present in runoff from undeveloped land. For simplicity, the language pertaining to site specific retention standards was removed. The word “runoff” was added to the description of “design capture volume” per the Copermittees’ requests. Similarly, the language pertaining to biofiltration LID BMPs was removed because the Alternative Compliance Program was restructured to better coincide with the Copermittee’s planning efforts in the Water Quality Improvement Plan.

PROVISION E.3.c.(2): Hydromodification Management BMP Requirements

E3c2-1: Allow San Diego Copermittees to continue implementation of current San Diego Hydromodification Management Plan, as approved under Resolution No. R9-2010-0066

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E3c2-1	PROVISION E.3.c.(2): Hydromodification Management BMP Requirements	
	COMMENT: <i>Allow San Diego Copermittees to continue implementation of current San Diego Hydromodification Management Plan, as approved under Resolution No. R9-2010-0066.</i> The San Diego County Copermittees and several other commenters have requested that the <i>Hydromodification Management Plan for San Diego County</i> (HMP), which was approved by the San Diego Water Board in 2010 under Resolution No. R9-2010-0066, be memorialized in the Tentative Order as the standard for hydromodification management.	Building Industry / Industry Building Industry Association of Southern California, Inc. Otay Land Company Otay Ranch New Homes Community Planning Groups Jamul Dulzura Community Planning Group Pala Pauma Valley Community Sponsor Group Copermittees City of Chula Vista City of Del Mar City of Poway City of San Diego County of San Diego County of San Diego Office of County Counsel San Diego County Copermittees Societies/Associations/Coalitions East Otay Mesa Property Owners Association Otay Mesa Property Owners Association Other Entities National Enterprises Inc.
	RESPONSE: The San Diego Water Board disagrees with commenters that it is appropriate to reference the San Diego County HMP in the Tentative Order. The San Diego HMP does not include standards that are currently included in the Fourth Term MS4 permits for Orange and Riverside Counties. However, commenters should note that the requirements in the Tentative Order allow the San Diego Copermittees to use the information and analysis that was used to develop the San Diego HMP. In addition, the San Diego HMP will remain in effect until the Water Quality Improvement Plans are accepted by the San Diego Water Board. The San Diego Water Board is aware that the San Diego County Copermittees spent over \$1 million to develop the HMP. This investment is not lost because the Tentative Order allows the Copermittees to build upon the	

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E3c2-1	PROVISION E.3.c.(2): Hydromodification Management BMP Requirements	
	findings in the HMP; thus, the information developed is not irrelevant. For example, the San Diego HMP used an analysis to determine the range of flows for which Priority Development Projects must implement hydromodification management BMPs. This analysis includes evaluation of site specific conditions, including the level of susceptibility of the downstream receiving water to erosion. Further, the analysis includes a mechanism for Priority Development Projects to determine appropriately sized BMPs, depending on the condition of the downstream receiving water. This analysis is the crux of the San Diego HMP, and the Tentative Order allows its continued use. There are two important changes in the Tentative Order from Order No. R9-2007-0001 that the San Diego County HMP must make adjustments for. Firstly, the Tentative Order includes a requirement that Priority Development Projects use the "predevelopment" condition for evaluating the baseline hydrology for a specific site. The San Diego HMP, as written, can still be used because this requirement only affects the input variables used in the analysis. The San Diego Water Board is requiring the use of the pre-development condition for the reasons discussed in the Response to Comment E3c2-2. Secondly, in response to several comments, the Tentative Order has been revised to include an exemption from hydromodification management requirements for Priority Development Projects that discharge to conveyance channels whose bed and bank are concrete lined all the way from the point of discharge to water storage reservoirs, lakes, enclosed embayments, or the Pacific Ocean. Additional exemptions may be allowed on a watershed-basis only if the Copermittees perform a watershed-specific analysis, as part of the Water Quality Improvement Plan that justifies inclusion of exemptions. Much of this work has already been done by the San Diego County Copermittees in the HMP, as the HMP contains many exemptions above and beyond those described in Order No. R9-2007-0001. Again, the investment made in the HMP is not lost; the Copermittees must develop the Watershed Management Area Analysis described in Provision B.3.b.(4) of the Tentative Order and include the exemptions and rationale therein. Finally, the San Diego County Copermittees were notified before completion of the HMP that requirements pertaining to hydromodification management would likely change. As part of the development of the HMP, the Copermittees submitted a first draft on May 1, 2009. In a comment letter dated June 29, 2009, the San Diego Water Board stated that: <i>"Although the Permit (R9-2007-0001) does not specifically interpret "pre-project" conditions to reference pre-development (naturally occurring) conditions, the Copermittees are not restricted from implementing this more conservative standard. Tentative Order No. R9-2009-0002 (the draft Orange County Municipal Permit) dated June 18, 2009 contains this more restrictive language. The San Diego</i>	

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E3c2-1 PROVISION E.3.c.(2): Hydromodification Management BMP Requirements
<i>Copermittees should be aware that the next iteration of the Permit may contain similar language. Additionally, the exceptions for hydromodification management measures included in the Permit (provision D.1.g.(3) for discharges into hardened channels will also likely be eliminated."</i> Although this quote referred to text in the draft Orange County MS4 Permit, the requirements for using the pre-development baseline hydrology for hydromodification management were eventually included in the final versions of the MS4 permits for both Orange and Riverside Counties. Therefore the San Diego County Copermittees were well aware of the evolving requirements before their HMP was finalized.

E3c2-2: Objections with requiring pre-development versus pre-project hydrology for hydromodification management BMP performance standards.

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E3c2-2	PROVISION E.3.c.(2): Hydromodification Management BMP Requirements	
	COMMENT: <i>Objections with requiring pre-development versus pre-project hydrology for hydromodification management BMP performance standards.</i> Comments submitted by Copermittees, Building Industry, Community Planning Groups, Engineering/Design Consultants, Societies/Associations/Coalitions, and Other Entities objected to the use of pre-development hydrology as a baseline for hydrograph matching (and therefore, BMP design) in the case of redevelopment projects, and that the pre-project design standard is the appropriate standard. Commenters argue that including the pre-development standard would be tantamount to requiring a Priority Development Project to mitigate beyond its impacts.	Building Industry / Industry San Diego Green Building Council Community Planning Groups Julian Community Planning Group Pala Pauma Valley Community Sponsor Group Copermittees City of National City City of Poway City of San Diego City of San Diego City Attorney County of San Diego County of San Diego Office of County Counsel Orange County Copermittees Riverside County Copermittees San Diego County Copermittees San Diego Unified Port District Engineering/Design Consultants Project Design Consultants Societies/Associations/Coalitions East Otay Mesa Property Owners Association Otay Mesa Property Owners Association Other Entities National Enterprises Inc.
	RESPONSE: The San Diego Water Board disagrees with the commenters that pre-project hydrology should be used as the baseline hydrology for redevelopment projects. The “pre-development” language in the Tentative Order has not been removed, but the qualifier “naturally occurring” has been removed from the text because some commenters stated that it caused confusion rather than providing clarity. The definition for “pre-development runoff condition” has been revised in Attachment C and discussion pertaining to this definition and how the San Diego Water Board expects Copermittees to interpret this phrase has been added to the Fact Sheet. Fundamentally, the San Diego Water Board believes that using a hydrology baseline that approximates that of an undeveloped, natural watershed is the only way to facilitate the return of more natural hydrological conditions	

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E3c2-2	PROVISION E.3.c.(2): Hydromodification Management BMP Requirements	
	to already built-out watersheds. Using the pre-project hydrology as a baseline for redevelopment projects results in propagating the unnatural hydrology of urbanized areas, which is largely made up of impervious surfaces. Flows from impervious surfaces are highly erosive and consequently have detrimental effects on receiving waters in the San Diego Region. Furthermore, propagating the urbanized flow regime does not support conditions for restoring degraded or channelized stream segments, and would forever sentence such streams to the degraded state. Rehabilitating or restoring degraded stream segments is a critical component of the Tentative Order and is expected to be incorporated into Copermittee's strategies for improving water quality in the watersheds. Finally, the predevelopment standard is not requiring Priority Development Projects to mitigate beyond its impacts because the project would be perpetuating impacts that originated upon initial land alteration (i.e., the project would continue to cause accelerated erosion). Commenters have stated that it is impracticable to require hydromodification management BMPs to mimic the "pre-Columbian" hydrology because it would be impossible to know the historical conditions with any certainty. However, estimating the conditions of historical conditions is not the intent of this requirement. Rather, using the characteristics of a more natural hydrological condition than that of an urbanized setting is the intent. In terms of using a pre-development condition for the baseline hydrology, a Priority Development Project has a number of options for estimating this condition when it is not known. For example, a Priority Development Project may consult soil maps, such as those published by the National Resources Conservation Service (NRCS). These readily available maps show the soil types in a given area, regardless of whether or not the land has been developed. This information, along with information regarding existing grade, constitute sufficient data needed to approximate the pre-development condition and intent of the Tentative Order. Another option is for Priority Development Projects to use characteristics of a nearby open space area as an equivalent baseline. Or, a Priority Development Project may be able to research the geotechnical report associated with a structure upon its development. In any case, the San Diego Water Board asserts that the pre-development hydrology of the area in question can be roughly estimated. However, using the hydrology of a more natural condition, even if not precisely known, will provide significant benefit to receiving waters over using the hydrology associated with pervious (developed) surfaces. Therefore in order to support the basic objectives of the Clean Water Act, which are to <u>restore</u> and maintain the chemical, <u>physical</u>, and biological integrity of the nation's waters [emphasis added], the most appropriate standard to use for hydromodification management is the standard associated with the pre-development runoff condition.	

E3c2-3: *Include exemptions from the implementation of hydromodification management BMPs where there is no threat of erosion to downstream receiving waters or there are special circumstances.***RESPONSES TO COMMENTS RECEIVED ON TENTATIVE ORDER NO. R9-2013-0001**

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E3c2-3	PROVISION E.3.c.(2): Hydromodification Management BMP Requirements	
	COMMENT: <i>Include exemptions from the implementation of hydromodification management BMPs where there is no threat of erosion to downstream receiving waters or there are special circumstances.</i> The Copermittees, Building Industry, Engineering/Design Consultants, and others have commented that the Tentative Order should restore exemptions for the implementation of hydromodification management BMPs where there is no threat of erosion to downstream receiving waters, such as concrete-lined or otherwise hardened channels. Commenters also argue that exemptions should be allowed for emergency projects or flood control projects.	Building Industry / Industry BIA Regulated Community Coalition Building Industry Association of Southern California Copermittees City of Chula Vista City of Dana Point City of Del Mar City of Imperial Beach City of Laguna Hills City of Lake Forest City of Mission Viejo City of Rancho Santa Margarita City of San Juan Capistrano Orange County Copermittees Riverside County Copermittees San Diego County Copermittees San Diego Unified Port District Engineering/Design Consultants Contech Engineered Solutions Project Design Consultants Societies/Associations/Coalitions East Otay Mesa Property Owners Association Otay Mesa Property Owners Association South County Economic Development Council Other Entities National Enterprises Inc.
	RESPONSE: The San Diego Water Board disagrees conceptually that blanket exemptions from hydromodification management BMP requirements should be granted to all redevelopment projects that discharge to hardened channels. Although the San Diego Water Board has not been advocating for the implementation of expensive BMPs to protect stream reaches that are not susceptible to erosion, the idea was to use the resources obtained from these low-threat Priority Development Projects on separate projects located elsewhere in the watershed, where protection from hydromodification is critical. In the most recent findings regarding hydromodification management, found in Southern California Coastal Water Research Project (SCCWRP) Technical Report No. 667, authors state: <i>“The exemption of many small projects from hydromodification controls can result in cumulative impacts to downstream waterbodies...”</i>	

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E3c2-3	PROVISION E.3.c.(2): Hydromodification Management BMP Requirements	
	SCCWRP Technical Report No. 667 further states that: <i>“An effective management program will likely include combinations of on-site measures (e.g., low-impact development techniques, flow-control basins), in-stream measures (e.g., stream habitat restoration), floodplain and riparian zone actions, and off-site measures. Off-site measures may include <u>compensatory mitigation measures at upstream locations</u> that are designed to help restore and manage flow and sediment yield in the watershed [Emphasis added].”</i> The Tentative Order released on October 31, 2012 was written to incorporate these important watershed-based concepts. Nevertheless, several commenters voiced concern over the elimination of exemptions to hardened channels and other non-susceptible receiving waters. After careful consideration, the San Diego Water Board revised the Tentative Order to accommodate the re-introduction of exemptions. Provision E.3.c.(2) has been revised to include an exemption from hydromodification management requirements for Priority Development Projects that discharge to conveyance channels whose bed and bank are concrete lined all the way from the point of discharge to water storage reservoirs, lakes, enclosed embayments, or the Pacific Ocean. Additional exemptions may be allowed; however, they would occur on a watershed-specific basis, and must be defined and defended by the Copermittees. Under the newly created Provision B.3.b.(4), the Copermittees have been provided the option to perform a Watershed Management Area Analysis for the purpose of 1) characterizing the watersheds, 2) identifying alternative compliance projects that Priority Development Projects may use in lieu of implementing structural BMPs onsite, and 3) identifying areas within the watershed where it is appropriate to exempt Priority Development Projects from implementing hydromodification management BMPs. Exemptions, then, would be applicable on a watershed-specific basis, and would require supporting rationale. One reason why the San Diego Water Board has reservations regarding the idea of blanket exemptions is that allowing them without some sort of analysis is short-sighted. SCCWRP Technical Report 667 discusses the importance of watershed-based planning. The report states: <i>“There is usually also an exemption for projects discharging to hardened channels or waterbodies; however these exemptions may not be supportive of future stream restoration possibilities...”</i> Although the San Diego Water Board understands that hardened channels may sometimes provide essential flood control, there are situations where stream rehabilitation can take place, and concrete segments can be removed. For this reason, if the Copermittees choose to perform the Watershed Management Area Analysis,	

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E3c2-3 PROVISION E.3.c.(2): Hydromodification Management BMP Requirements
they may be able to differentiate between hardened stream segments where the concrete will likely never be removed, and other stream segments where there is a possibility for future rehabilitation. Nevertheless, an exemption for concrete-lined channels has been added to the Tentative Order. Finally, the Copermittees commented that there should be exemptions allowed for emergency projects or flood control projects. The San Diego Water Board disagrees with the Copermittees in either case. Provision E.3 describes requirements that pertain to development planning. Emergency situations, by definition, are not planning exercises and therefore do not involve the design, approval, and construction of a building or structure. The San Diego Water Board believes that it may be appropriate to relax the structural BMP standards for, or altogether exempt flood control projects, but not before projects are evaluated on a case-by-case basis. In many instances, environmentally friendly practices may be appropriate for implementation in flood control projects, but a variety of options would not be evaluated by the project proponent if the Tentative Order allowed a blanket exemption.

E3c2-4: *Objections with requirements to compensate for sediment supply.***RESPONSES TO COMMENTS RECEIVED ON TENTATIVE ORDER NO. R9-2013-0001**

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E3c2-4	PROVISION E.3.c.(2): Hydromodification Management BMP Requirements	
	COMMENT: <i>Objections with requirements to compensate for sediment supply.</i> The Copermittees, Building Industry, and Engineering/Design Consultants have commented that management of sediment supply is a complicated and challenging issue, and more direction regarding the Tentative Order's intent should be provided. Commenters have also stated that it is inappropriate to require analysis of sediment supply on a site-by-site basis, and that it is better addressed at the regional level.	Building Industry / Industry BIA Regulated Community Coalition Copermittees City of Chula Vista County of San Diego San Diego County Copermittees Engineering/Design Consultants Contech Engineered Solutions Project Design Consultants
	RESPONSE: The San Diego Water Board agrees with the commenters that addressing the sediment supply issue when a Priority Development Project is under review is complicated and challenging. The intent of the Tentative Order is to protect the coarse sediment supply and ensure that Priority Development Projects will not impact the supply. Therefore, language pertaining to "compensating for" sediment supply has been removed. Instead, where a Copermittee is aware of areas where coarse sediment is naturally discharged to downstream receiving waters, then the San Diego Water Board expects the Copermittee to ensure the protection of this natural process by conditioning the Priority Development Project to either avoid the area, or implement measures that would allow the natural hydrologic process to continue. Please see Provision E.3.c.(2)(b) in the revised Tentative Order for the revisions.	

E3c2-5: *Monitoring and assessment program requirements will not provide information necessary to re-define the range of flows causing erosion.***RESPONSES TO COMMENTS RECEIVED ON TENTATIVE ORDER NO. R9-2013-0001**

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E3c2-5	PROVISION E.3.c.(2): Hydromodification Management BMP Requirements	
	COMMENT: <i>Monitoring and assessment program requirements will not provide information necessary to re-define the range of flows causing erosion.</i> The City of Chula Vista commented that water quality monitoring as described in Provision D of the Tentative Order will not provide the necessary information to re-define the range of flows thought to cause erosion to receiving waters.	Copermittees City of Chula Vista
	RESPONSE: The San Diego Water Board disagrees that the monitoring and assessment program requirements cannot provide information necessary to re-evaluate or re-define the range of flows causing erosion. The water quality monitoring described in Provision D.1.a.(2) represents the minimum level of monitoring needed to comply with the Tentative Order. If the Copermittees elect to re-evaluate the range of flows that are thought to cause erosion to downstream receiving waters, as defined in the San Diego County HMP, then they may design a monitoring program that will provide the necessary information to do so.	

E3c2-6: The low-flow thresholds included in the San Diego County HMP need to be revised.

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E3c2-6 PROVISION E.3.c.(2): Hydromodification Management BMP Requirements		
	<u>COMMENT:</u> <i>The low-flow thresholds included in the San Diego County HMP need to be revised.</i> Project Design Consultants submitted comments suggesting that the schedule for development of the San Diego County HMP was extremely rushed, and technical expertise was ignored. The HMP should be revised and included in the Tentative Order.	Engineering/Design Consultants Project Design Consultants
	<u>RESPONSE:</u> The San Diego Water Board does not object to revising the low-flow thresholds included in the San Diego County HMP, provided that revisions are based on data acquired by the Copermittees. However, the process for updating this design standard in the HMP will occur on an ad-hoc basis and need not be referenced in the Tentative Order.	

E3c2-7: The hydromodification management BMP performance standards should allow the use of the erosion potential (Ep) method and in-stream metrics for compliance.

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E3c2-7	PROVISION E.3.c.(2): Hydromodification Management BMP Requirements	
	COMMENT: <i>The hydromodification management BMP performance standards should allow the use of the erosion potential (Ep) method and in-stream metrics for compliance.</i> The Building Industry Association of Southern California requests that the performance standards for hydromodification management allow the use of the Ep method. Requiring project-by-project flow duration control may not be as effective as a regionally-coordinated approach that combines upland control with in-stream remedies.	Building Industry / Industry Building Industry Association of Southern California
	RESPONSE: The San Diego Water Board considered the request and found that changes are not necessary. Although the language in Provision E.3.c.(2) does not specifically reference the concept of erosion potential, the Copermittees are not prohibited from using such an approach. Provision E.3.c.(2)(a) requires the Copermittees to require implementation of BMPs to ensure that post-project runoff flow rates and durations do not exceed pre-development runoff flow rates and durations by more than 10 percent (for the range of flows that are deemed to cause erosion). However, Provision E.3.c.(2)(c) allows a Priority Development Project to utilize the alternative compliance program in lieu of complying with the requirement to implement structural BMPs onsite. Priority Development Projects are allowed to comply with the hydromodification management requirements by funding, partially funding, or implementing an offsite project, such as stream rehabilitation (which can include stream stabilization). The San Diego Water Board agrees that a regionally-coordinated approach that includes in-stream remedies is more effective than requiring flow duration control BMPs on every Priority Development Project, and for this reason has written the Tentative Order to allow these metrics. However, ultimately, administration of the Alternative Compliance Program is at the discretion of the Copermittees. If the Copermittees find that administering the Alternative Compliance Program is too difficult, costly, or is not in a Copermittee's best interest, than they are not obligated to do so.	

E3c2-8: *There is insufficient data to suggest a need to change the hydromodification management requirements.***RESPONSES TO COMMENTS RECEIVED ON TENTATIVE ORDER NO. R9-2013-0001**

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E3c2-8	PROVISION E.3.c.(2): Hydromodification Management BMP Requirements	
	COMMENT: <i>There is insufficient data to suggest a need to change the hydromodification management requirements.</i> The City of Mission Viejo, Orange County and San Diego County Copermittees have commented that there is no need to include new requirements for hydromodification management, as no new data has emerged suggesting a need for change and the Copermittees have only begun to implement their current HMPs.	Copermittees City of Mission Viejo Orange County Copermittees San Diego County Copermittees
	RESPONSE: The San Diego Water Board disagrees that there have been any fundamental changes to the hydromodification management requirements from those included in the Fourth Term storm water permits. The basic premise, which is requiring hydromodification management for erosive flows as defined by the Copermittees, has not changed. The San Diego County Copermittees spent considerable funds and effort to define the range of flows that cause erosive effects, and the Tentative Order does not trump those efforts. The San Diego Water Board disagrees with the notion that no new data has emerged regarding hydromodification management. Several commenters have referenced Southern California Coastal Water Research Project's latest findings in <i>Hydromodification Assessment and Management in California</i> (Technical Report 667). SCCWRP Technical Report 667 clearly states that: <i>"An effective management program will likely include combinations of on-site measures...in-stream measures...and offsite measures...."</i> Further, SCCWRP Technical Report 667 states that: <i>"The exemption of many small projects from hydromodification controls can result in cumulative impacts to downstream waterbodies."</i> The requirements in the Tentative Order are consistent with the findings in this report and MS4 permits in Orange and Riverside Counties. The San Diego Water Board agrees with the underlying premise advocated in this report, which is that effective hydromodification programs begin with watershed-scale analysis and planning. Although the Copermittees have just recently begun implanting their HMPs, the changes needed to incorporate the requirements of the Tentative Order will not undermine the mechanics of the HMPs and therefore will not require substantial revisions. The incorporation of the pre-development baseline standards and inclusion of only qualified exemptions, resulting from thorough watershed analyses, is essential for protecting receiving streams from erosion caused by altered flow regimes.	

PROVISION E.3.c.(3): Alternative Compliance to Onsite Structural BMP Performance Requirements
 E3c3-1: Objections to the onsite LID biofiltration treatment control BMP performance standards.

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E3c3-1	PROVISION E.3.c.(3): Alternative Compliance to Onsite Structural BMP Performance Requirements	
	COMMENT: <i>Objections to the onsite LID biofiltration treatment control BMP performance standards.</i> The San Diego County, Orange County, and Riverside County Copermittees and Engineering/Design Consultants have commented that there is no need to include a 1.5 times multiplier on biofiltration LID BMPs, and that doing so is technically unjustified.	Building Industry / Industry Building Industry Association of Southern California Copermittees City of Vista Orange County Copermittees Riverside County Copermittees Engineering/Design Consultants Contech Engineered Solutions Project Design Consultants
	RESPONSE: Provision E.3.c.(3) describing the Alternative Compliance Program has been substantially revised so that it coincides better with the watershed planning efforts of the Copermittees in the Water Quality Improvement Plans. As a result, the requirements related to LID biofiltration BMPs has been removed.	

E3c3-2: *Modify requirements to implement alternative compliance options.***RESPONSES TO COMMENTS RECEIVED ON TENTATIVE ORDER NO. R9-2013-0001**

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E3c3-2	PROVISION E.3.c.(3): Alternative Compliance to Onsite Structural BMP Performance Requirements	
	COMMENT: <i>Modify requirements and process to implement alternative compliance options.</i> The San Diego County, Orange County, and Riverside County Copermittees, Engineering/Design Consultants, and Environmental Organizations have expressed concern with the process associated with the Alternative Compliance Program to Onsite Structural BMP Implementation. The Copermittees assert that this program should be administered by the San Diego Water Board, that more time than 4 years should be granted for alternative compliance project completion, and that the administrative costs would be prohibitive. The Environmental Organizations suggest that language be added to the Tentative Order to clearly indicate that the Copermittees are responsible for ensuring that alternative compliance projects are completed within the 4 year timeframe, and also expressed concerns as to whether the alternative compliance project would provide equal water quality benefits as implementing structural BMPs onsite. Engineering/Design Consultants submitted recommendations regarding how administration of the Alternative Compliance Program would work.	Building Industry / Industry American Society of Landscape Architects BIA Regulated Community Coalition Building Industry Association of Southern California San Diego Green Building Council Copermittees City of Imperial Beach County of San Diego Orange County Copermittees Riverside County Copermittees San Diego County Copermittees Environmental Organizations Environmental Groups Natural Resources Defense Council Engineering/Design Consultants Project Design Consultants
	RESPONSE: The San Diego Water Board disagrees with the Copermittees that the Alternative Compliance Program should be administered by the San Diego Water Board and not by the Copermittees. The Alternative Compliance Program is provided as an option to the Copermittees. The Copermittees are not required to implement the Alternative Compliance Program. If, however, the Copermittees do implement the Alternative Compliance Program, it is expected to coincide with the Copermittees' watershed planning efforts and assist the Copermittees in reaching their goals of reducing pollutants in storm water runoff leaving their MS4s. This is because the alternative compliance projects consist of projects such as retrofitting existing development, where pollutant treatment can be an added benefit where no treatment currently exists; or stream rehabilitation, where natural attenuation of pollutants can occur as an ancillary benefit to improved stream habitat. Other example projects are regional BMPs that receive runoff from multiple areas, or the preservation or purchase of critical floodplain land. The Tentative Order establishes requirements for the Copermittees and not the San Diego Water Board. Therefore, it would inappropriate for the San Diego Water Board administer this program, but could assist in its implementation by streamlining permits for stream rehabilitation and restoration... The San Diego Water Board understands that the initial costs for administering this program could be significant; however, there are fiscal benefits in that Priority Development Projects could provide the funding for projects that are expected to improve water quality, thereby negating the need for Copermittees to expend their resources on BMPs to accomplish the	

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E3c3-2	PROVISION E.3.c.(3): Alternative Compliance to Onsite Structural BMP Performance Requirements	
	same thing. Finally, the Copermittees are not required to administer this program and can elect to administer BMPs strictly onsite. Provision E.3.c.(3) has been substantially revised for simplicity and to better coincide with the Copermittees' planning efforts, and all references to LEED certification have been removed. The San Diego Water Board further disagrees that more than 4 years should be granted for alternative compliance project completion. First of all, pollutants from the Priority Development Project are being discharged without treatment and there is not necessarily any equivalent treatment until the alternative compliance project is constructed (although temporal mitigation is required when there is a lag between the two projects). Second of all, the Tentative Order explicitly allows more time for projects where the Executive Officer approves additional time. The San Diego Water Board disagrees with the recommendation that the Tentative Order specify that the Copermittees are responsible for ensuring that the alternative compliance projects are completed within the 4 year time frame. The Tentative Order is issued to the San Diego County, Orange County, and Riverside County Copermittees; therefore all of these entities are responsible for complying with the requirements, and further discussion would be redundant. Finally, the San Diego Water Board agrees that the alternative compliance program presents some uncertainty regarding "greater water quality benefit" expected to come from these projects versus implementation of structural BMPs onsite. If the Copermittees elect to implement an Alternative Compliance Program, they are required to develop a list of potential candidate projects that can be implemented with the Watershed Management Area. The candidate projects will be included in the Water Quality Improvement Plans, which will be reviewed by the public and the San Diego Water Board before implementation takes place. The water quality benefits that can be achieved by implementing those candidate projects will likely be made evident during the public participation process in the development of the Water Quality Improvement Plans.	

E3c3-3: Request for modifications to the alternative compliance water quality credit system option.

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E3c3-3	PROVISION E.3.c.(3): Alternative Compliance to Onsite Structural BMP Performance Requirements	
	COMMENT: <i>Request for modifications to the alternative compliance water quality credit system option.</i> The Orange County Copermittees have requested that language pertaining to the water quality credit system be revised to remove the no-net impact limitations because certain projects may offer significant environmental benefits that are not necessarily related to water quality. The BIA Regulated Community Coalition recommended that any water quality credit system exercised by the Copermittees be included in the Water Quality Improvement Plans and be approved by the San Diego Water Board and not by its Executive Officer.	Building Industry / Industry BIA Regulated Community Coalition Copermittees Orange County Copermittees
	RESPONSE: The San Diego Water Board disagrees with the Orange County Copermittees that the no-net impact language should be removed from the Tentative Order. The optional credit system described in Provision E.3.c.(3)(d) is based on meeting the structural BMP performance standards as they pertain to protecting and improving water quality. A credit system that would allow other environmental benefits cannot necessarily ensure that water quality would be protected to the MEP standard, for which the performance standards are structured to achieve. The San Diego Water Board disagrees that a water quality credit system requires approval from San Diego Water Board instead of the Executive Officer because the provisions for such a credit system are clearly outlined in the Tentative Order. The Executive Officer will be able to determine whether or not the Copermittee has met the requirements as dictated in the Tentative Order. However, the public may request that any action taken by the Executive Officer be considered by the San Diego Water Board at any time.	

E3c3-4: Define a list of preferred or "best-in-class" BMPs and include specific guidance regarding evaluation of treatment systems in the Tentative Order.

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E3c3-4	PROVISION E.3.c.(3): Alternative Compliance to Onsite Structural BMP Performance Requirements	
	COMMENT: Define a list of preferred or "best-in-class" BMPs and include specific guidance regarding evaluation of treatment systems in the Tentative Order. The San Diego Green Building Council commented that the Tentative Order should clearly define the best-in-class BMPs and require the creation of a system to catalogue the implementation strategies used by the various Copermittees, and that the database should include the measured water quality impacts from each site. Such information can be used as a resource for future projects and development. Contech Engineered Solutions recommended that the Tentative Order include specific guidance regarding evaluation of proprietary treatment systems, and that the Copermittees need to conduct a performance and feasibility assessment of such systems.	Building Industry / Industry San Diego Green Building Council Engineering/Design Consultants Contech Engineered Solutions
	RESPONSE: The San Diego Water Board disagrees with this comments because 1) the San Diego Water Board cannot dictate the manner of compliance with any requirements or regulation for any of the programs it administers, and 2) a "best-in-class" BMP cannot be concretely defined because the MEP standard is dynamic (see Appendix C for the definition of MEP). The Copermittees may choose to share information regarding BMP performance and evaluation of proprietary treatment systems via the Regional Clearinghouse or other mechanism. The Copermittees have the experience and expertise to define what are the appropriate BMPs.	

E3c3-5: *Mitigation should not be required if flow-thru biofiltration LID BMPs are used.***RESPONSES TO COMMENTS RECEIVED ON TENTATIVE ORDER NO. R9-2013-0001**

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E3c3-5	PROVISION E.3.c.(3): Alternative Compliance to Onsite Structural BMP Performance Requirements	
	COMMENT: <i>Mitigation should not be required if flow-thru biofiltration LID BMPs are used.</i> The Building Industry Association of Southern California submitted comments stating that the Tentative Order should not require mitigation for the portion of the design storm volume that is not retained onsite if this volume is treated by biofiltration LID BMPs prior to discharge. This requirement penalizes and dis-incentivizes the use of these BMPs.	Building Industry / Industry Building Industry Association of Southern California
	RESPONSE: The San Diego Water Board has included the requirement that mitigation is necessary for the portion of the design storm volume that is not retained onsite because, although this remaining volume of storm water would be treated, the MEP standard as represented by the structural BMP performance requirements would not have been met. The requirement for mitigation is not limited to the use of biofiltration BMPs; mitigation is required no matter what type of flow-thru treatment BMP is utilized by the Priority Development Project. Therefore the San Diego Water Board disagrees that this requirement is penalizing the Priority Development Project for the use of biofiltration LID BMPs, as suggested by the commenter. Retention of the 85th percentile storm is clearly the MEP standard for storm water pollutant control, as represented by the Tentative Order and recently adopted MS4 permits in the San Diego Region, other areas of southern California, and elsewhere in the United States. Retention of anything less than the design storm volume must be mitigated because the MEP standard has not been met.	

PROVISION E.4: Construction Management

E4-1: Requests for "clarifications" for construction management requirements

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E4-1	PROVISION E.4: Construction Management	
	COMMENT: <i>Requests for "clarifications" for construction management requirements.</i> The San Diego County and Riverside County Copermittees submitted requests for specific modifications to the language of Provision E.4 attempting to increase clarity to what is required of the Copermittees and what the Copermittees are to require of private party construction sites within their jurisdiction. The USEPA provided general comments on the need for the construction requirements to include enough specificity to determine compliance with the Tentative Order.	Copermittees Riverside County Copermittees San Diego County Copermittees State and Federal Government USEPA
	RESPONSE: The San Diego Water Board generally agreed with the specific language modifications requested by the Copermittees and in many instances adjusted the language of Provision E.4 as requested. Specific changes were made to Provision E.4 to: 1) Remove the requirement for the Copermittees to verify a project applicant has obtained coverage under permits, other than the State Water Board's General Construction Storm Water Permit, 2) Use the term 'pollution control plan' consistently; 3) Require the Copermittees to conduct inspections and require BMPs at inventoried construction sites (based on the priority set in Provision E.4.b.2) to 'confirm' rather than 'ensure' the controls at the site reduce the discharge of pollutants in storm water from the site to the MEP; and 4) Require the Copermittees to conduct inspections and require BMPs at inventoried construction sites (based on the priority set in Provision E.4.b.2) that effectively prohibits non-storm water discharges from the site from entering the MS4. Modifications were also made to the opening paragraph of Provision E.4 requiring each Copermittee to implement a construction management program in accordance with the strategies in the Water Quality Improvement Plan described pursuant to Provision B.3.b.(1). Additionally, the San Diego Water Board made adjustments to Provision E.4 requirements setting minimum inspection frequencies equivalent to the amount required to confirm compliance with the Clean Water Act. Provision E.4.d(1)(a) specifically requires the Copermittees to conduct inspections at all inventoried sites, including high threat to water quality sites, at an frequency appropriate to confirm the site reduces the discharge of pollutants in storm water from the construction site to the MEP, and effectively prohibits non-storm water	

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E4-1	PROVISION E.4: Construction Management
	discharges from entering the MS4. The San Diego Water Board supports the adaptive management approach in the Tentative Order and has structured the construction inspections to focus on those sites that represent a high priority to maintaining or protecting downstream surface water quality.

E4-2: Requests for modifications to construction site inventory, tracking, recordkeeping requirements.

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E4-2	PROVISION E.4: Construction Management	
	COMMENT: <i>Requests for modifications to construction site inventory, tracking, recordkeeping requirements.</i> The Orange County, Riverside County and San Diego County Copermittees each submitted comments requesting changes to the construction management requirements that specific construction sites to be inventoried would include only those sites that involve any ground disturbance or soil disturbing activities, include a process for confirming adequate BMP implementation on inventoried sites, specify project 'completion' date not "anticipated completion" date; and 'weather condition during inspection' not 'approximate amount of rainfall since last inspection' on inspection forms, and require construction inventories to be updated quarterly not monthly. The Riverside County Copermittees provided recommended revisions to the construction requirements.	Copermittees Orange County Copermittees Riverside County Copermittees San Diego County Copermittees
	RESPONSE: The San Diego Water Board agreed with most of the changes requested by the commenters and modified Provision E.4 accordingly. However, the request to remove the requirement to include 'approximate amount of rainfall since last inspection' on the inspection forms, and the suggestion to include a process for confirming adequate construction BMP implementation for non-inventoried construction site were not incorporated into the revised Tentative Order. The San Diego Water Board is interested in site conditions after a significant rain event(s) therefore documenting the approximate amount of rainfall since the last inspection is required rather than the weather conditions during the inspection. A process for confirming adequate construction BMP implementation for non-inventoried sites can be developed and included in the jurisdictional program, but is not a requirement of the Tentative Order. The San Diego Water Board reviewed all of the recommended revisions provided by the Riverside County Copermittees. See Provision E.4 for those requested revisions that were incorporated into the Tentative Order.	

E4-3: Request to only require verification of coverage under Construction General Permit, not "applicable permits."

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E4-3	PROVISION E.4: Construction Management	
	COMMENT: Request to only require verification of coverage under Construction General Permit, not "applicable permits." The Copermittees commented that the requirement to verify permits other than the State Water Board's Construction General Permit is unnecessary because applicable permits are included as attachments to a construction projects SWPPP, and redundant with other environmental regulations.	Copermittees City of Chula Vista Orange County Copermittees Riverside County Copermittees San Diego County Copermittees
	RESPONSE: The San Diego Water Board agrees with the commenters. The San Diego Water Board modified the language in Provision E.4.a to require verification that the project applicant has obtained coverage under the Construction General Permit, only.	

PROVISION E.5: Existing Development Management
 E5-1: Concerns with inspections by volunteers.

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E5-1	PROVISION E.5: Existing Development Management	
	COMMENT: <i>Concerns with inspections by volunteers.</i> The San Diego County Copermittees expressed concern with exposure to significant liability should a volunteer be injured in the course of an unauthorized inspection, or if private property is damaged during that inspection, or other unforeseen legal issues that result from volunteer groups conducting inspections of inventoried existing developments sites. Similar concerns were expressed by the Industrial Environmental Association and the San Diego Port Tenants Association.	Building Industry / Industry Industrial Environmental Association Copermittees San Diego County Copermittees Societies/Associations/Coalitions San Diego Port Tenants Association
	RESPONSE: The San Diego Water Board understands the position presented by the commenters and agrees that changes to the language in Provision E.5.c are necessary. Provision E.5.c was modified to restrict the use of Copermittee-trained volunteer monitoring or patrol programs to visual inspections of those inventoried facilities or areas that are publicly accessible. Additionally, the San Diego Water Board incorporated the Industrial Environmental Association's suggested change to the language of Provision E.5.c.(2). The ability of the Copermittee to use volunteer monitoring or patrol programs was included in the Tentative Order to give the Copermittees additional resources to accomplish the inspection requirements of Provision E.5.c. The Copermittees retain sole discretion on using volunteer monitoring or patrol programs to augment their inspection programs. The Copermittees also retain sole discretion to stipulate conditions (insurance, training, etc.) for which a volunteer monitoring or patrol program must comply in order assist them with inspections.	

E5-2: Requests for modifications to existing development inventory and tracking requirements.

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E5-2	PROVISION E.5: Existing Development Management	
	COMMENT: <i>Requests for modifications to existing development inventory and tracking requirements.</i> The San Diego County Copermittees and City of Santee each requested removal of 'mobile home parks' from the list of residential areas that should be included in its existing development inventory, citing the Mobile Home Park Act preempts a municipality's ability to regulate within the mobile home park. The Copermittees further requested modification to the language of Provision E.5.a to replace the phrase 'may discharge pollutants' with 'has the reasonable potential to discharge pollutants,' claiming that the term 'may' is too broad and limits the Copermittees' ability to focus on those sites in their inventories identified as jurisdictional and watershed priorities. A specific comment was submitted by the City of Chula Vista asking that the Tentative Order allow use of more than one data management system to track the required information.	Copermittees City of Chula Vista City of Santee San Diego County Copermittees
	RESPONSE: The San Diego Water Board understands that a city does not have full access to regulate mobile home parks pursuant to the Mobile Home Park Act, but disagrees that the Copermittees do not have the legal authority to regulate discharges from and require BMPs at mobile home parks to their MS4s. The requirements of the Tentative Order are that each Copermittee maintain an inventory of its existing development that may discharge a pollutant load to and from the MS4. If a Copermittee has mobile home parks in its jurisdiction it must be included in its inventory so that the mobile home park gets considered in the Water Quality Improvement Plan priorities and strategies to address sources of pollutants. The comments included a description of what a city is allowed to regulate via its police powers, at mobile home parks. This list included access 'streets and roads' and parking. These are areas where potentially BMPs could be located if, through the Water Quality Improvement Plan process, it was determined that pollutants discharged from mobile home parks were a high priority water quality condition. Additionally, other scenarios could exist where discharges from mobile home parks are not considered a high priority, and inspections would occur much less often. Therefore, mobile home parks must remain within a Copermittee's existing development inventories, but can be dealt with according to the priorities, schedules and goals of the Water Quality Improvement Plan. Therefore, no change to the Tentative Order was made. The San Diego Water Board disagrees with the comment that the term 'may' should be replaced with 'reasonable potential.' The term 'may' is used to indicate possibility or probability that a pollutant load is discharged from an inventoried existing development facility or area. The term reasonable potential can imply the need to conduct a reasonable potential analysis, which is a far more involved process than a Copermittee making the determination that a facility possibly or probably discharges a pollutant load into its MS4. Nothing in	

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E5-2	PROVISION E.5: Existing Development Management	
	the Tentative Order prevents a Copermittee from conducting a more robust analysis of the potential for pollutant loads to be discharged from its inventoried existing facilities or areas. Therefore, no change to the Tentative Order was made. The use of a GIS database to track inventoried facilities is only “highly recommended” in the Tentative Order, it is not explicitly required. Therefore a Copermittee can use one or more than one data management system to track the required information.	

E5-3: Requests for modifications to existing development BMP implementation and maintenance requirements.

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E5-3	PROVISION E.5: Existing Development Management	
	COMMENT: <i>Requests for modifications to existing development BMP implementation and maintenance requirements.</i> The Riverside County and San Diego County Copermittees submitted comments requesting a modification to the language of Provision E.5.b to specify each Copermittee only be required to designate a minimum set of BMPs for all inventoried existing development with the reasonable potential to discharge pollutant loads to their MS4. Commenters further suggest clarifying language for the required use of pollutant prevention methods (i.e. designated BMPs) in Provision E.5.b. A specific comment was made by the City of Chula Vista to removed 'freeways' from list of existing facilities the Copermittees are required to properly operate and maintain BMPs. The City of Chula Vista notes that freeways are under the jurisdiction of Caltrans, not a city.	Copermittees City of Chula Vista Riverside County Copermittees San Diego County Copermittees
	RESPONSE: The San Diego Water Board disagrees with the commenters request to modify the language of Provision E.5.b to specify each Copermittee only be required to designate a minimum set of BMPs for all inventoried existing development with the reasonable potential to discharge pollutant loads to their MS4. Provision E.5.b states that each Copermittee must designate a minimum set of BMPs required for all inventoried existing development, including special event venues. Any existing development that gets inventoried has been identified as a facility that may generate pollutant loads to and from the MS4 under Provision E.5.a. Therefore, if a facility is on the inventory, a Copermittee has already made the determination that the existing development possibly or probably generates a pollutant load. Therefore, no change to the Tentative Order was made. The San Diego Water Board agrees with the requests to clarify the language in Provisions E.5.b.(1)(b) and (d) to specify when a Copermittee must require implementation of BMPs at inventoried existing development not owned by the Copermittee, and when a Copermittee must implement BMPs on their own municipal facilities. The San Diego Water Board also agrees with the City of Chula Vista's request to remove 'freeways' from the list of existing facilities the Copermittees are required to properly operate and maintain BMPs.	

E5-4: *Requests for modifications to existing development inspection requirements.***RESPONSES TO COMMENTS RECEIVED ON TENTATIVE ORDER NO. R9-2013-0001**

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E5-4	PROVISION E.5: Existing Development Management	
	COMMENT: <i>Requests for modifications to existing development inspection requirements.</i> The County of San Diego commented on the need for an exemption from the minimum annual inspection requirement of 20 percent for inventoried linear municipal facilities. Riverside County Copermittees requested the requirement to inspect at least 20 percent of its existing development inventory be deleted. The Tentative Order requires each inventoried existing development be inspected once every five years. Both San Diego County and Riverside County Copermittees commented on this minimum. San Diego County Copermittees want it changed to once per permit term, conversely Riverside County Copermittees support existing language of once per five years. The USEPA does not support relaxation to inspection frequencies because it weakens enforceability and the ability to determine compliance. The San Diego County Copermittees requested clarifying language be added to what must be included in a visual inspection of existing development.	Copermittees County of San Diego Riverside County Copermittees San Diego County Copermittees State and Federal Government USEPA
	RESPONSE: The San Diego Water Board agrees with the County of San Diego's comment concerning the need for exempting linear municipal facilities from the existing development annual inspection requirements due to the number of inspections required if such facilities are considered when calculating 20 percent of the existing development inventory. To address their comments, the language in Provision E.5.c.(1)(a)(iv) includes a footnote, which excludes linear municipal facilities (i.e. MS4 linear channels, sanitary sewer collections systems, streets, roads, and highways). MS4 inlets and basins are not mentioned in this footnote and are still required to be considered when determining 20 percent of inventoried development for the purposes of annual inspections. The San Diego Water Board expects MS4 inlets and basins to be inspected in order to confirm that BMPs are being implemented and maintained to reduce the discharge of pollutants in storm water from the MS4 to the MEP. Comments provided by the USEPA support leaving MS4 inlets and basins in the existing development inventory to strengthen permit enforceability and compliance determinations. The San Diego Water Board kept the existing development minimum inspection requirement of once every five years. This requirement is consistent with comments received by USEPA to include minimum requirements to strengthen permit enforceability and compliance determinations.	

E5-5: *Requests to limit existing development requirements to existing development with "reasonable potential" to discharge pollutants.***RESPONSES TO COMMENTS RECEIVED ON TENTATIVE ORDER NO. R9-2013-0001**

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E5-5	PROVISION E.5: Existing Development Management	
	COMMENT: <i>Requests to limit existing development requirements to existing development with "reasonable potential" to discharge pollutants.</i> The San Diego County Copermittees requested the existing development requirements be limited to those existing facilities and areas of development with "reasonable potential" to discharge pollutants.	Copermittees San Diego County Copermittees
	RESPONSE: The San Diego Water Board disagrees that replacing the term 'may' with the phrase 'reasonable potential' in Provisions E.5.a-c will give a Copermittee more flexibility to focus on jurisdictional and watershed priorities. The Water Quality Improvement Plan will establish the priority water quality conditions within a Watershed Management Area to which a Copermittee will customize its jurisdictional program (i.e. inspection location and frequencies, pollutant reduction efforts (BMP implementation), retrofit opportunities, etc.). The term 'may' is used to indicate possibility or probability that a pollutant load is discharged from an inventoried existing development facility or area. The term 'reasonable potential' can imply the need to conduct a reasonable potential analysis, which is a far more involved process than a Copermittee making the determination that a facility or developed area possibly or probably discharges a pollutant load into its MS4. Nothing in the Tentative Order prevents a Copermittee from conducting a more robust analysis of the potential for existing development to discharge pollutant loads to and from the MS4. Therefore, no change to the Tentative Order was made.	

E5-6: *Request to allow the Copermittees to reallocate resources required for monitoring for retrofit and/or rehabilitation projects.***RESPONSES TO COMMENTS RECEIVED ON TENTATIVE ORDER NO. R9-2013-0001**

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E5-6	PROVISION E.5: Existing Development Management	
	COMMENT: <i>Request to allow the Copermittees to reallocate resources required for monitoring for retrofit and/or rehabilitation projects.</i> The San Diego County Copermittees requested an addition to the requirements of Provision E.5.e to allow the Copermittees to reallocate resources required for monitoring for retrofit and/or rehabilitation projects.	Copermittees Riverside County Copermittees San Diego County Copermittees
	RESPONSE: The San Diego Water Board disagrees with the request and no change to the Tentative Order was made. Temporarily suspending the monitoring requirements of Provision D to fund a retrofit and/or rehabilitation process is inappropriate. The monitoring requirements in Provision D are the minimum necessary for the Copermittees to demonstrate that the water quality improvement strategies being implemented as part of the Water Quality Improvement Plan are making progress toward achieving the numeric goals.	

PROVISION E.5.e.(2): Retrofitting Areas of Existing Development
 E5e2-1: Retrofit existing development to improve water quality.

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E5e2-1	PROVISION E.5.e.(2): Retrofitting Areas of Existing Development	
	COMMENT: <i>Retrofit existing development to improve water quality.</i> The San Diego Green Building Council and South Laguna Civic Association support retrofitting areas of existing development as a means to achieve mandated water quality objectives.	Building Industry / Industry San Diego Green Building Council Environmental Organizations South Laguna Civic Association
	RESPONSE: The San Diego Water Board agrees with the commenters and has developed requirements to encourage retrofitting to achieve reductions in pollutants discharged from MS4s and improved water quality conditions in the receiving waters.	

E5e2-2: Requests to remove or modify retrofitting of existing development requirements.

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E5e2-2	PROVISION E.5.e.(2): Retrofitting Areas of Existing Development	
	COMMENT: <i>Requests to remove or modify retrofitting of existing development requirements.</i> The Riverside County Copermittees generally requested the removal of the retrofit and stream/channel/habitat rehabilitation project requirements. However, the Riverside County Copermittees also submitted requests for specific retrofit language changes.	Copermittees Riverside County Copermittees
	RESPONSE: The San Diego Water Board disagrees with the requests to remove or modify the retrofitting of existing development requirements. The San Diego Water Board reviewed the requested language changes and did not make any of the revisions recommended as they were not necessary or changed the intent of the requirement. The requirements in the Tentative Order do not require any Copermittee to implement or require the implementation of a retrofitting project. The Tentative Order requires each Copermittee to describe a program that identifies those areas (public, private, or both) as good candidates for retrofitting. In areas where retrofitting projects within certain areas of existing development cannot be implemented by the Copermittee because of ownership (i.e. private property) or permitting, the Copermittee must develop strategies to facilitate the implementation of retrofitting projects if and when the opportunities become available. The San Diego Water Board did not remove or modify the requirements of Provision E.5.e.(2), but the requirements are now under Provision E.5.e.(1) in the revised Tentative Order.	

PROVISION E.5.e.(3): Stream, Channel and/or Habitat Rehabilitation in Areas of Existing Development

E5e3-1: *Rehabilitate receiving waters to improve water quality.***RESPONSES TO COMMENTS RECEIVED ON TENTATIVE ORDER NO. R9-2013-0001**

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E5e3-1 PROVISION E.5.e.(3): Stream, Channel and/or Habitat Rehabilitation in Areas of Existing Development		
	<u>COMMENT:</u> <i>Rehabilitate receiving waters to improve water quality.</i> The Laguna Bluebelt Coalition and South Laguna Civic Association expressed support for rehabilitating high value coastal receiving waters to improve water quality.	Environmental Organizations Laguna Bluebelt Coalition South Laguna Civic Association
	<u>RESPONSE:</u> The San Diego Water Board agrees with the commenters that rehabilitation of coastal wetlands and estuaries are important to the improvement of water quality within the San Diego Region.	

E5e3-2: Create map to identify creeks and coastal receiving waters impacted by discharges from storm drains and candidate areas for restoration.

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E5e3-2	PROVISION E.5.e.(3): Stream, Channel and/or Habitat Rehabilitation in Areas of Existing Development	
	COMMENT: <i>Create map to identify creeks and coastal receiving waters impacted by discharges from storm drains and candidate areas for restoration.</i> The Laguna Bluebelt Coalition and South Laguna Civic Association expressed support for the creation of maps to show water quality impacted areas of all creeks and coastal receiving waters within the region. The commenters also supported identifying degraded land elements, offending storm drain outlets and candidate areas for re-forestation and estuarine/coastal restoration.	Environmental Organizations Laguna Bluebelt Coalition South Laguna Civic Association
	RESPONSE: The San Diego Water Board agrees that maps identifying candidate areas for restoration would be useful. The Copermittees have been provided an opportunity to create maps to assist in their efforts to comply with the requirements of the Tentative Order. Specifically, the Copermittees will have the option to generate a map and list of candidate projects, including stream, channel and habitat rehabilitation projects, which could potentially be used as alternative compliance options for Priority Development Projects, to be implemented in lieu of onsite structural BMP performance requirements. The optional Watershed Management Area Analysis is provided in Provision B.3.b.(4).	

E5e3-3: Request for modifications to existing development stream, channel and/or habitat rehabilitation requirements.

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E5e3-3	PROVISION E.5.e.(3): Stream, Channel and/or Habitat Rehabilitation in Areas of Existing Development	
	COMMENT: Request for modifications to existing development stream, channel and/or habitat rehabilitation requirements. The Orange County Copermittees requested a modification to the requirements of Provision E.5.e.(3) to allow a Copermittee to identify stream, channel, and/or habitat rehabilitation projects downstream of its jurisdiction. The Orange County Copermittees also requested the removal of Provision E.5.e.(3)(a) requiring each Copermittee to identify streams, channels, and/or habitats in areas of existing development as candidates for rehabilitation.	Copermittees Orange County Copermittees
	RESPONSE: The San Diego Water Board disagrees with the requests. The requirements of Provision E.5.e.(3) are to be implemented by each Copermittee within its jurisdiction. Allowing a Copermittee to identify stream, channel, and/or habitat rehabilitation projects downstream of its jurisdiction is not appropriate for this requirement. The Copermittee will, however, be able to identify stream, channel, and/or habitat rehabilitation projects downstream of its jurisdiction as potential alternative compliance options for Priority Development Projects if the Copermittees in the Watershed Management Area perform the optional Watershed Management Area Analysis and include it in the Water Quality Improvement Plan. The removal of Provision E.5.e.(3)(a) is not appropriate because without this requirement, the subsequent requirements could not be implemented by the Copermittee. The San Diego Water Board did not modify the requirements of Provision E.5.e.(3), but the requirements are now under Provision E.5.e.(2) in the revised Tentative Order.	

PROVISION E.6: Enforcement Response Plans

E6-1: *Specify criminal penalties are limited to intentional or criminally negligent acts.***RESPONSES TO COMMENTS RECEIVED ON TENTATIVE ORDER NO. R9-2013-0001**

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E6-1	PROVISION E.6: Enforcement Response Plans	
	<u>COMMENT:</u> <i>Specify criminal penalties are limited to intentional or criminally negligent acts.</i> The Riverside County and San Diego County Copermittees each submitted comments requesting Provision E.6.b.(5) be modified to specify criminal penalties are limited to intentional or criminally negligent acts.	Copermittees Riverside County Copermittees San Diego County Copermittees
	<u>RESPONSE:</u> The San Diego Water Board disagrees that the revision is necessary. Provision E.6.b requires each Copermittee to list the enforcement response approaches that the Copermittee will implement within its jurisdiction to compel compliance with its statutes, ordinances, permits, contracts, order, or similar means, and the requirements of the Order. The Copermittee may specify in its Enforcement Response Plan that criminal penalties are limited to intentional or criminally negligent acts. The San Diego Water Board did not revise Provision E.6.b.(5).	

E6-2: Notification to San Diego Water Board for "escalated" enforcement should be consistent with Construction General Permit.

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E6-2	PROVISION E.6: Enforcement Response Plans	
	COMMENT: Notification to San Diego Water Board for "escalated" enforcement should be consistent with Construction General Permit. The Riverside County and San Diego County Copermittees each submitted comments requesting Provision E.6.e.(1) be modified to be consistent with the notification requirements of the Construction General Permit.	Copermittees Riverside County Copermittees San Diego County Copermittees
	RESPONSE: The San Diego Water Board agrees with the request. Provision E.6.e.(1) has been revised as requested.	

E6-3: *Revise the term "escalated enforcement" to "progressive enforcement."***RESPONSES TO COMMENTS RECEIVED ON TENTATIVE ORDER NO. R9-2013-0001**

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E6-3	PROVISION E.6: Enforcement Response Plans	
	COMMENT: <i>Revise the term "escalated enforcement" to "progressive enforcement."</i> The Orange County and Riverside County Copermittees each submitted comments requesting Provision E.6.d be modified to be "Progressive Enforcement" instead of "Escalated Enforcement" because the term is more appropriate.	Copermittees Orange County Copermittees Riverside County Copermittees
	RESPONSE: The San Diego Water Board disagrees with the request. The Copermittees are expected to implement "progressive enforcement" in all cases of enforcement. For enforcement issues that are associated with the highest priority water quality conditions identified by the Copermittees in the Watershed Management Area, the Copermittees are expected to implement the enforcement more swiftly, meaning escalating its enforcement measures and resources to compel compliance with its statutes, ordinances, permits, contracts, order, or similar means, and the requirements of the Order as soon as possible. The term "escalated enforcement" correctly reflects this added level of urgency and focus to compel compliance. The San Diego Water Board did not revise Provision E.6.d.	

E6-4: *Allow the Copermittees to utilize existing guidelines and procedures for enforcement.***RESPONSES TO COMMENTS RECEIVED ON TENTATIVE ORDER NO. R9-2013-0001**

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E6-4	PROVISION E.6: Enforcement Response Plans	
	<u>COMMENT:</u> <i>Allow the Copermittees to utilize existing guidelines and procedures for enforcement.</i> The Orange County and Riverside County Copermittees each submitted comments requesting the introductory paragraph of Provision E.6 be modified to specify that a Copermittee may utilize and implement established, equivalent guidelines and procedures for enforcement.	Copermittees Orange County Copermittees Riverside County Copermittees
	<u>RESPONSE:</u> The San Diego Water Board disagrees with the request. The Copermittees are allowed to utilize and implement their existing procedures if they meet the requirements of Provision E.6. Provision E.6, however, requires each Copermittee to develop an Enforcement Response Plan, included as part of its jurisdictional runoff management program document, which the San Diego Water Board and the public may utilize to determine if the Copermittee is indeed implementing its enforcement program according to its procedures. The Enforcement Response Plan is expected to be a tool the Copermittee can refer to when issuing enforcement actions to compel compliance with its statutes, ordinances, permits, contracts, order, or similar means, and the requirements of the Order. The Enforcement Response Plan is also expected to result in more consistent enforcement and enforcement actions by the Copermittee within its jurisdiction. The San Diego Water Board did not revise the introductory paragraph to Provision E.6.	

PROVISION E.7.a: Public Education

E7a-1: Requests for modifications to public education requirements.

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E7a-1	PROVISION E.7.a: Public Education	
	COMMENT: <i>Requests for modifications to public education requirements.</i> The Orange County, Riverside County and San Diego County Copermittees each submitted comments requesting the requirements in Provision E.7.a be modified to allow the Copermittees to focus their public education efforts on the highest priority water quality conditions, and remove or reduce the emphasis in the language that focuses on pesticides, herbicides and fertilizers.	Copermittees Orange County Copermittees Riverside County Copermittees San Diego County Copermittees
	RESPONSE: The San Diego Water Board disagrees with the requested modifications. The public education requirements under Provision E.7.a provide the Copermittees the flexibility to focus their public education efforts on the highest priority water quality conditions, while being consistent with federal regulations. Provision E.7.a.(1) is consistent with 40CFR122.26(d)(2)(iv)(A)(6), which requires each Copermittee to provide “A description of a program to reduce to the maximum extent practicable, pollutants in discharges from municipal separate storm sewers associated with the application of pesticides, herbicides and fertilizer which will include...educational activities...” Provision E.7.a.(1) has been expanded to include “other pollutants of concern...as determined and prioritized by the Copermittee(s) by jurisdiction and/or watershed to address the highest priority water quality conditions...” To be consistent with 40CFR122.26(d)(2)(iv)(A)(6), however, each Copermittee must have a program of educational activities to reduce pollutants associated with pesticides, herbicides and fertilizers to the MEP. The San Diego Water Board did not modify Provision E.7.a.	

PROVISION E.8: Fiscal Analysis

E8-1: Request to remove requirement to secure resources to meet requirements of the permit.

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E8-1	PROVISION E.8: Fiscal Analysis	
	COMMENT: <i>Request to remove requirement to secure resources to meet requirements of the Tentative Order.</i> The Riverside County Copermittees requested that Provision E.8.a, requiring each Copermittee to secure the resources necessary to meet all the requirements of the Order, be removed. The Riverside County Copermittees assert this requirement exceeds the requirements of the Clean Water Act.	Copermittees Riverside County Copermittees
	RESPONSE: The San Diego Water Board disagrees with the request. The Copermittees are responsible for securing the resources necessary to meet the requirements of the Tentative Order. Without securing the resources necessary to meet all requirements of the Tentative Order, the Copermittee would be unable to meet the requirements of the Tentative Order. Additionally, CWA section 402(p)(3)(B)(iii) requires that NPDES permits for storm water discharges from MS4s to “<i>require controls to reduce the discharge of pollutants [in storm water] to the maximum extent practicable [MEP], including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.</i>” The requirement for each Copermittee to secure the resources necessary to meet all the requirements of the Order is considered “<i>such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.</i>” The San Diego Water Board did not remove the requirement.	

PROVISION F.1: Water Quality Improvement Plans

F1-1: Requests for modifications to Water Quality Improvement Plan development process and schedule.

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F1-1	PROVISION F.1: Water Quality Improvement Plans	
	COMMENT: <i>Requests for modifications to Water Quality Improvement Plan development process and schedule.</i> Comments from the Building Industry and the Copermittees requested modifications to the schedules for developing and updating the Water Quality Improvement Plans. Generally, the requests were for more time because of several different factors. The San Diego County Copermittees also requested several modifications to the content of the submittal required for each element of the Water Quality Improvement Plan. Comments from the Environmental Groups and USEPA were primarily concerned with the public participation process during the development of the Water Quality Improvement Plans. The concern was that the requirements of the Tentative Order did not allow for enough public participation, and they requested that additional opportunities be provided during the Water Quality Improvement Plan development and updates. The Environmental Groups also requested that the Water Quality Improvement Plans be required to be developed consecutively instead of concurrently.	Building Industry / Industry BIA Regulated Community Coalition Copermittees Orange County Copermittees Riverside County Copermittees San Diego County Copermittees San Diego Unified Port District Environmental Organizations Environmental Groups State/Federal Government USEPA
	RESPONSE: The San Diego Water Board agrees with the request to provide additional time to develop the Water Quality Improvement Plans, but disagrees with requiring the Water Quality Improvement Plans to be developed consecutively instead of concurrently. The San Diego Water Board also agrees with including additional opportunities for public participation during the Water Quality Improvement Plan development and update processes. The San Diego Water Board has modified the requirements of Provision F.1 to provide the Copermittees up to 24 months, instead of 18 months, to develop the Water Quality Improvement Plans. The schedules for developing and submitting the elements of the Water Quality Improvement Plan have also been modified to provide additional time, and additional flexibility to stagger the development of the Water Quality Improvement Plans to provide the public sufficient opportunity to provide data, information and recommendations. Please also see the response to comment B-3.	

PROVISION F.3.b: Annual Reports

F3b-1: Recommendations for modifications to Annual Report requirements.

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F3b-1	PROVISION F.3.b: Annual Reports	
	COMMENT: <i>Recommendations for modifications to Annual Report requirements.</i> Several commenters provided recommendations for modifications to the Annual Report requirements to clarify the requirements, include different requirements, or remove requirements. Ecolayers and the San Diego County Copermittees are concerned with the requirements related to uploading data to the California Environmental Data Exchange Network (CEDEN). Uploading data to CEDEN is not necessary according to Ecolayers. The Copermittees would like to limit the data uploads only to data generated by the Copermittees and not third parties. The Orange County, Riverside County, and San Diego County Copermittees all expressed concern about the transitional reporting period between the time the Tentative Order becomes effective and the date that the first Water Quality Improvement Plan Annual Reports are required. The Orange County Copermittees also expressed concern with the use of the Jurisdictional Runoff Management Program Annual Report Form (Form) in Attachment D to the Tentative Order. The Orange County Copermittees requested continuing the use of the current jurisdictional runoff management program annual reporting format instead of the Form. The Environmental Groups also expressed concern with the Form. The Environmental Groups are concerned that the Form would not adequately reflect the activities that each Copermittee was implementing within its jurisdiction and allow the public to understand how the Copermittees were implementing effective water quality improvement strategies.	Copermittees Orange County Copermittees Riverside County Copermittees San Diego County Copermittees Environmental Organizations Environmental Groups Other Entities Ecolayers
	RESPONSE: The San Diego Water Board agrees that modifying the Annual Report requirements is necessary to clarify transitional reporting requirements and Water Quality Improvement Plan reporting requirements. The San Diego Water Board does not agree that uploading data to CEDEN is unnecessary. Finally, the San Diego Water Board disagrees with replacing the Form with the current jurisdictional runoff management program annual reporting format. The San Diego Water Board has revised the Annual Report requirements under Provision F.3.b to include (1) Transitional Jurisdictional Runoff Management Program Annual Reports, (2) Transitional Monitoring and Assessment Program Annual Reports, and (3) Water Quality Improvement Plan Annual Reports. The Transitional Jurisdictional Runoff Management Program Annual Reports and Transitional Monitoring and	

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F3b-1	PROVISION F.3.b: Annual Reports
	Assessment Program Annual Reports will be submitted by the Copermittees until the first Water Quality Improvement Plan Annual Reports are required. The Form is required for each Copermittee within each Watershed Management Area during the transitional reporting permit. Each Copermittee has the option to continue utilizing the current jurisdictional runoff management program annual reporting format in addition to the Form until the Water Quality Improvement Plan Annual Reports are required. The Form will continue to be required as part of the Water Quality Improvement Plan Annual Reports, but they are expected to be included as an appendix or attachment to the report. The San Diego Water Board will review the Forms to ensure that the Copermittees have certified that they are implementing their jurisdictional runoff management programs in compliance with the requirements. The San Diego Water Board will also utilize the Forms during audits of the Copermittees' jurisdictional runoff management programs and their records. The Water Quality Improvement Plan Annual Reports will provide the information that the Environmental Groups are interested in seeing as part of the annual reporting requirements. Provision F.3.b.(3)(d) requires each Copermittee to report the water quality improvement strategies that were implemented and/or no longer implemented by each of the Copermittees during the reporting period and previous reporting periods, and are planned to be implemented during the next reporting period. Finally, the San Diego Water Board has not removed the requirements to upload data to CEDEN, but has limited the data that is required to be uploaded to CEDEN to just data generated by the Copermittees.

PROVISION F.3.c: Regional Monitoring and Assessment Report

F3c-1: Requests for modifications to Regional Monitoring and Assessment Report requirements.

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F3c-1	PROVISION F.3.c: Regional Monitoring and Assessment Report	
	COMMENT: <i>Requests for modifications to Regional Monitoring and Assessment Report requirements.</i> The Riverside County and San Diego County Copermittees each submitted requests for modifications to the Regional Monitoring and Assessment Report requirements. The Riverside County Copermittees recommended aligning the requirements with the Integrated Assessment of the Water Quality Improvement Plans. The San Diego County Copermittees recommended removing the requirement for the Regional Monitoring and Assessment Report as it appears to be duplicative with the Integrated Assessment of the Water Quality Improvement Plans. The San Diego County Copermittees also requested, if the Regional Monitoring and Assessment Report requirements remain, that data uploaded to the Regional Clearinghouse be limited only to data generated by the Copermittees and not third parties.	Copermittees Riverside County Copermittees San Diego County Copermittees
	RESPONSE: The San Diego Water Board disagrees with the requests to modify the Regional Monitoring and Assessment Report requirements. The San Diego Water Board agrees with limiting the data uploaded to the Regional Clearinghouse only to data generated by the Copermittees. The Regional Monitoring and Assessment Report is for the entire San Diego Region, not specific to each Watershed Management Area. The Regional Monitoring and Assessment Report may utilize the findings from the Integrated Assessments of the Water Quality Improvement Plans, but the Regional Monitoring and Assessment Report is intended to provide a “snapshot” of the conditions of the entire San Diego Region. The San Diego Water Board did not remove Provision F.3.c from the requirements. The San Diego Water Board did, however, revise Provision F.3.c.(3) to limit the data that is required to be uploaded to the Regional Clearinghouse to just data generated by the Copermittees.	

PROVISION F.4: Regional Clearinghouse

F4-1: Request to allow the Copermittees to utilize existing mechanisms and linkages as part of the Regional Clearinghouse.

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F4-1	PROVISION F.4: Regional Clearinghouse	
	COMMENT: Request to allow the Copermittees to utilize existing mechanisms and linkages as part of the Regional Clearinghouse. The Orange County and San Diego County Copermittees each submitted comments requesting the requirements in Provision F.4 be modified to allow the Copermittees to utilize their existing web-based systems. The Orange County and San Diego County Copermittees requested that language be added to Provision F.4 that specifies a Copermittee may elect to develop and maintain clearinghouses provided by other Copermittees or agencies.	Copermittees Orange County Copermittees San Diego County Copermittees
	RESPONSE: The San Diego Water Board agrees that the Copermittees should be allowed to utilize their existing web-based systems. Provision F.4.a allows the Copermittees to link the Regional Clearinghouse “to other internet-based data portals and databases where the original documents are stored.” The Regional Clearinghouse, however, must be a single website that is linked to the other web-based systems. Provision G.2.d requires the Principal Watershed Copermittees to coordinate and develop the Regional Clearinghouse. The San Diego Water Board has added a footnote to the opening paragraph of Provision F.4 as requested by the San Diego County Copermittees, which is consistent with the language requested by the Orange County Copermittees.	

PROVISION G: PRINCIPAL WATERSHED COPERMITTEE RESPONSIBILITIES

G-1: Request for "clarifications" of Copermittee responsibilities.

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G-1	PROVISION G: PRINCIPAL WATERSHED COPERMITTEE RESPONSIBILITIES	
	COMMENT: Request for "clarifications" of Copermittee responsibilities. The San Diego County Copermittees requested that Provision G "clarifies" that all Copermittees have some responsibilities to implement the requirements of the permit, not just the Principal Watershed Copermittees. The San Diego County Copermittees also requested removal of the language recommending that an individual Copermittee should not be designated a Principal Watershed Copermittee for more than two Watershed Management Areas.	Copermittees San Diego County Copermittees
	RESPONSE: The San Diego Water Board agrees to clarify that all Copermittees are responsible for implementing the requirements. The San Diego Water Board disagrees that it is necessary to remove the recommendation that an individual Copermittee should not be designated a Principal Watershed Copermittee for more than two Watershed Management Areas. Provision G states that an individual Copermittee "should not" be designated a Principal Watershed Copermittee for more than two Watershed Management Areas. "Should not" indicates that it is a recommendation, not a requirement. The recommendation has been included to express the San Diego Water Board's desire for, as well as encourage, more Copermittees to assume leadership positions in developing Water Quality Improvement Plans and coordinating water quality improvement strategies among Copermittees in a Watershed Management Area and in the San Diego Region. The recommendation is not a requirement. Removal of a recommendation is not necessary. The San Diego Water Board has added Provision G.3 to specify that the Principal Watershed Copermittees are not responsible for ensuring that the other Copermittees in the Watershed Management Area are in compliance with the requirements, and that each Copermittee is responsible for implementing the requirements of the Tentative Order.	

PROVISION H: MODIFICATION OF PROGRAMS

H-1: Request for an explicit re-opener provision in permit for TMDLs.

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H-1	PROVISION H: MODIFICATION OF PROGRAMS	
	COMMENT: <i>Request for an explicit re-opener provision in permit for TMDLs.</i> The Orange County and San Diego County Copermittees and several individual Copermittees requested an explicit re-opener provision be included in the Tentative Order for when TMDLs may be amended.	Copermittees - City of Dana Point - City of Imperial Beach - City of Laguna Niguel - City of Mission Viejo - City of Poway - City of Rancho Santa Margarita - City of San Diego - Orange County Copermittees - San Diego County Copermittees
	RESPONSE: The San Diego Water Board agrees with the request. The San Diego Water Board has revised Provision H.4 to explicitly state when the San Diego Water Board will re-open the Order for modifications. Provision H.4.c explicitly states that the San Diego Water Board will re-open the Order if any of the TMDLs in Attachment E are amended in the Basin Plan by the San Diego Water Board, and the amendment is approved by the State Water Board, Office of Administrative Law, and the USEPA.	

H-2: Request to include language that the permit may be amended outside of the Water Quality Improvement Plan process.

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H-2	PROVISION H: MODIFICATION OF PROGRAMS	
	COMMENT: Request to include language that the permit may be amended outside of the Water Quality Improvement Plan process. The San Diego County Copermittees have requested the San Diego Water Board include language in Provision H.3 that explicitly states the Tentative Order may be modified outside of the Water Quality Improvement Plan development and implementation process. The San Diego County Copermittees indicated that there may be frequent modifications to the permit requirements based on the Water Quality Improvement Plan development and implementation process.	Copermittees San Diego County Copermittees
	RESPONSE: The San Diego Water Board disagrees with the request. The Tentative Order has been structured to allow the iterative and adaptive management process to occur within the Water Quality Improvement Plan development and implementation process. The San Diego Water Board does not anticipate any need to modify the Order's requirements as a result of the implementation of the Water Quality Improvement Plans. In the event that the Order's requirements do need to be modified, the language currently in Provision H.3 is adequate for this purpose. Thus, the San Diego Water Board did not revise Provision H.3 as requested by the San Diego County Copermittees.	

ATTACHMENT A: Discharge Prohibitions and Special Protections

AttA-1: Requests for modifications to Areas of Special biological Significance (ASBS) Special Protections requirements.

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AttA-1	ATTACHMENT A: Discharge Prohibitions and Special Protections	
	COMMENT: <i>Requests for modifications to Areas of Special Biological Significance (ASBS) Special Protections requirements.</i> San Diego Gas and Electric and Southern California Gas Company requested modifications to Provision I.A.1.e.(2)(ii) of the Special Protections for Areas of Special Biological Significance, Governing Point Source Discharges of Storm Water and Nonpoint Source Waste Discharges (Special Protections) in Attachment A to the Order. San Diego Gas and Electric and Southern California Gas Company requested Provision I.A.1.e.(2)(ii) be revised to include a reference to Finding 32 of the Order to be consistent with their comments regarding authorized non-storm water discharges to MS4s that discharge to ASBS (see comment Fnd-14).	Building Industry / Industry San Diego Gas and Electric Southern California Gas Company
	RESPONSE: The San Diego Water Board disagrees with the request. The Special Protections in Attachment A to the Tentative Order were adopted under Resolution No. 2012-0012 by the State Water Board, and are provided verbatim as a reference. Revising the provisions of the Special Protections, which are part of a resolution issued by the State Water Board, is not appropriate or necessary. The San Diego Water Board did not revise the Special Protections in Attachment A.	

ATTACHMENT B: Standard Permit Provisions and General Provisions

AttB-1: Requests for modifications to the Standard Permit Provisions.

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AttB-1	ATTACHMENT B: Standard Permit Provisions and General Provisions	
	COMMENT: <i>Requests for modifications to Standard Permit Provisions.</i> The Riverside County and San Diego County Copermittees each submitted comments requesting Standard Permit Provision 1.m be removed from the Standard Permit Provisions in Attachment B. The Copermittees are concerned that the bypass provisions of Standard Permit Provision 1.m would require the Copermittees to notify the San Diego Water Board whenever there is an anticipated or unanticipated bypass of storm water treatment BMPs.	Copermittees Riverside County Copermittees San Diego County Copermittees
	RESPONSE: The San Diego Water Board disagrees with the request. The Standard Permit Provisions in Attachment B are required to be included in all NPDES permits. Thus, it is inappropriate to remove any of the Standard Permit Provisions. Standard Permit Provision 1.m(1)(a) defines a bypass as the intentional diversion of waste streams from any portion of a treatment facility. As most storm water treatment BMPs are not expected to be attended and expected to operate without oversight, there are unlikely to be “intentional” diversions of waste streams. If, however, one or more Copermittees operate a storm water treatment control BMP that requires an “intentional” diversion of the waste stream, the San Diego Water Board expects the Copermittee(s) to comply with the requirements of Standard Permit Provision 1.m. The San Diego Water Board did not revise the Standard Permit Provisions in Attachment B.	

AttB-2: Requests for "clarifications" to the General Provisions.

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AttB-2	ATTACHMENT B (Standard Permit Provisions and General Provisions)	
	COMMENT: <i>Requests for "clarifications" to the General Provisions.</i> The Riverside County and San Diego County Copermittees each submitted comments requesting "clarifications" to the General Provisions in Attachment B. The Copermittees requested that General Provision 2.h include language that specifies the Copermittees are not responsible for pollutants in its MS4 discharges originating from an NPDES-permitted non-storm water discharge. The Copermittees also requested that recordkeeping requirements of General Provision 2.i.(2) be deleted or revised to be consistent with Standard Permit Provision 1.j.(2).	Copermittees Riverside County Copermittees San Diego County Copermittees
	RESPONSE: The San Diego Water Board disagrees with the requests. Discharges to the Copermittees' MS4s authorized by a separate NPDES permit do not have to be prohibited, as specified in the requirements of Provisions A.1.b and E.2. The Copermittees, however, are responsible for identifying the sources of the discharges from its MS4 if it causes or contributes to exceedances of water quality standards in receiving waters. Please see the response to comment E2-3. The recordkeeping requirements of General Provision 2.i.(2) are not inconsistent with Standard Permit Provision 1.j.(2). Standard Permit Provision 1.j.2 requires records to be kept for a minimum of 3 years unless the San Diego Water Board extends this period, consistent with the Code of Federal Regulations requirement. The San Diego Water Board has extended the recordkeeping requirements of Standard Permit Provision 1.j.(2) with General Provision 2.i.(2) to a period of 5 years. Thus, there is no conflict or inconsistency. The San Diego Water Board did not revise the General Provisions in Attachment B.	

ATTACHMENT C: Acronyms, Abbreviations, and Definitions

AttC-1: Requests for additional or modified definitions.

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AttC-1	ATTACHMENT C: Acronyms, Abbreviations, and Definitions	
	<u>COMMENT:</u> <i>Requests for additional or modified definitions.</i> Several comments were submitted by the Copermittees and Building Industry / Industry requesting modifications to existing definitions and/or the addition of new definitions to Attachment C to the Tentative Order.	Building Industry / Industry BIA Regulated Community Coalition San Diego Gas and Electric Southern California Gas Company Copermittees City of Chula Vista Orange County Copermittees Riverside County Copermittees San Diego County Copermittees
	<u>RESPONSE:</u> The San Diego Water Board reviewed and considered the requested modifications to existing definitions and additional definitions. Where the San Diego Water Board determined a modification to a definition requested by a commenter was appropriate and necessary to clarify a definition or make it consistent with other revisions made in the Tentative Order, the San Diego Water Board made a revision. Where the San Diego Water Board determined the addition of a definition requested by a commenter was appropriate and necessary, the San Diego Water Board added the definition. In several cases, the requested modification or addition was not appropriate, not necessary, or both. In such cases, the San Diego Water Board did not modify or add the definition as requested. Please see Attachment C in the revised Tentative Order to see the revisions that were made.	

ATTACHMENT E: Specific Provisions for Total Maximum Daily Loads

AttE-1: Link compliance with TMDL requirements to development and implementation of Water Quality Improvement Plans.

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AttE-1	ATTACHMENT E: Specific Provisions for Total Maximum Daily Loads	
	COMMENT: <i>Link compliance with TMDL requirements to development and implementation of Water Quality Improvement Plans.</i> The San Diego County Copermittees submitted comments requesting that the development and implementation of the Water Quality Improvement Plans be a compliance mechanism for the TMDL requirements of Attachment E. The San Diego Unified Port District submitted separate comments in support of the request. The Orange County Copermittees submitted comments requesting that Provision A.1 and A.2 include language that specifies that compliance with the discharge prohibitions and receiving water limitations will be achieved through implementing the requirements of Attachment E. Comments from Environmental Groups were not in support of allowing compliance with the TMDL requirements through a “reasonable assurance analysis” included in the Water Quality Improvement Plan.	Copermittees City of San Diego Orange County Copermittees San Diego County Copermittees San Diego Unified Port District Environmental Organizations Environmental Groups
	RESPONSE: The San Diego Water Board agrees with the comments from the Copermittees. The San Diego Water Board disagrees with the comments from the Environmental Groups. The San Diego Water Board acknowledges that monitoring all MS4 outfalls or all receiving waters at all times to demonstrate compliance with the final WQBELs is difficult, likely to be cost prohibitive, and likely to be infeasible. Thus, the San Diego Water Board has included an option to the Compliance Determination requirements allowing the utilization of the Water Quality Improvement Plan to demonstrate compliance with the interim and final TMDL requirements. The compliance determination option provides the Copermittees a mechanism through an analysis to demonstrate that there is “reasonable assurance” that the interim and final numeric WQBELs are being achieved through the implementation of BMPs. Because the Water Quality Improvement Plans will undergo a public participation and review process, the San Diego Water Board is confident that a Water Quality Improvement Plan that includes such an analysis will allow the Copermittees to demonstrate that the final TMDL requirements are being achieved and will be acceptable to the public and the San Diego Water Board. For the interim TMDL compliance determination requirements, the Copermittees are allowed to demonstrate compliance by implementing a Water Quality Improvement Plan that has been accepted by the San Diego Water Board, with a “reasonable assurance” that the implementation of the BMPs will achieve the interim TMDL WQBELs within the interim compliance dates. The Copermittees will be provided considerable flexibility for	

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AttE-1	ATTACHMENT E: Specific Provisions for Total Maximum Daily Loads	
	demonstrating compliance with achieving the interim WQBELs. For the final TMDL compliance determination requirements, the Copermittees are allowed to demonstrate compliance with the final WQBELs by implementing a Water Quality Improvement Plan that includes an analysis to demonstrate that the implementation of the BMPs required by the TMDL achieves compliance with one or more of the final numeric WQBELs. The Water Quality Improvement Plan must include monitoring and assessments to confirm that the Water Quality Improvement Plan is achieving the final TMDL requirement. The San Diego Water Board must accept and continue to accept the Water Quality Improvement Plan and analysis, and the Copermittees must continue to implement the BMPs and demonstrate through the analysis that the final numeric WQBELs are being achieved.	

AttE-2: Requests for including TMDL requirements consistent with the TMDLs as developed or "as originally intended."

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AttE-2	ATTACHMENT E: Specific Provisions for Total Maximum Daily Loads	
	COMMENT: <i>Requests for including TMDL requirements consistent with the TMDLs as developed or "as originally intended."</i> Several Copermittees submitted comments that the TMDLs have not been incorporated "as originally written and intended" or somehow inconsistent with the TMDLs as they were developed. The Orange County Copermittees specifically referred to the Baby Beach Bacteria TMDLs and the Beaches and Creeks Bacteria TMDLs, noting examples that they identified as "inconsistent" with the TMDLs in the Basin Plan. A comment from Clean Water Now seemed to imply that there was some inconsistencies present in the TMDL requirements "in light of recent legal renderings" though no specific legal interpretations or decisions were provided. The USEPA noted that the Beaches and Creeks Bacteria TMDLs included additional WLAs and compliance endpoints that were not included in Attachment E.	Copermittees City of Dana Point City of Imperial Beach City of Laguna Hills City of Lake Forest City of Mission Viejo City of Rancho Santa Margarita City of San Juan Capistrano Orange County Copermittees San Diego Unified Port District Environmental Organizations Clean Water Now State/Federal Government USEPA
	RESPONSE: The San Diego Water Board disagrees that the TMDL requirements in Attachment E are inconsistent with the TMDLs as developed or "as originally intended." The comments from the Copermittees and USEPA noted that several aspects of the TMDLs as they are in the Basin Plan are not included in the Tentative Order. The omission of those aspects of the TMDLs, however, does not mean that the TMDL requirements in Attachment E are inconsistent with the TMDLs as developed or "as originally intended." The TMDLs as developed are all intended to restore the water quality standards in receiving waters impaired by specific pollutants. The WLAs and LAs as developed are all intended to ensure that discharges from point and nonpoint sources to receiving waters will not cause or contribute to exceedances of water quality standards in receiving waters. The TMDL requirements in Attachment E are consistent with the intent of the TMDLs, and the WLAs for MS4s. In other words, the TMDL requirements in Attachment E are intended to ensure that discharges from the Responsible Copermittees' MS4s will not cause or contribute, and will continue to not cause or contribute to exceedances of water quality standards in receiving waters. According to each TMDL, when all point sources and nonpoint sources achieve their WLAs and LAs, including the WLAs for MS4s, the water quality standards in receiving waters will be restored. The San Diego Water Board included TMDL requirements in Attachment E that are entirely consistent with the requirements of the TMDLs as adopted and incorporated into the Basin Plan. The implementation plans of the	

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AttE-2 ATTACHMENT E: Specific Provisions for Total Maximum Daily Loads
TMDLs in the Basin Plan are essentially “instructions” for the San Diego Water Board to incorporate the requirements into the regulatory mechanisms that will implement the requirements of the TMDL to attain the water quality standards that are being impaired by a pollutant in a water body. In each case, the “instructions” provide the permit writer considerable flexibility in how to express the WLAs as WQBELs in the permit, but not as much flexibility in the compliance schedules for achieving the WLAs. Nonetheless, the San Diego Water Board has revised the TMDL requirements in Attachment E to include some of the additional aspects of the TMDLs as developed and included in the Basin Plan. Please see the following responses to comments pertaining to Attachment E.

AttE-3: Objections with how the Water Quality Based Effluent Limitations are included or expressed in the Tentative Order.

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AttE-3	ATTACHMENT E: Specific Provisions for Total Maximum Daily Loads	
	COMMENT: <i>Objections with how the Water Quality Based Effluent Limitations are included or expressed in the Tentative Order.</i> The Orange County and San Diego County Copermittees each submitted comments that objected to how the WQBELs for the TMDLs in Attachment E are included or expressed. The San Diego County Copermittees object to including receiving water limitations as a component of the WQBELs, and requested a clearer linkage between receiving water limitations and effluent limitations. The Orange County Copermittees had a similar objection. The San Diego County Copermittees also requested that the WQBELs expressed as effluent limitations specify that the concentration-based effluent limitations be applied on a watershed basis and not outfall by outfall. The Orange County Copermittees questioned the feasibility of the numeric WQBELs, and asserted that compliance with WQBELs should be based on implementation of BMPs. The Orange County Copermittees assert that a Reasonable Potential Analysis (RPA) is required before including WQBELs into the permit. The Orange County Copermittees also assert that the WQBELs for the Baby Beach Bacteria TMDLs and Beaches and Creeks Bacteria TMDLs are not consistent with the assumptions and requirements of the WLAs. In contrast, the USEPA generally supported the San Diego Water Board's approach for incorporating the TMDL requirements into the Tentative Order.	Copermittees Orange County Copermittees San Diego County Copermittees State/Federal Government USEPA
	RESPONSE: The San Diego Water Board has included WQBELs that are consistent with the requirements and assumptions of the TMDLs. WQBELs can be expressed as (1) conditions in receiving waters that are to be attained to restore or protect water quality standards in receiving waters, (2) conditions in discharges that will not cause or contribute to exceedances of water quality standards in receiving waters, (3) BMPs that will ensure discharges will not cause or contribute to exceedances of water quality standards in receiving waters, or (4) a combination of one or more of (1)-(3). The San Diego Water Board has incorporated (1)-(3) under the WQBEL requirements for each of the TMDLs in Attachment E. In most cases, if the WQBEL expressed as a receiving water limitation is achieved, the discharges from the MS4s are assumed to be in compliance with the TMDL requirements. If not, then the	

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AttE-3	ATTACHMENT E: Specific Provisions for Total Maximum Daily Loads	
	Copermittees must demonstrate that discharges from the MS4s are not causing or contributing to the exceedances in the receiving waters by achieving the WQBELs expressed as effluent limitations. In every case, the Copermittees are required to implement BMPs to ensure that discharges from their MS4s do not cause or contribute to exceedances of water quality standards in receiving waters. Because there are TMDLs in the Basin Plan that have identified the MS4s as causing or contributing to exceedances of water quality standards, an RPA is not necessary to establish WQBELs. RPAs are only necessary if the San Diego Water Board decides to develop and incorporate WQBELs into an NPDES permit absent a TMDL. The WQBELs are also consistent with the assumptions and requirements of the WLAs. In each case, the WLAs are calculated based on numeric targets that are assumed to be able to restore or protect water quality standards in receiving waters and/or ensure discharges from the Responsible Copermittees' MS4s will not cause or contribute to exceedances of water quality standards in receiving waters. The numeric targets are required to be based on water quality objectives in the Basin Plan. Discharges from the MS4s are required to achieve the numeric targets for their discharges to protect water quality standards in receiving waters to meet the WLAs. The WQBELs for the TMDLs in Attachment E are consistent with the numeric targets, and thus consistent with the underlying assumptions and requirements of the numeric targets that are the basis of the WLAs. For the Baby Beach Bacteria TMDLs and Beaches and Creeks Bacteria TMDLs, the San Diego Water Board has not revised the concentration-based WQBELs, but has included WQBELs expressed as load-based effluent limitations. The Copermittees may utilize the load-based effluent limitations to demonstrate that the BMPs they are implementing are achieving their effluent limitations and not causing or contributing to exceedances of water quality standards in receiving waters. Please see the response to comment AttE-1.	

AttE-4: Recommendation to reorganize the Specific Provisions for the TMDLs.

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AttE-4 ATTACHMENT E: Specific Provisions for Total Maximum Daily Loads		
	<u>COMMENT:</u> Recommendation to reorganize the Specific Provisions for the TMDLs. The San Diego County Copermittees recommended reorganizing the Specific Provisions of the TMDLs in Attachment E. To clearly outline the interim and final requirements and schedules, the San Diego County Copermittees recommended organizing the compliance dates, WQBELs, and compliance determination by final TMDL requirements and interim TMDL requirements.	Copermittees San Diego County Copermittees
	<u>RESPONSE:</u> The San Diego Water Board agrees with the recommendation. The San Diego Water Board reorganized the Specific Provisions for the TMDLs in Attachment E as recommended.	

AttE-5: The San Diego Water Board does not have the authority to establish TMDLs for non-pollutants (surrogates).

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AttE-5 ATTACHMENT E: Specific Provisions for Total Maximum Daily Loads		
	COMMENT: <i>The San Diego Water Board does not have the authority to establish TMDLs for non-pollutants (surrogates).</i> The BIA Regulated Community Coalition requested that that San Diego Water Board revise the TMDLs to conform with a U.S. District Court for the Eastern District of Virginia decision that TMDLs could not be established to regulate non-pollutants as surrogates for pollutants.	Building Industry / Industry BIA Regulated Community Coalition
	RESPONSE: The San Diego Water Board disagrees that the TMDLs need to be revised. The TMDLs in Attachment E are all based on reducing pollutant loads in MS4 discharges to ensure the Copermittees' MS4s will not cause or contribute to exceedances of water quality standards in receiving waters. The TMDLs in Attachment E do not establish any requirements to regulate non-pollutants as surrogates for pollutants.	

AttE-6: Recommendation to add a provision to address TMDLs approved during the term of the Tentative Order.

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AttE6-1 ATTACHMENT E: Specific Provisions for Total Maximum Daily Loads	
COMMENT: Recommendation to add a provision to address TMDLs approved during the term of the Tentative Order. The USEPA recommended adding a provision to the requirements of the Tentative Order to address TMDLs approved during the term of the permit to expedite implementation of the TMDLs by the Copermittees.	State/Federal Government USEPA
RESPONSE: The San Diego Water Board agrees with the recommendation. The San Diego Water Board has revised Provision F.2.c to include a requirement for the Copermittees to initiate an update to the applicable Water Quality Improvement Plans to incorporate the requirements of any TMDL Basin Plan amendments, applicable to the Copermittees, approved by the Office of Administrative Law and USEPA within the term of the Tentative Order.	

ATTACHMENT E 1: Chollas Creek Diazinon TMDL

AttE1-1: Request to revise WQBELs for Chollas Creek Diazinon TMDL based on recalculated criteria.

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AttE1-1	ATTACHMENT E 1: Chollas Creek Diazinon TMDL	
	COMMENT: <i>Request to revise WQBELs for Chollas Creek Diazinon TMDL based on recalculated criteria.</i> The San Diego County Copermittees assert that the Chollas Creek Diazinon TMDL is based on erroneous numeric targets due to an error discovered in the criteria used to develop the TMDL. The San Diego County Copermittees requested that the WQBELs for the Chollas Creek Diazinon TMDL be revised based on recalculated criteria, or remove the TMDL until the WQBELs can be “corrected.”	Copermittees San Diego County Copermittees
	RESPONSE: The San Diego Water Board disagrees with the request. The Chollas Creek Diazinon TMDL was incorporated into the Basin Plan in September 2003. Until the Basin Plan is revised to include the “corrected” criteria as part of the numeric targets, the San Diego Water Board is required to include the TMDL requirements in the Tentative Order consistent with the requirements of the TMDL in the Basin Plan. The criteria utilized in the development of the Chollas Creek Diazinon TMDL are more protective than the “corrected” criteria cited by the commenter. Implementation of the Chollas Creek Diazinon TMDL with the WQBELs consistent with the numeric targets in the TMDL in the Basin Plan is protective of the water quality standards in receiving waters. According to the commenter, the “corrected” criteria were discovered in 2004. The commenter has had almost 9 years to approach the San Diego Water Board to request a revision to the TMDL in the Basin Plan. If the commenter would like to revise the numeric targets of the TMDL in the Basin Plan, the commenter must approach the TMDL and Basin Planning staff of the San Diego Water Board to request the change. Requesting the change through the MS4 permit development process is not the appropriate forum. The WQBELs for the Chollas Creek Diazinon TMDL were not revised.	

ATTACHMENT E 2: Shelter Island Yacht Basin Dissolved Copper TMDLs

AttE2-1: Request to include San Diego Unified Port District as MS4 operator in SIYB Dissolved Copper TMDL

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AttE2-1	ATTACHMENT E 2: Shelter Island Yacht Basin Dissolved Copper TMDLs	
	COMMENT: Request to include San Diego Unified Port District as MS4 operator in SIYB Dissolved Copper TMDL. The City of San Diego requested that the San Diego Unified Port District be listed as a Responsible Copermittee under the dissolved copper TMDL for Shelter Island Yacht Basin.	Copermittees City of San Diego
	RESPONSE: The San Diego Water Board disagrees that the San Diego Unified Port District should be listed as a Responsible Copermittee under the Shelter Island Yacht Basin dissolved copper TMDL. The Shelter Island Yacht Basin dissolved copper TMDL adopted under Resolution No. R9-2005-0019 only listed the City of San Diego as an owner or operator of an MS4 that discharges to Shelter Island Yacht Basin. The TMDL provides a wasteload allocation (WLA) of 30 kg/yr for MS4 discharges by the City of San Diego only. This means that if the San Diego Unified Port District does in fact have MS4 discharges to Shelter Island Yacht Basin, the TMDL currently has assigned MS4 discharges from the San Diego Unified Port District a WLA of 0 kg/yr. Any discharge of dissolved copper from MS4s owned or operated by the San Diego Unified Port District to Shelter Island Yacht Basin would be in violation of its WLA and WQBELs expressed as effluent limitations.	

AttE2-2: Request to revise WQBELs expressed as receiving water limitations for the Shelter Island Yacht Basin Dissolved Copper TMDL to include Water Effects Ratio.

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AttE2-2	ATTACHMENT E 2: Shelter Island Yacht Basin Dissolved Copper TMDLs	
	COMMENT: Request to revise WQBELs expressed as receiving water limitations for the Shelter Island Yacht Basin Dissolved Copper TMDL to include Water Effects Ratio. The San Diego County Copermittees noted that the Water Effects Ratio (WER) term was incorporated into the Chollas Creek Dissolved Metals TMDLs and requested that the WQBELs expressed as receiving water limitations for the Shelter Island Yacht Basin Dissolved Copper TMDL include the WER term.	Copermittees San Diego County Copermittees
	RESPONSE: The San Diego Water Board agrees with the request. The San Diego Water Board has included a WER multiplier to the WQBELs expressed as receiving water limitations for the Shelter Island Yacht Basin Dissolved Copper TMDL. The WER is assumed to be 1.0 unless there is a site-specific and chemical-specific WER. The WER must be incorporated into the Basin Plan before it can be utilized in the calculation for the WQBELs expressed as receiving water limitations. The footnote includes this clarification. The San Diego Water Board also revised the footnotes for the WER term in the Chollas Creek Dissolved Metals TMDLs to clarify that the WER is assumed to be 1.0 unless a site-specific and chemical-specific WER is provided in the Basin Plan.	

AttE2-3: *Revise Shelter Island Yacht Basin Dissolved Copper TMDL requirements to allow for BMP-based compliance.***RESPONSES TO COMMENTS RECEIVED ON TENTATIVE ORDER NO. R9-2013-0001**

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AttE2-3 ATTACHMENT E 2: Shelter Island Yacht Basin Dissolved Copper TMDLs		
	COMMENT: <i>Revise Shelter Island Yacht Basin Dissolved Copper TMDL requirements to allow for BMP-based compliance.</i> The San Diego County Copermittees requested that the Shelter Island Yacht Basin Dissolved Copper TMDL requirements be revised to allow for BMP-based compliance.	Copermittees San Diego County Copermittees
	RESPONSE: The San Diego Water Board agrees with the request to include a BMP-based compliance determination option. Please see the response to comment AttE-1.	

ATTACHMENT E 3: Rainbow Creek Total Nitrogen and Total Phosphorus TMDLs

AttE3-1: Request to remove the Rainbow Creek Total Nitrogen and Total Phosphorus TMDLs from the permit.

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AttE3-1	ATTACHMENT E 3: Rainbow Creek Total Nitrogen and Total Phosphorus TMDLs	
	COMMENT: Request to remove the Rainbow Creek Total Nitrogen and Total Phosphorus TMDLs from the Tentative Order. The County of San Diego and San Diego County Copermittees requested the Rainbow Creek Total Nitrogen and Total Phosphorus TMDLs be removed from Attachment E to the Tentative Order. The Copermittees noted that the TMDL, as it is incorporated in the Basin Plan, only identified a wasteload allocation (WLA) for Caltrans. The TMDL only assigns load allocation (LAs) for land uses to the County of San Diego. The Copermittees assert that only requirements for WLAs can be incorporated into an NPDES permit. The San Diego County Copermittees also requested, if the Rainbow Creek Total Nitrogen and Total Phosphorus TMDLs are not removed from Attachment E, that one of the compliance determination options allow the Responsible Copermittee to demonstrate compliance by “using its legal authority to reduce nutrient discharges from the land uses identified...to the maximum extent practicable.”	Copermittees County of San Diego San Diego County Copermittees
	RESPONSE: The San Diego Water Board disagrees with the request to remove the Rainbow Creek Total Nitrogen and Total Phosphorus TMDLs from Attachment E. The San Diego Water Board also disagrees with allowing compliance by only achieving MEP. The Basin Plan states in the Rainbow Creek Total Nitrogen and Total Phosphorus TMDLs, “<i>In the event that a nonpoint source becomes a permitted discharge, the portion of the load allocation that is associated with the source can become a wasteload allocation</i>” (page 7-17 of the Basin Plan). The Rainbow Creek Total Nitrogen and Total Phosphorus TMDLs include several LAs that have been assigned to land uses that fall within the jurisdiction of the County of San Diego and discharge non-storm water and storm water to and from its MS4. Because these “nonpoint sources” are discharges subject to the requirements of an NPDES permit, they are permitted discharges. Thus they are effectively and appropriately considered WLAs that must be incorporated into the Tentative Order. The San Diego Water Board has revised and reorganized the format of the TMDL requirements in Attachment E, as requested by the Copermittees (see response to comment AttE-4). The reformatting and reorganization also resulted in the removal of the WLA term from the TMDL requirements. The introductory paragraph has been revised to specify that the TMDLs in Attachment E incorporate provisions that implement the LAs and WLAs applicable to discharges regulated under the Tentative Order.	

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AttE3-1 ATTACHMENT E 3: Rainbow Creek Total Nitrogen and Total Phosphorus TMDLs
The request by the Copermittees to include a compliance determination option of allowing compliance only by achieving MEP is not appropriate for a TMDL. TMDLs require the achievement of WQBELs when technology-based effluent limitations (TBELs) cannot achieve the attainment of water quality standards in receiving waters. The MEP standard is a TBEL. The Responsible Copermittee must achieve the WQBELs to either restore or protect water quality standards in receiving waters, or ensure discharges from the MS4 do not cause or contribute to exceedances of water quality standards in receiving waters. The San Diego Water Board did not remove the Rainbow Creek Total Nitrogen and Total Phosphorus TMDLs from Attachment E. The San Diego Water Board did not include a compliance determination option that allows compliance only by achieving MEP.

ATTACHMENT E 4: Chollas Creek Dissolved Copper, Lead, and Zinc TMDLs

AttE4-1: Request to revise the Chollas Creek Dissolved Copper, Lead, and Zinc TMDL requirements to allow for BMP-based compliance.

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AttE4-1 ATTACHMENT E 4: Chollas Creek Dissolved Copper, Lead, and Zinc TMDLs		
	COMMENT: Request to revise the Chollas Creek Dissolved Copper, Lead, and Zinc TMDL requirements to allow for BMP-based compliance. The San Diego County Copermittees requested that the Chollas Creek Dissolved Copper, Lead, and Zinc TMDL requirements be revised to allow for BMP-based compliance.	Copermittees San Diego County Copermittees
	RESPONSE: The San Diego Water Board agrees with the request to include a BMP-based compliance determination option. Please see the response to comment AttE-1.	

ATTACHMENT E 5: Baby Beach and Shelter Island Shoreline Park Bacteria TMDLs

AttE5-1: Request to revise the WQBELs of the Baby Beach and Shelter Island Shoreline Park Bacteria TMDL requirements to allow for load-based compliance.

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AttE5-1	ATTACHMENT E 5: Baby Beach and Shelter Island Shoreline Park Bacteria TMDLs	
	COMMENT: Request to revise the WQBELs of the Baby Beach and Shelter Island Shoreline Park Bacteria TMDL requirements to allow for load-based compliance. The Orange County and San Diego County Copermittees, Environmental Groups, and the USEPA each commented that the bacteria TMDLs included load-based WLAs, expressed as mass loads, percent load reductions, or both, and recommended including load-based WQBELs. The Orange County and San Diego County Copermittees requested the WQBELs include load-based effluent limitations and allow compliance to be demonstrated with load-based effluent limitations instead of concentration-based effluent limitations. The Environmental Groups did not support allowing compliance determination solely through mass-loading numbers.	Copermittees Orange County Copermittees San Diego County Copermittees Environmental Organizations Environmental Groups State/Federal Government USEPA
	RESPONSE: The San Diego Water Board agrees with the request to include requirements that allow for load-based compliance with the Baby Beach and Shelter Island Shoreline Park Bacteria TMDLs. Please see the responses to comment AttE-1 and AttE-3.	

ATTACHMENT E 6: Beaches and Creeks Bacteria TMDLs

AttE6-1: Water bodies no longer listed on the 303(d) List should not be required to implement or comply with the requirements of the Beaches and Creeks Bacteria TMDLs.

RESPONSES TO COMMENTS RECEIVED ON TENTATIVE ORDER NO. R9-2013-0001

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AttE6-1	ATTACHMENT E 6: Beaches and Creeks Bacteria TMDLs	
	COMMENT: <i>Water bodies no longer listed on the 303(d) List should not be required to implement or comply with the requirements of the Beaches and Creeks Bacteria TMDLs.</i> The Orange County and San Diego County Copermittees and the Cities of Carlsbad, Del Mar and Encinitas submitted comments noting that the Beaches and Creeks Bacteria TMDLs included language that beach segments that were delisted from the 303(d) list are not subject to further action and not required to submit Bacteria Load Reduction Plans (BLRPs) or Comprehensive Load Reduction Plans (CLRPs) as long as monitoring continues to support compliance with REC-1 water quality standards. The Copermittees requested that the Beaches and Creeks Bacteria TMDLs be modified so the beach segments that are not included on the 303(d) list are not required to implement or comply with the Beaches and Creek Bacteria TMDLs requirements.	Copermittees City of Carlsbad City of Del Mar City of Encinitas Orange County Copermittees San Diego County Copermittees
	RESPONSE: The San Diego Water Board disagrees that beach segments that are not on the 303(d) List should not be required to implement or comply with the Beaches and Creek Bacteria TMDLs requirements. The Beaches and Creeks Bacteria TMDLs have been incorporated into the Basin Plan and apply to all the water bodies listed in the TMDL. The Copermittees cite the following from the introduction to the Beaches and Creeks TMDLs: <i>"Specific beach segments from some of the Pacific Ocean shorelines listed in the above table have been delisted from the 2008 303(d) list that was approved by the San Diego Board on December 16, 2009, and therefore are not subject to any further action as long as monitoring data continues to support compliance with water quality standards"</i> (Basin Plan page 7-60). This does not mean that the TMDLs do not apply to these segments, only that the current BMPs are working and additional actions (i.e. additional BMPs) are not necessary at this time. Under the TMDL Compliance Schedule for the Beaches and Creeks Bacteria TMDLs, the Basin Plan states: <i>"The TMDLs that address the Pacific Ocean shorelines identified in the 2002 303(d) List are assumed to be applicable to all the beaches located on the shorelines of the hydrologic subareas (HSAs), hydrologic areas (HAs), and hydrologic units (HUs) listed above, or as listed individually in the 2008 and future 303(d) Lists"</i> (Basin Plan page 7-106). This means that the TMDLs apply to the entire Pacific Ocean Shorelines identified in the TMDL and is not only where there are beach segments that are listed on the 303(d) List. Thus, it does not matter if a particular segment has been delisted, the TMDLs still apply to the entire Pacific Ocean Shoreline identified in the TMDL.	

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AttE6-1 ATTACHMENT E 6: Beaches and Creeks Bacteria TMDLs
The TMDL Compliance Schedule also states, <i>"In some cases, receiving water limitations are already being met, resulting in the delisting of those segments or areas from the 2006 and/or 2008 303(d) Lists. The protection of the REC-1 beneficial use of those delisted segments or areas, however, must also be maintained, and those segments or areas must remain off future iterations of the 303(d) List... If receiving water limitations are exceeded in the future in those locations, the BLRPs or CLRPs must include the implementation of a BMP program that will ensure that the TMDLs will be achieved by the end of the TMDL compliance schedules."</i> (Basin Plan page 7-106). The Basin Plan continues, <i>"For watersheds in Table 7-52 where there are no longer any impairments listed on the 2008 303(d) List, the Phase I MS4s and Caltrans are not required to submit a BLRP or CLRP within 18 months of the effective date of these TMDLs. If, however, any segment of a waterbody for the watershed (Pacific Ocean shoreline, creek, or mouth as shown in Table 7-36) is re-listed on a future 303(d) List for any type of indicator bacteria, the Phase I MS4s and Caltrans will be required to submit a BLRP or CLRP within 6 months of the adoption of the 303(d) List by the San Diego Regional Board"</i> (page 7-107). This means that a BLRP or CLRP is not required by the Basin Plan to be submitted within 18 months of the effective date of the TMDLs, but it also does not mean that the San Diego Water Board cannot require a BLRP or CLRP to be submitted. The Beaches and Creeks Bacteria TMDLs were developed when it was unknown when the Orange County and San Diego County MS4 Permits would be renewed to incorporate the requirements of the TMDLs. At the time the TMDLs were adopted, the Orange County MS4 Permit had just been renewed in 2009, and the San Diego County MS4 Permit was unlikely to be renewed before 2012. The San Diego Water Board wanted the implementation of the TMDLs to begin with the submittal of BLRPs or CLRPs, before the Orange County and San Diego County MS4 permits were expected to be renewed. Thus, the TMDL included the 18 month period of time for the Copermittees to develop the BLRPs or CLRPs to be required by the San Diego Water Board through an appropriate regulatory mechanism. The regulatory mechanism to compel the submittal of the BLRPs or CLRPs from the Copermittees could have been in the form of an investigative order, enforcement action, or a modification to the existing MS4 permits. The San Diego Water Board removed the 18 month BLRP or CLRP submittal requirement only for the watersheds where there were no bacteria impairments on the 2008 303(d) List because there was not the same level of urgency to begin implementation of the TMDL requirements as for those watersheds where there continue to be bacteria impairments. The removal of the 18 month BLRP or CLRP submittal requirement did not mean that a BLRP or CLRP would not be required to be developed as part of the TMDL requirements in the MS4 permit.

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AttE6-1 ATTACHMENT E 6: Beaches and Creeks Bacteria TMDLs
The fact that the Beaches and Creeks Bacteria TMDLs are now part of the Basin Plan means that the TMDLs and the requirements of the TMDLs must be implemented through a regulatory mechanism to restore water quality standards in receiving waters and/or ensure discharges are not causing or contributing to exceedances of water quality standards in receiving waters. In this case, the Tentative Order is the regulatory mechanism that is implementing the requirements of the Beaches and Creeks Bacteria TMDLs to ensure that discharges from the Copermittees' MS4s will comply with the WLAs in the TMDL and not cause or contribute to exceedances of water quality standards in receiving waters. For segments or areas where there is no bacteria impairment identified on the 303(d) List, implementation of the Beaches and Creeks Bacteria TMDL requirements in the Tentative Order will ensure that discharges from the Copermittees' MS4s will continue to not cause or contribute to exceedances of water quality standards in receiving waters and remain off the 303(d) List. The Copermittees will be required to include the monitoring and assessments that are necessary to demonstrate that discharges from the Copermittees MS4s continue to not cause or contribute to exceedances of water quality standards in receiving waters and remain off the 303(d) List. The Copermittees will not be required to include additional BMPs in the Water Quality Improvement Plans if the existing BMPs are allowing the Copermittees to achieve the bacteria TMDL requirements. If, however, bacteria impairments result in the re-listing of any of these beach segments on the 303(d) List, the incorporation of the TMDL requirements in the Water Quality Improvement Plan will fulfill the CLRP requirements, and the Copermittees will be required to update the Water Quality Improvement Plan to ensure that discharges from the Copermittees' MS4s will not cause or contribute to exceedances of water quality standards in receiving waters by the final TMDL compliance date.

AttE6-2: Estimated costs to implement Beaches and Creeks Bacteria TMDLs are very high, and TMDLs may not be attainable.

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AttE6-2	ATTACHMENT E 6: Beaches and Creeks Bacteria TMDLs	
	COMMENT: <i>Estimated costs to implement Beaches and Creeks Bacteria TMDLs are very high, and TMDLs may not be attainable.</i> Several community planning groups, the County of San Diego and the San Diego Taxpayers Association expressed concerns with the estimated costs of implementing the Beaches and Creeks Bacteria TMDLs. There were also concerns expressed about the feasibility of attaining the TMDLs. The commenters generally objected to including the Beaches and Creeks Bacteria TMDLs in the Tentative Order until there was some certainty that the expenses associated with implementing the TMDLs will result in the achievement of the TMDLs.	Community Planning Groups Pala Pauma Valley Community Sponsor Group Jamul Dulzura Community Planning Group Ramona Community Planning Group Julian Community Planning Group Copermittees County of San Diego County of San Diego Office of County Counsel Societies/Associations/Coalitions San Diego Taxpayers Association
	RESPONSE: The San Diego Water Board understands the concerns with the potential costs of implementing the requirements of the TMDLs, as well as the concerns with the feasibility of attaining the TMDLs. The costs associated with achieving the requirements of the Beaches and Creeks Bacteria TMDLs were considered during Basin Plan amendment process. The Beaches and Creeks Bacteria TMDL Basin Plan amendment was made available for public review and comment on several occasions. The San Diego Water Board adopted the Beaches and Creeks Bacteria TMDLs after considering the potential costs. The State Water Board, Office of Administrative Law, and the USEPA also approved the Beaches and Creeks Bacteria TMDLs. At this time it is difficult to predict the actual costs of complying with the Beaches and Creeks Bacteria TMDL requirements. Even the estimates that have been provided by the County of San Diego and the City of San Diego in their Comprehensive Load Reduction Plans acknowledge there is significant uncertainty in their cost estimates. While the cost estimates do provide some idea of the magnitudes of the potential costs for implementing BMPs and programs to achieve the TMDLs, the cost estimates fail to include or consider the potential cost savings or cost benefits that may be achieved or realized by implementing the Beaches and Creeks Bacteria TMDLs. The Beaches and Creeks Bacteria TMDL requirements provide the Copermittees a compliance schedule of up to 20 years. The Copermittees have not truly begun implementing the requirements of the TMDLs and have only questioned and raised concerns over the potential costs and feasibility of attaining the TMDLs before developing any information to demonstrate the TMDLs cannot, in fact, be attained or that the costs exceed the benefits of implementing the TMDLs.	

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AttE6-2	ATTACHMENT E 6: Beaches and Creeks Bacteria TMDLs	
	The San Diego Water Board is implementing the requirements of the federal Clean Water Act. The incorporation of the requirements of the Beaches and Creeks Bacteria TMDLs in the Tentative Order is required to implement the WLAs that have been assigned to the MS4s, which is supported by the USEPA. The San Diego Water Board has not removed the Beaches and Creeks Bacteria TMDLs from Attachment E to the Order.	

AttE6-3: Request to revise the WQBELs of the Beaches and Creeks Bacteria TMDL requirements to allow for load-based compliance.

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AttE6-3	ATTACHMENT E 6: Beaches and Creeks Bacteria TMDLs	
	COMMENT: <i>Request to revise the WQBELs of the Beaches and Creeks Bacteria TMDL requirements to allow for load-based compliance.</i> The Orange County and San Diego County Copermittees, the City of Laguna Niguel, Environmental Groups, and the USEPA each commented that the bacteria TMDLs included load-based WLAs, expressed as mass loads, percent load reductions, or both, and recommended including load-based WQBELs. Several Copermittees submitted separate letters that supported the inclusion load-based WQBELs. The Orange County and San Diego County Copermittees requested the WQBELs include load-based effluent limitations and allow compliance to be demonstrated with load-based effluent limitations instead of concentration-based effluent limitations. The Environmental Groups did not support allowing compliance determination solely through mass-loading numbers.	Copermittees City of Dana Point City of Imperial Beach City of Laguna Niguel City of Mission Viejo City of Poway City of Rancho Santa Margarita City of San Diego Orange County Copermittees San Diego County Copermittees Environmental Organizations Environmental Groups State/Federal Government USEPA
	RESPONSE: The San Diego Water Board agrees with the request to include requirements that allow for load-based compliance with the Beaches and Creeks Bacteria TMDLs. Please see the responses to comment AttE-1 and AttE-3.	

AttE6-4: Request to revise the Beaches and Creeks Bacteria TMDL requirements to allow for BMP-based compliance.

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AttE6-4 ATTACHMENT E 6: Beaches and Creeks Bacteria TMDLs	
COMMENT: Request to revise the Beaches and Creeks Bacteria TMDL requirements to allow for BMP-based compliance. The Orange County and San Diego County Copermittees requested that the Beaches and Creeks Bacteria TMDL requirements be revised to allow for BMP-based compliance. Several Copermittees submitted separate comments supporting the concept. Comments from Environmental Groups were not in support of allowing BMP-based compliance with the TMDL requirements through a “reasonable assurance analysis.”	Copermittees City of Imperial Beach City of Poway City of San Diego Orange County Copermittees San Diego County Copermittees Environmental Organizations Environmental Groups
RESPONSE: The San Diego Water Board agrees with the Copermittees’ request. The San Diego Water Board disagrees with the Environmental Groups that BMP-based compliance option should not be provided. Please see the response to comment AttE-1.	

AttE6-5: Request to revise the Beaches and Creeks Bacteria TMDL requirements to allow for adjustment of interim TMDL compliance dates.

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March 27, 2013

AttE6-5 ATTACHMENT E 6: Beaches and Creeks Bacteria TMDLs	
COMMENT: Request to revise the Beaches and Creeks Bacteria TMDL requirements to allow for adjustment of interim TMDL compliance dates. The Orange County and San Diego County Copermittees and the City of San Diego submitted comments noting that the Beaches and Creeks Bacteria TMDL included a provision that allows for the Copermittees to propose interim compliance dates if they develop a Comprehensive Load Reduction Plan, and requested the TMDL requirements be modified to allow for the interim TMDL compliance dates to be adjusted. The City of Imperial Beach supported the concept. The Environmental Groups requested that there be an assessment of progress toward achieving the interim goals within the term of the permit.	Copermittees City of Imperial Beach City of San Diego Orange County Copermittees San Diego County Copermittees Environmental Organizations Environmental Groups
RESPONSE: The San Diego Water Board agrees with the Copermittees to allow for the interim TMDL compliance dates to be adjusted. The San Diego Water Board also agrees that there should be an assessment or progress toward achieving interim goals within the term of the permit. The Water Quality Improvement Plan is essentially the same as a CLRP. Including language allowing the Copermittees to adjust the interim TMDL compliance dates in the Water Quality Improvement Plan would not be inconsistent with the requirements of the Beaches and Creeks Bacteria TMDLs in the Basin Plan. Thus, the San Diego Water Board has included language in Specific Provision 6.c.(1) of the revised Tentative Order that allows the Copermittees to propose alternative interim TMDL compliance dates in the Water Quality Improvement Plan. The requirements of Provision B.3.a.(2)(b) in the revised Tentative Order also require the Copermittees to establish an interim goal that the Copermittees will work toward achieving within the term of the permit.	

AttE6-6: Requests to revise the WQBELs of the Beaches and Creeks Bacteria TMDLs requirements.

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March 27, 2013

AttE6-6 ATTACHMENT E 6: Beaches and Creeks Bacteria TMDLs		
	COMMENT: <i>Requests to revise the WQBELs of the Beaches and Creeks Bacteria TMDLs requirements.</i> The City of Laguna Niguel submitted comments with information from a study being conducted by the Southern California Coastal Waters Research Project (SCCWRP) in cooperation with the Copermittees regarding bacteria loads that can be attributed to natural sources. The information provided by the City of Laguna Niguel was provided to support a request to include load-based WQBELs based on load reductions. The City of Laguna Niguel also requested that the load reductions be calculated using a baseline of 1996-2002 data instead of 2002-2011 data. The San Diego County Copermittees submitted comments noting that the total coliform water quality objectives only apply to ocean waters and should not be applied to creeks. The San Diego County Copermittees requested that the WQBELs expressed as receiving water limitations specify that the total coliform receiving water limitations only apply to beaches and not creeks.	Copermittees City of Laguna Niguel San Diego County Copermittees
	RESPONSE: The San Diego Water Board agrees with the requests from the City of Laguna Niguel and the San Diego County Copermittees. The San Diego Water Board has incorporated WQBELs expressed as load-based effluent limitations based on percent load reductions. Please see the response to comments AttE-1 and AttE-3. The San Diego Water Board revised the tables with the WQBELs expressed as receiving water limitations to be consistent with the tables in the Beaches and Creeks Bacteria TMDLs.	

AttE6-7: Request to revise the Beaches and Creeks Bacteria TMDLs monitoring and assessment requirements to be consistent with TMDL Basin Plan amendment.

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March 27, 2013

AttE6-7 ATTACHMENT E 6: Beaches and Creeks Bacteria TMDLs	
COMMENT: Request to revise the Beaches and Creeks Bacteria TMDLs monitoring and assessment requirements to be consistent with TMDL Basin Plan amendment. The San Diego County Copermittees submitted comments requesting that the Beaches and Creeks Bacteria TMDLs monitoring and assessment requirements in the Order include the procedures to calculate wet weather exceedance frequencies as provided in the TMDL Basin Plan amendment.	Copermittees San Diego County Copermittees
RESPONSE: The San Diego Water Board agrees with the request. Specific Provisions 6.d.(1)(c) and 6.d.(2)(c) have been modified to include the procedures for calculating the dry weather and wet weather exceedance frequencies for beaches and creeks.	

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Linda S. Adams
Secretary for
Environmental Protection

California Regional Water Quality Control Board San Diego Region

Over 50 Years Serving San Diego, Orange, and Riverside Counties
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Arnold Schwarzenegger
Governor

TO: Chairman Wright and San Diego Regional Water
Quality Control Board Members

FROM: *Catherine George Hagan*
Catherine George Hagan, Senior Staff Counsel
Office of Chief Counsel

DATE: 5 November 2009

SUBJECT: Regulatory Authority for Imposing Numeric Effluent Limits on Dry
Weather, Non-Storm Water Discharges, in Municipal Storm Water Permits

At the July 1, 2009, San Diego Regional Board Meeting, Regional Board members received public comments regarding the inclusion of regulations specific to non-storm water discharges in Tentative Order No. R9-2009-002, the reissuance of National Pollutant Discharge Elimination System (NPDES) Waste Discharge Requirements for Discharges of Urban Runoff from the Municipal Separate Storm Sewer Systems (MS4s) draining the watersheds of Orange County within the San Diego Region (South Orange County Municipal Storm Water Requirements). At the July meeting, Regional Board members requested that Board Counsel respond to public comments and Board member questions regarding the Regional Board regulation of non-storm water discharges. Commenters assert that the definition of "storm water" in the federal regulations includes drainage and surface runoff entirely unrelated to precipitation events. They also comment that regardless of whether a discharge is composed entirely of storm water or non-storm water, any pollutants discharged from an MS4 are subject to the maximum extent practicable (MEP) standard and related iterative process, despite the Clean Water Act's (CWA) requirement that discharges of non-storm water into an MS4 be "effectively prohibited." As a result, commenters assert that numeric effluent limitations on dry weather, non-storm water discharges are inappropriate. Board members also sought clarity on the claims by copermitees that many provisions in the Tentative Order are unfunded state mandates, requiring reimbursement by the State. This memorandum addresses both the non-storm water and unfunded mandate issues.

I. Regulatory Background

The Clean Water Act (CWA) employs the strategy of prohibiting the discharge of any pollutant from a point source into waters of the United States unless the discharger of the pollutant(s) obtains a NPDES permit pursuant to Section 402 of the Clean Water Act. The 1987 amendment to the CWA includes provision 402(p) that specifically addresses NPDES permitting requirements for storm water discharges from MS4s. Section 402(p) prohibits the discharge of pollutants from specified MS4s to waters of the United States except as authorized by an NPDES permit and identifies two substantive standards for MS4 storm

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water permits. MS4 permits (1) “shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers[]” and (2) “shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or State determines appropriate for the control of such pollutants.” (CWA Section 402(p)(3)(B)(ii-iii).)

On November 16, 1990, USEPA published regulations addressing storm water discharges from MS4s. (Vol. 55 Federal Register (Fed. Reg.) 47990 and following (Nov. 16, 1990).) The regulations establish minimum requirements for MS4 permits, and generally focus on the requirement that MS4s implement programs to reduce the amount of pollutants found in storm water discharges to the maximum extent practicable. However, the regulations also require the MS4's program to include an element to detect and remove illicit discharges and improper disposal into the storm sewer. (40 CFR § 122.26(d)(2)(iv)(B).) “Illicit discharges” defined in the regulations is the most closely applicable definition of “non-storm water” contained in federal law and the terms are often used interchangeably. The State Water Board has concluded that “U.S. EPA added the illicit discharge program requirement with the stated intent of implementing the Clean Water Act's provision requiring permits to ‘effectively prohibit non-storm water discharges.’” (State Board Order WQ 2009-0008 (*County of Los Angeles*), p. 4.)

II. Definition of Storm Water and Non-Storm Water

Federal regulations define “storm water” as “storm water runoff, snow melt runoff, and surface runoff and drainage.” (40 C.F.R. § 122.26(b)(13).) While “surface runoff and drainage” is not defined in federal law, USEPA's preamble to the federal regulations demonstrates that the term is related to precipitation events such as rain and/or snowmelt. (55 Fed. Reg. 47990, 47995-96.) For example, USEPA states: “In response to the comments [on the proposed rule] which requested EPA to define the term ‘storm water’ broadly to include a number of classes of discharges which are not in any way related to precipitation events, EPA believes that this rulemaking is not an appropriate forum for addressing the appropriate regulation under the NPDES program of such non-storm water discharges Consequently, the final definition of storm water has not been expanded from what was proposed.” (*Ibid.*) The State Water Board recently considered and rejected in its precedential *Los Angeles County* order, WQ 2009-0008, the very arguments made here by commenters that storm water includes dry weather flows, completely unrelated to precipitation events. The State Water Board concluded that “U.S. EPA has previously rejected the notion that ‘storm water,’ as defined at 40 Code of Federal Regulations section 122.26(b)(13), includes dry weather flows. In U.S. EPA's preamble to the storm water regulations, U.S. EPA rejected an attempt to define storm water to include categories of discharges ‘not in any way related to precipitation events.’ [Citations.]” (*County of Los Angeles*, Order WQ 2009-0008, p. 7.)

The storm water regulations themselves identify numerous categories of discharges including landscape irrigation, diverted stream flows, discharges from potable water sources, foundation drains, air conditioning condensation, irrigation water, springs, water from crawl space pumps, footing drains, lawn watering, individual residential car washing, and street

wash water as “non-storm water.” While these types of discharges may be regulated under storm water permits, they are not considered storm water discharges. (40 CFR § 122.26(d)(2)(iv)(B).) Applicable regulations do not prohibit these and other categories of non-storm water discharges that are not expected to be a source of pollutants. But where, as in the Tentative Permit, certain categories of non-storm water discharges have been identified by the municipality to be sources of pollutants, they are no longer exempt and become subject to the effective prohibition requirement in section 402(p)(3)(B)(ii). This process would be wholly unnecessary if MEP were the governing standard for these non-storm water discharges.

Not only does a review of the storm water regulations and USEPA's discussion of the definition of storm water in its preamble to these regulations strongly support the interpretation that storm water includes only precipitation-related discharges, the Regional Board is bound to follow the State Water Board's interpretation of the definition of “storm water” set forth in the precedential State Water Board Order WQ 2009-0008 which rejects the commenters' interpretation. Therefore, while commenters assert that dry weather, non-precipitation related discharges are nonetheless storm water discharges (and therefore subject to the MEP standard in CWA section 402(p)(3)(B)(iii)), their interpretation is not supported and does not conform to applicable State Water Board precedent.

III. Non-Storm Water Regulation

Oral and written comments received by the Regional Board throughout this proceeding assert that the *discharge* of non-storm water, like storm water, from the MS4 is subject to the MEP standard and may not be regulated appropriately with numeric effluent limitations. Several commenters assert that once pollutants contained in prohibited non-storm water enter the MS4, the MEP standard and related iterative approach to storm water regulation is the most stringent means available to require those discharges to comply with water quality standards. In other words, the commenters assert that it is inappropriate for a Regional Board to regulate non-storm water discharges with numeric effluent limitations. As explained below, this interpretation is incorrect. Building on the effective prohibition against non-storm water discharges, the Clean Water Act requirement to reduce pollutants discharged from the MS4 to the MEP standard necessarily is limited to storm water discharges.

The Clean Water Act's municipal storm water MEP standard does not require storm water discharges to strictly meet water quality standards, as is required for other NPDES permitted discharges. This distinction reflects Congress's recognition that variability in flow and intensity of storm events render difficult strict compliance with water quality standards by MS4 permittees. In describing the controls that permits must include to reduce pollutants in storm water discharges to the MEP, the statute states that the controls shall include: “management practices, control techniques and system, design and engineering methods, and such other provisions as the [permit writer] determines appropriate for the control of such pollutants.” (CWA § 402(p)(3)(B)(iii).)

In contrast, non-storm water discharges from the MS4 that are not authorized by separate NPDES permits, nor specifically exempted, are subject to requirements under the NPDES program, including discharge prohibitions, technology-based effluent limitations and water quality-based effluent limitations. (40 C.F.R. § 122.44.) USEPA's preamble to the storm

water regulations also supports the interpretation that regulation of non-storm water discharges through an MS4 is not limited to the MEP standard in CWA section 402(p)(3)(B)(iii):

“Today’s rule defines the term “illicit discharge” to describe any discharge through a municipal separate storm sewer system that is not composed entirely of storm water and that is not covered by an NPDES permit. Such illicit discharges are not authorized under the Clean Water Act. Section 402(p)(3)(B) requires that permits for discharges from municipal separate storm sewers require the municipality to “effectively prohibit” non-storm water discharges from the municipal separate storm sewer... Ultimately, such non-storm water discharges through a municipal separate storm sewer must either be removed from the system or become subject to an NPDES permit.” (55 Fed. Reg. 47990, 47995.)

USEPA has recently affirmed its support for the Tentative Order’s regulatory approach to non-storm water discharges in comments submitted in this proceeding. As noted above, the State Water Board concluded in its recent Order WQ 2009-0008 that “U.S. EPA added the illicit discharge program requirement with the stated intent of implementing the Clean Water Act’s provision requiring permits to ‘effectively prohibit non-storm water discharges.’” (State Board Order WQ 2009-0008 (*County of Los Angeles*), p. 4.) Along these same lines, the State Water Board also explained that “the Clean Water Act and the federal storm water regulations assign different performance requirements for storm water and non-storm water discharges. These distinctions in the guidance document . . . , the Clean Water Act, and the storm water regulations make it clear that a regulatory approach for storm water - such as the iterative approach we have previously endorsed - is not necessarily appropriate for non-storm water.” (State Water Board Order WQ 2009-0008, *County of Los Angeles*), p. 9.)

Some commenters place extensive reliance on various State Water Board water quality orders, the State Water Board’s expert storm water panel (also known as the “Blue Ribbon Panel”) report entitled, *The Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial and Construction Activities* (June 2006), and other references, to assert that it is inappropriate to include numeric effluent limitations for dry weather non-storm water discharges from the MS4. It is important to note that the Blue Ribbon Panel neither considered nor made any determination on how non-storm water discharges from MS4s that adversely affect receiving waters are to be addressed. The discussion of the feasibility of numeric and/or narrative water quality-based effluent limitations and the MEP standard within these documents is applicable to discharges of storm water from MS4 systems, and does not pertain to non-storm water discharges from the MS4. Similarly, commenters also identify a superior court ruling in (*Cities of Arcadia, et al., v. State Water Resources Control Board* (Super. Ct. Orange County, 2007, No. 06CC02974)) (*Arcadia II*) to support its interpretation that numeric effluent limitations are not legally appropriate for the non-storm water discharges identified in the Tentative Order. Again, these references pertain to storm water and not non-storm water discharges and are inapposite here.

Federal law mandates that permits issued to MS4s must require management practices that will result in reducing storm water pollutants to the MEP yet at the same time requires that non-storm water discharges be effectively prohibited from entering the MS4.

Consistent with USEPA's position, the State Water Board has clearly indicated that Regional Boards are not limited by the iterative approach to storm water regulations in crafting appropriate regulations for non-storm water discharges. (State Water Board Order WQ 2009-0008, *County of Los Angeles*, p. 9.) The argument that non-storm water discharges, prohibited from entry into the MS4 in the first instance, should be held to comply with only the less stringent MEP standard developed for storm water discharges in recognition of the variable quality of storm events, is contrary to and potentially renders the "effectively prohibit" requirement in section 402(p)(3)(B)(ii) meaningless. While water quality based effluent limits, expressed as numeric effluent limitations, are not *required* to be imposed on dry weather, non-storm water discharges from the MS4, it is legally permissible to do so.¹

IV. Water Code Section 13241

Many commenters assert that provisions in the Tentative Order, including NELs, storm water action levels (SALs), and implementation of the Baby Beach TMDL requirements, are new permit terms that exceed federal law. Therefore, the commenters argue that the Regional Board is required, but has failed, to consider Water Code section 13241 factors, including economic considerations, prior to approving any of these provisions. The City of Dana Point cites extensively to the California Supreme Court case, *City of Burbank v. State Water Resources Control Board, et al.* ((2005) 35 Cal.4th 613) (*Burbank*), particularly the concurring opinion of Justice Brown, as supportive of its assertions.

The *Burbank* court stated: "[Water Code s]ection 13377 specifies that wastewater discharge permits must meet the federal standards set by federal law. In effect, section 13377 forbids a regional board's consideration of any economic hardship on the part of the permit holder if doing so would result in the dilution of the requirements set by Congress in the Clean Water Act. That act prohibits the discharge of pollutants into the navigable waters of the United States unless there is compliance with federal law (33 U.S.C. § 1322(a)), and publicly operated wastewater treatment plants such as those before us here must comply with the act's clean water standards, regardless of cost [citations]. Because [Water Code] section 13263 cannot authorize what federal law forbids, it cannot authorize a regional board, when issuing a wastewater discharge permit, to use compliance costs to justify pollutant restrictions that do not comply with federal clean water standards." (*Burbank*, 35 Cal.4th at 625.)

While the *Burbank* decision does require an analysis of Water Code section 13241 factors when the state adopts permit conditions that are more stringent than federal law (*id.* at 618) the Tentative Order reflects that all of the challenged provisions are required to implement federal law. Thus, the Regional Board is not required to consider economic information to justify a "dilution of the requirements" established in federal law. Nonetheless, as staff has

¹ Commenters have also claimed that TMDLs are inappropriately included as numeric effluent limitations on both dry and wet weather discharges. This is not the case. The Tentative Order requires the Copermittees to implement BMPs capable of achieving the interim and final Waste Load Allocations (WLA) and Numeric Targets in the approved TMDL. The BMPs apply to the discharges, while compliance with the WLAs and Numeric Targets occurs in receiving waters. Further, the Copermittees have 10 years to meet the final allocations and targets established for wet weather. Finally, these provisions within the Tentative Order comply with federal regulations [40 CFR 122.33(d)(1)(vii)(B)] by being consistent with the assumptions and requirements of the Waste Load Allocations of an adopted and applicable TMDL.

noted extensively in responses to comments, to the extent that economic information has been provided in connection with compliance and other costs associated with challenged permit provisions, staff has fully considered this information. Under these circumstances, the *Burbank* case does not require more.

V. Unfunded State Mandates

Both prior to and at the July 1, 2009, Regional Board meeting on an earlier version of the Tentative Order, commenters raised the issue of unfunded state mandates in connection with many of the proposed permit provisions. Board members indicated that they would appreciate clarification about the subject of unfunded state mandates. In recently submitted written comments, the City of Dana Point and others again assert that a number of the provisions in the Tentative Order go beyond what is required under federal law and therefore constitute unfunded state mandates that may not be imposed absent necessary funding first being made available to Permittees.

Commenters are correct that one factor to be considered in determining whether a requirement is an unfunded state mandate is whether the requirement goes beyond, or exceeds, what is required by federal law. However, the commenters are incorrect that the provisions in the Tentative Order exceed federal law. Moreover, there are a number of other factors that also must be established before a requirement will be found to be an unfunded state mandate warranting state reimbursement. Finally, unless and until a particular provision is determined by the State of California, Commission on State Mandates (Commission) to be an unfunded state mandate for which reimbursement is required, the Regional Board is not, as some commenters assert, precluded from adopting such provisions.

State Mandate Law

Article XIII B, Section 6 of the California Constitution requires subvention of funds to reimburse local governments for state-mandated programs in specified situations. The process for establishing that a requirement is subject to reimbursement as an unfunded state mandate involves the filing by a local agency of a Test Claim with the Commission on State Mandates. There are several exceptions and limitations to the subvention requirements that provide bases for the Commission to determine that one or more provisions in a Test Claim are not subject to subvention. Article XIII B, Section 6 provides, "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service." Implementing statutes clarify that no subvention of funds is required if: (1) the mandate imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation (Govt. Code, § 17556, subd. (c)); or (2) the local agency proposed the mandate (*id.*, subd. (a)); or (3) the local agency has the authority to levy service charges, fees, or assessments sufficient to pay (*id.*, subd. (d)).

Numerous judicial decisions have further defined limitations on the requirements for subvention of funds. Specifically, subvention is only required if expenditure of tax monies is

required, and not if the costs can be reallocated or paid for with fees. (*County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176; *Redevelopment Agency v. Commission on State Mandates* (1997) 55 Cal.App.4th 976.) In addition, reimbursement to local agencies is required only for the costs involved in carrying out functions peculiar to government, not for expenses incurred by local agencies as an incidental impact of laws that apply generally to all state residents and entities. Laws of general application are not entitled to subvention. *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46. The fact that a requirement may single out local governments is not dispositive; where local agencies are required to perform the same functions as private industry, no subvention is required. *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190.

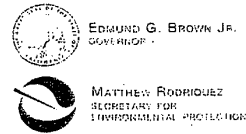
If the Commission determines that provisions in a permit in fact constitute reimbursable state mandates, the determination may be challenged through the judicial process. There also exists a Commission process for determining appropriate reimbursement of state mandates. If a determination that a provision constitutes an unfunded state mandate is upheld, the State likely would decide whether to reimburse the local agency for the program or the Regional Board could decide to withdraw a provision from a permit.

Recent Commission Proceedings

Recently, the Commission issued a Final Statement of Decision in a storm water permit Test Claim filed by the County of Los Angeles and several additional co-permittee test claimants. (*Municipal Storm Water and Urban Runoff Discharges*, 03-TC-04, 03-TC-19, 03-TC-20, and 03-TC-21 (Los Angeles Regional Water Quality Control Board Order No. 01-182 (July 31, 2009) (County of Los Angeles Test Claim).) In the Commission's Statement of Decision, the Commission found that all but one of the challenged provisions issued by the Los Angeles Water Board in its MS4 permit did not qualify as unfunded state mandates as they did "not impose costs mandated by the state within the meaning of article XIII B, section 6 of the California Constitution because the claimants have fee authority (under Cal. Const. article XI, § 7) within the meaning of Government Code section 17556, subdivision (d), sufficient to pay for the activities in those parts of the permit." (County of Los Angeles Test Claim, Statement of Decision, p. 2.)

As you know, on June 20, 2008, the County of San Diego filed a Test Claim with the State of California, Commission on State Mandates (Commission), challenging multiple provisions in Order No. R9-2007-001 (National Pollutant Discharge Elimination System (NPDES) No. CAS0108758), Waste Discharge Requirements for Discharges of Urban Runoff From the Municipal Separate Storm Sewer Systems (MS4s) Draining the Watersheds of the County of San Diego, the Incorporated Cities of San Diego County, the San Diego Unified Port District, and the San Diego County Regional Airport Authority), adopted on January 24, 2007 (2007 MS4 Permit). The County filed the Test Claim on behalf of 18 of the 20 MS4 Co-permittees (Claimants). Only the San Diego Unified Port District and the San Diego County Regional Airport Authority did not join in the Test Claim. The San Diego Water Board and State Water Board responded to the Test Claim. It is still pending and a draft staff analysis has not yet been issued for comment.

A similar process would need to be followed by the Orange County permittees in order to establish that any of the Tentative Order's provisions constitute unfunded state mandates entitling them to reimbursement by the state.

**California Regional Water Quality Control Board, San Diego Region**

September 7, 2012

Via U.S. Mail and E-Mail

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Subject: May 10, 2012, Letter from County of Orange, County Counsel and May 21, 2012, Letter from County of Riverside, County Counsel Re Regional Municipal Separate Storm Sewer System Permit

Messrs. Baron and Huff:

This letter responds to legal concerns raised in a May 10, 2012, letter from the County of Orange and the Orange County Flood Control District (collectively Orange County) and in a May 21, 2012, letter from the County of Riverside and Riverside County Flood Control & Water Conservation District (collectively Riverside County). Both letters question whether legal authority exists to support a Regional Municipal Separate Storm Sewer System (MS4) Permit (Regional MS4 Permit), as is under development by the California Regional Water Quality Control Board, San Diego Region (San Diego Water Board). Orange County questions whether and how a regional MS4 permit application process is consistent with and can satisfy the individual permit application requirements in federal law as neither County is yet required to submit, nor has submitted a Report of Waste Discharge (ROWD) for the discharges covered under their respective MS4 Permits.

As a foundation for their concerns, the Counties maintain that the three groups of Copermittees (San Diego County, portions of Orange County and portions of Riverside County) presently regulated under three separate MS4 permits do not share an interconnected MS4, are not under common jurisdiction, contain separate and distinct watersheds, are

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characterized by different hydrologic and climatic conditions and possess distinctly different water quality concerns.

The San Diego Water Board has the legal authority to issue a regional MS4 permit through its authority in the Clean Water Act. Section 402, subpart (p)(3)(B) of the Clean Water Act states that "Permits for discharges from municipal storm sewers—(i) may be issued on a system- or jurisdiction-wide basis" The federal storm water regulations in 40 Code of Federal Regulations (CFR) at Part 122.26, subdivision (a)(1)(v) also state that the Director may designate dischargers from municipal separate storm sewers on a system-wide or jurisdiction-wide basis. In making this determination, the Director may consider the following factors: (A) the location of the discharge with respect to waters of the United States; (B) the size of the discharge; (c) the quantity and nature of the pollutants discharged to waters of the United States; and (D) other relevant factors. (40 CFR Part 122.26(a)(1)(v).)

More specifically, the federal regulations provide that for large and medium MS4 systems, the San Diego Water Board may issue a regional permit. Specifically, the regulations provide:

"(ii) The Director may either issue one system-wide permit covering all discharges from municipal separate storm sewers within a large or medium municipal storm sewer system or issue distinct permits for appropriate categories of discharges within a large or medium municipal separate storm sewer system including, but not limited to: all discharges owned or operated by the same municipality; located within the same jurisdiction; all discharges within a system that discharge to the same watershed; discharges within a system that are similar in nature; or for individual discharges from municipal separate storm sewers within the system.

(iii) The operator of a discharge from a municipal separate storm sewer which is part of a large or medium municipal separate storm sewer system must either: (A) Participate in a permit application (to be a permittee or a co-permittee) with one or more other operator of discharges from the large or medium municipal storm sewer system which covers all, or a portion of all, discharges from the municipal separate storm sewer system; (B) Submit a distinct permit application which only covers discharges from the municipal separate storm sewers for which the operator is responsible; or (C) A regional authority may be responsible for submitting a permit application under the following guidelines

(iv) One permit application may be submitted for all or a portion of all municipal separate storm sewers within adjacent or interconnected large or medium municipal separate storm sewer systems. The Director may issue one system-wide permit covering all, or a portion of all municipal separate storm sewers in adjacent or interconnected large or medium municipal separate storm sewer systems.

(v) Permits for all or a portion of all discharges from large or medium municipal separate storm sewer systems that are issued on a system-wide, jurisdiction-

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wide, watershed or other basis may specify different conditions relating to different discharges covered by the permit, including different management programs for different drainage areas which contribute storm water to the system."

(40 CFR Part 122.26 (a)(3)(ii)-(v).)¹

These regulations make it clear that the San Diego Water Board may issue a regional MS4 permit. The regulations also clarify that the permit may include different conditions for separate discharges covered by the permit. This allows the San Diego Water Board to ensure that suitable water quality conditions and provisions are identified for each watershed.

The United States Environmental Protection Agency's (USEPA) responses to comments for the above-mentioned regulations also make it clear that the permitting authority, in this case the San Diego Water Board, has the flexibility to establish system- or region-wide permits. In the Final Rule published in the Federal Register and containing the responses to comments, USEPA notes that that paragraph (iv) (40 CFR § 122.26(a)(3)(iv)) would allow an entire system in a geographical region under the purview of a State agency to be designated under a permit. (National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, 55 FR 47990-01, 48042.) USEPA also states that many commenters wanted to allow the permitting authority broad discretion to establish system-wide permits, and that EPA believes that paragraphs (a)(1)(v) and (a)(3)(ii) allow for such broad discretion. (*Id.*, 47990-01, 48039-48042.)

Not only is it legally allowable for the San Diego Water Board to issue a regional MS4 permit, it is also appropriate for the San Diego Water Board to do so. Orange County argues that the three large metropolitan counties "do not share an interconnected municipal storm sewer system, are not under common jurisdiction, and contain separate and distinct watersheds."² However, the counties are connected through shared watersheds and/or are adjacent to each other. For example, the Santa Margarita watershed begins in Riverside County but drains into San Diego County. The Regional MS4 Permit creates watershed requirements that apply to multiple counties, which will ensure consistency of regulations in a watershed and result in overall cost savings for the Copermittees due to reduced redundancy in water quality monitoring. Even if the MS4s were not interconnected, the regulations make it clear the San Diego Water Board can require one permit for all MS4s that are adjacent. (40 CFR Part 122.26(a)(3)(iv).) Managing storm water on a watershed basis is expected to result in improved water quality, as the Regional MS4 Permit focuses the monitoring and management practices necessary to improve each watershed rather than arbitrary political boundaries. A single permit also allows San Diego Water Board staff to expend fewer resources developing multiple permits and more resources working cooperatively with all three current groups of Copermittees to ensure implementation of the permit results in improved water quality.

¹ These regulations are applicable to California's NPDES program. (40 CFR §123.25.)

² Letter from the County of Orange, dated May 10, 2012, on page 1.

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A regional MS4 permit also does not expand the requirements for each municipality beyond its borders as each municipality is only responsible for discharge within its jurisdictional boundaries. The federal regulations make it clear that Copermittees need only comply with permit conditions relating to discharges from the MS4s for which they are operators. (40 CFR Part 122.26(a)(3)(vi).) The Administrative Draft Regional MS4 Permit does not require the Counties to manage storm water outside of their jurisdictional boundaries, but rather to work collectively to improve storm water management within watersheds.

The San Francisco region-wide permit from the Regional Water Quality Control Board, San Francisco Region, provides an example of a regional MS4 permit. Neither the USEPA nor the State Water Resources Control Board (State Water Board) objected to the San Francisco regional MS4 permit. While that permit was developed with consensus among the Copermittees, the Federal Regulations make it clear that the San Diego Water Board may impose a regional MS4 permit without a consensus. Another example of a regional MS4 permit is in Alaska, where the City of Fairbanks, the City of North Pole, the University of Alaska, and Department of Transportation and Public Facilities received a single permit, NPDES Permit No. AKS-053406.

The Regional MS4 Permit will continue to use the ROWD process prior to initially enrolling any Orange or Riverside County Copermittee into the Regional MS4 Permit or renewing the permit. The San Diego Water Board understands that each municipality is unique although the Counties share watersheds and geographical boundaries. As provided in their current MS4 permits, the Orange and Riverside County Copermittees will submit a ROWD no later than 180 days prior to expiration of their current permits. Staff at the San Diego Water Board will review the ROWDs to determine whether the Copermittees should be enrolled in the Regional MS4 Permit, what changes to the Regional MS4 Permit proposed in the ROWD are appropriate, and what is the proper level of public process for consideration of the issues raised in the ROWDs. The regional MS4 permit will continue to rely on the ROWD process to frame prospective revisions to the permit. Prior to release of the Public Comment Draft Permit, San Diego Water Board staff will consider whether changes to the text of the Administrative Draft are necessary for consistency with the intent to fully evaluate the ROWDs submitted by the Orange and Riverside County Copermittees as outlined above.

Please contact either me at 916-341-5168 or by e-mail at Jessica.jahr@waterboards.ca.gov or Catherine George Hagan at 858-467-2958 or by e-mail at catherine.hagan@waterboards.ca.gov if you have questions.

Respectfully,



Jessica Jahr

cc: See next page

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cc: David W. Gibson, Executive Officer (via e-mail only)
San Diego Water Board Interested Persons List (via e-mail only)

