

# Draft Response to Comments on R9-2010-0016

## As of September 29, 2010

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<b>Comment #</b> 1	<b>Commentor</b> 1	<b>Comment Subject</b> Unpaved Roads
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**Specific Comment**

I have now found that the new requirements for Copermittees include a draft for “Unpaved Roads Construction and Maintenance” that spells out “sediment control measures during construction and maintenance activities on unpaved roads, including developing and implementing appropriate training and technical assistance resources”. This has given me new hope that these hills have a chance of being returned to the once beautiful land that I loved so many years ago. Is it possible that this new order can require help from the County to solve the erosion problems in Rancho Glenoaks, as well as others in the same situation as I? I truly hope it can happen. The County and environmental agencies need to take responsibility.

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**Comment Response**

Through several investigations and complaints during the previous permit period, unpaved roads were identified as significant sources of water quality pollutants, namely sediment, within Riverside County. The proposed Tentative Order can help solve erosion problems from unpaved roads throughout the watershed. The Tentative Order's provisions address the unpaved roads as a source of pollution during design, construction and ongoing maintenance phases. Rancho Glenoaks, however, is a private road, and as a result of comments received from the Copermittees, the Tentative Order has been revised to remove requirements for private roads. Please see the errata sheet for exact language changes.

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<b>Comment #</b> 2	<b>Commentor</b> 2	<b>Comment Subject</b> LID
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**Specific Comment**

First, this section erroneously states that where infiltration BMPs alone are technically infeasible, other LID BMPs may be employed to treat the volume of runoff not retained onsite. This language improperly excludes any requirement that a site first use all LID practices that retain water onsite—including those other than infiltration such as evapotranspiration or capture and onsite reuse—to meet the design capture requirement where feasible, even where infiltration may not be. A Priority Development Project should not be permitted to participate in the Permit’s offsite mitigation program or to employ other means of addressing the design capture volume where LID based options for the onsite retention of stormwater are available. The Permit’s language in section F.1.d.(4)(c) must therefore reflect that a finding of infeasibility may only be made where use of any and all LID practices that retain water onsite, including evapotranspiration and capture, is infeasible.

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**Comment Response**

The San Diego Water Board agrees with the comment and has made the suggested changes in the errata to the Tentative Order. With the changes, the Tentative Order is consistent with the adopted South Orange County MS4 permit and the Ventura County MS4 permit.

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<b>Comment #</b> 3	<b>Commentor</b>	2	<b>Comment Subject</b> LID
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**Specific Comment**

Second, this section would allow for measures that do not retain water onsite, described by the Permit as “other LID BMPs,” to count toward the design capture requirement. Practices that allow for the discharge of any volume of stormwater to receiving waters would have to be 100% effective at removing pollutants—a condition almost certain not to be attained—in order to provide the equivalent water quality benefit derived from retaining the same volume of stormwater onsite. The Permit should be revised such that it clearly states that only water retained onsite may count towards the design capture requirement and that a site using BMPs that allow for offsite discharge must participate in the LID Waiver Program to address the volume not retained onsite.

**Comment Response**

Please see the response to comment 12. Other LID BMPs that allow for the discharge of any volume of the design storm event must achieve equivalent volume and pollutant load reduction.

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<b>Comment #</b> 4	<b>Commentor</b>	2	<b>Comment Subject</b> LID
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**Specific Comment**

Of particular concern in this regard is that the Permit does not define the term “LID BMPs.” As a result, the Permit would allow virtually any practice, potentially including conventional stormwater management techniques, which have been demonstrated to be far less effective at removing pollutants than LID-based retention practices, to count toward meeting the Permit’s design capture requirement. While we argue here that practices that do not retain stormwater onsite, such as biofiltration, should not count towards the onsite retention standard at all, should the Board determine to allow the use of such practices, it should clearly define the term “LID BMPs,” or more appropriately, delete the phrase and explicitly state which practices may be used. The Board should additionally ensure that conventional or structural treatment practices that are not LID based may not count toward the Permit’s LID requirements.

**Comment Response**

Comment noted. A definition of LID BMPs has been provided in the errata for Attachment C.

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<b>Comment #</b> 5	<b>Commentor</b>	2	<b>Comment Subject</b> LID
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**Specific Comment**

Further troubling is that, in allowing “LID BMPs” to count toward the design capture requirement, the Permit includes no performance requirements or metrics, and requires only that “other LID BMPs [shall be] sized to hold the design storm volume that is not infiltrated,” or that “LID BMPs must be designed for an appropriate surface loading rate to prevent erosion, scour and channeling within the BMP.” Permit at ¶ F.1.d.(4)(c)(ii). The Permit should be revised to require that, in addition to the above standard, any practices that allow for the discharge of stormwater in-lieu of onsite retention must, at a minimum, reduce the pollutant load in such discharge to equivalent levels as would be achieved through use of onsite retention. The Board should further ensure that discharges resulting from other BMPs not contribute to erosion or other volume based impacts to receiving waters, as opposed to impacts only within the BMP. Given that practices that do not incorporate onsite retention have been shown to be less effective at reducing pollution in stormwater runoff, we suggest that biofiltration or other practices allowing for discharge of runoff may be allowed, if at all, only if accompanied by a “multiplier” or “mitigation factor,” requiring treatment of between 1.5 to 2.0 times the volume required to be treated through onsite retention.

**Comment Response**

Please see the response to comment 12. The Tentative Order does not include a multiplier or mitigation for LID BMPs that do not incorporate onsite retention due to the requirement that such practices must achieve equivalent pollutant load reduction as retention BMPs.

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<b>Comment #</b> 6	<b>Commentor</b> 2	<b>Comment Subject</b> LID
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**Specific Comment**

The Permit requires that the “LID waiver program must clearly exhibit that it will not allow Priority Development Projects to result in a net impact (after consideration of any mitigation) from pollutant loadings over and above the impact caused by projects meeting LID requirements.” Permit at ¶ F.1.d.(7)(a). While we support the use of a performance requirement for waiver projects in general, we note that as currently drafted, the Permit allows for its “LID Requirements” to be met through use of unspecified “LID BMPs” with no express performance requirement or standard. We suggest, in order to ensure that any alternative or in-lieu program adequately protects surface waters in Riverside County, that the Permit language be changed to state that Priority Development Projects shall not result in a net impact “from pollutant loadings over and above the impact caused by projects meeting the onsite LID retention requirements.” This requirement would tie use of alternative or in-lieu programs specifically to achieving equivalent benefits to onsite retention, and remove any confusion over what standard of performance is required under this provision of the Permit.

**Comment Response**

Comment noted, meeting the onsite LID retention requirement is the San Diego Water Board's intent. Clarifying language has been included in the errata. Please also see the responses to comments 76 and 78.

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<b>Comment #</b> 7	<b>Commentor</b> 2	<b>Comment Subject</b> LID
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**Specific Comment**

Further, the Permit’s inclusion of a provision allowing for a LID waiver program to authorize implementation of either “an off-site mitigation project,” or “other mitigation developed by the Copermitees” should be clarified to require that any such project or mitigation measure must incorporate practices that result in the onsite retention of stormwater runoff equivalent to the volume not retained onsite by the Priority Development Project.

Such a move could help to ensure compliance with the Clean Water Act, would protect Riverside County’s aquatic resources, and would further serve important policy goals of the State. Given our current state of drought, Governor Schwarzenegger has issued a proclamation calling on water agencies to take additional actions to protect and enhance water supplies. By requiring offsite mitigation through practices that retain stormwater runoff, captured or infiltrated water could be used to increase water supplies through onsite use or recharging groundwater, in furtherance of this goal. In contrast, the draft Permit would currently allow most or all of that water to be discharged through use of biofiltration or “other LID BMPs,” without any volume retained to increase water supplies.

**Comment Response**

The San Diego Water Board disagrees with the proposed change. Limiting the LID waiver program to projects that provide equivalent retention of runoff only would limit the potential for other equally environmentally beneficial mitigation projects such as creek restoration or stream daylighting.

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**Specific Comment**

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RWQCB staff has expressed their opinion that the Cities are able to create new fees or tax assessments to pay for the requirements they have placed in the proposed MS4 permit. We strongly disagree with this assertion. Fees can only be collected from new development if there is a nexus to offset impacts created by development. There is simply no mechanism to impose a new fee or assessment on existing development to fund the storm water program. Furthermore, due to Proposition 218, any tax or fee increase must be approved by the voters.

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**Comment Response**

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The San Diego Water Board is aware of the challenges with developing new fees and/or tax assessments to fund storm water programs. These challenges are not limited to the City of Murrieta or the other Riverside County Copermittees. The Copermittees appear to be relying primarily on sales and property tax revenues and developer fees to fund their storm water programs. These sources of funding, unfortunately, can fluctuate significantly from year to year.

If the Copermittees choose to fund their storm water programs solely through revenues generated by sales and property taxes and developer fees, then they must be able to plan and prepare for times when those revenues decrease by setting aside funds when there are significant increases in revenue, such as during the intense and significant growth period experienced by the area between 2003 and 2008. Unfortunately, the Copermittees did not do the planning and preparation for this eventuality.

The Copermittees appear to dismiss the possibility of developing fees to fund their storm water program before attempting to do so, and the City only cites a case of failure rather than looking for and trying to emulate cases of success. While "imposing" new fees by edict may not be possible, developing and informing the residents that new fees for water quality protection are necessary is possible and probable. Several municipalities throughout California have been successful in developing new fees that are dedicated for funding their storm water programs, which are associated with sources that can cause and/or convey pollutants to and from the MS4. For example, the City of Poway assesses a storm water fee as part of their trash collection service, because trash generation can be a good indication of potential for storm water pollution. The City of Brea was successful in developing an "urban run-off" fee rate that is based on the type of development and associated with maintaining their storm sewer system. The City of San Diego includes a storm drain fee as part of their water and sanitary sewer services to pay for the cleaning, repair, and maintenance of the City's storm drain system. These types of fees are typically more sustainable than relying on general funds from sales and property tax revenue, which can fluctuate significantly from year to year. The San Diego Water Board encourages the Copermittees to explore other sources of revenue to fund their storm water programs instead of relying on property and sales taxes and developer fees.

In addition, several guidances are available for municipalities to assist in developing sustainable funding sources for their storm water programs such as USEPA's "Funding Stormwater Programs" (EPA 833-F-07-012), the National Association of Flood and Stormwater Management Agencies "Guidance for Municipal Stormwater Funding," Natural Resources Defense Council "Stormwater Strategies: Community Responses to Runoff Pollution, Chapter 4: Funding and Gaining Support for Stormwater Programs," and USEPA Watershed Academy "Catalog of Federal Funding Sources for Watershed Protection." These guidances describe storm water funding alternatives to property taxes, sales tax and general fund revenues such as service fees, stormwater utilities, special assessment districts, system development charges, grants, low-interest loans, and environmental tax shifting.

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**Specific Comment**

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Due to the historic decrease in property tax and sales tax revenues, the primary funding mechanism for the City to implement programs, it is unlikely we would be able to comply with the proposed MS4 permit. In order to do so, the City would have to make budget cuts to other programs. Considering we have already considerably cut our budget two years in a row, implemented layoffs and furloughs, and put other cost savings measures into practice, a further decrease to critical city services to fund the additional requirements is impractical. Of greatest concern to the City is that the proposed MS4 permit does not take the current economic climate into consideration, and yet has more costly and stringent requirements than other permits throughout the region that are more suitable to fund such programs. In our opinion, this seems inequitable and unfair.

The City of Murrieta joins the vast majority of Californians in supporting a balanced, cost-effective strategy to guarantee clean water. However, we remain concerned that the MS4 permit will impose additional costs on the City that we cannot afford at this time. Additionally, it seems the new regulations are inequitable compared to other regions. Therefore, the City is opposed to the proposed permit in its current form. Increasing the cost to the public on a region that is one of the hardest hit during this economic crisis seems excessive. Instead, the City would be more supportive of efforts that would phase in requirements once revenue levels can support the additional costs. Moreover, we request that the Board direct their staff to prioritize what permit requirements are necessary to address the most critical issues that will give the most efficient use of available funds. This will allow the City to allocate the funds they have for these programs while not increasing current expenditures.

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**Comment Response**

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The San Diego Water Board considers protection of water quality to be a "critical city service," especially when this water provides a potable drinking water source to USMC Camp Pendleton. The San Diego Water Board has taken the current economic climate into consideration along with the economic information provided by the Copermittees. We disagree that Tentative Order is more costly and stringent than other permits in the region.

As discussed in the response to comment 8, if the Copermittees choose to fund their storm water programs solely through revenues generated by sales and property taxes and developer fees, then they must be able to plan and prepare for times when those revenues decrease by setting aside funds when there are significant increases in revenue.

Between 2000 and 2008, the population of the portion of Riverside County in the San Diego Region grew from approximately 150,000 to over 250,000, at least a 65 percent increase. During that time, there was a significant growth in sales and property tax revenue and developer fees generated. That time period also was an opportune time for the Copermittees to develop, propose, and implement new and sustainable fees to fund their storm water programs, which municipalities in other parts of the region were successfully able to achieve.

The Copermittees have been well aware of the new and enhanced MS4 Permit requirements that were adopted for San Diego County in 2007, which were being developed in 2006, and similar requirements that were adopted for Orange County in 2009, which were being developed between 2007 and 2009. The Riverside County Copermittees had approximately 4 years to plan and prepare for the requirements that are now in the Tentative Order. Unfortunately, rather than planning and preparing for the new requirements that were likely to be included in the new Riverside County MS4 Permit, the Copermittees chose to continue doing the minimum that was required in their current permit, and less than what was required in some situations. The Copermittees also chose to continue funding their storm water programs primarily through sales and property tax revenues and developer fees, rather than trying to develop dedicated and more sustainable storm water fees.

The San Diego Water Board, however, has been sensitive to the current economic hardships that are being experienced by the Riverside County Copermittees. Between March and July 2010, we met with the Copermittees over a dozen times and modified the permit requirements and schedules for implementation to phase in the requirements with these economic concerns in mind. Many of the modifications were made because the Copermittees requested the changes. Many of the modifications to the implementation schedule that were agreed upon during those meetings between the Copermittees and the San Diego Water Board were also based on prioritizing the permit requirements to address the most critical issues. The Tentative Order provides the Riverside County Copermittees more time than the San Diego County and Orange County Copermittees to develop and implement several elements of the permit, as well as reducing the potential development costs for those elements.

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<b>Comment #</b> 10	<b>Commentor</b>	6	<b>Comment Subject</b> General
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**Specific Comment**

Thank you for the opportunity to comment on the San Diego Region - Riverside County Storm Water Permit. As you are aware, the U.S. Army Corps of Engineers has been developing a Special Area Management Plan (SAMP) for the San Jacinto and Santa Margarita Watersheds. There is direct overlap between the Santa Margarita portion of the SAMP and the San Diego Region - Riverside County Storm Water Permit.

The language proposed in the permit and the actions and studies proposed would complement the work being done for the SAMP. Ideally, the regulatory processing and permitting for the State and Federal agencies would be aligned and streamlined for the cities and County within this area. We remain committed to working with the Regional Water Quality Control Board (Board) and the jurisdictions to bring this idea to fruition.

Within the permit itself, the Watershed Water Quality work plan and the Jurisdictional Runoff Management Program are of particular interest. Unfortunately due to time constraints, we are not able to do a thorough review and comparison of the language at this time, but would like to work with the Board and the affected jurisdictions to streamline permitting and improved the water quality in the watershed.

The studies mentioned in the permit appear to have great value, and we would encourage the jurisdictions to complete them and applaud the Board for including them in the permit. Although all the studies mentioned in the permit are worthwhile, we draw particular interest to and support the inclusion of the MS4 and Receiving Water Maintenance Study and the Intermittent and the Ephemeral Stream Perennial Conversion Study in the final permit.

There are many additional comments that could be made regarding the permit; however, due to staffing and time limitations, these comments are abbreviated and limited. We would like to dedicate time in the near future to work with your staff and the jurisdictions in supporting actions to comply with the Clean Water Act and provide clean water to all of our communities.

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**Comment Response**

Comment noted.

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<b>Comment #</b> 11	<b>Commentor</b>	7	<b>Comment Subject</b> LID
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**Specific Comment**

As you know, Region 9 has been working with Regional Boards throughout the State over the last several years in an effort to develop clear, measurable and enforceable requirements for MS4 permits. We have focused most of our attention on requirements related to low impact development (LID) and TMDL implementation, given the potential environmental benefits to be derived from these particular components of the stormwater permit program. Since there are no approved wasteload allocations applicable to the Riverside County MS4 discharges at this time, the following comments focus on LID requirements, but also address several other issues as well. However, with regards to TMDLs, section I of the draft permit would incorporate applicable requirements of future TMDLs when fully approved, and we support this provision.

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**Comment Response**

Comment noted.

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<b>Comment #</b> 12	<b>Commentor</b>	7	<b>Comment Subject</b> LID
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**Specific Comment**

We recommend section F.1.d.(4)(c)(ii) of the draft permit (page 33) be revised as follows:

"If onsite [infiltration] retention LID BMPs are technically infeasible per section F.1.d.(7)(b), other LID BMPs may treat any volume that is not retained onsite provided that the other LID BMPs are sized to achieve equivalent stormwater volume and pollutant load reduction as if the entire design capture volume were retained onsite [to hold the design storm volume that is not infiltrated]."

The proposed language in the draft Riverside County MS4 permit (which only mentions infiltration as an LID BMP) is inconsistent with the analogous section in the adopted South Orange County MS4 permit, and would not require a consideration of LID measures such as evapotranspiration, or capture and reuse of stormwater in determining the feasibility of the permit's onsite retention requirement in section F.1.d.(7)(a). The revised approach we've suggested here is derived from the requirements of the Ventura County MS4 permit (section E.III.1.b) adopted by the Los Angeles Regional Board in July 2010, and we believe it is more consistent with the intent of LID for stormwater, i.e., retention of storm water onsite, and section F.1.d.(7)(a) of the draft permit.

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**Comment Response**

The San Diego Water Board agrees with the comment and has made the suggested changes in the errata to the Tentative Order. With the changes, the Tentative Order is consistent with the adopted South Orange County MS4 permit and the Ventura County MS4 permit. The consistent requirements will be easier for the regulated building industry to comply with and understand.

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<b>Comment #</b> 13	<b>Commentor</b>	7	<b>Comment Subject</b> LID
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**Specific Comment**

Further, although the draft permit includes a rough definition of "LID" in Attachment C-2, the permit is still not entirely clear concerning what is intended by the term "LID BMPs." We suggest additional descriptive information such as the following (also derived from the Ventura County MS4 permit) be added to Finding 2.c (page 9) or the definitions section of the draft Riverside County permit:

"LID site design BMPs, utilizing infiltration, storage for reuse, evapotranspiration, or biofiltration/bioretenion help preserve and restore the natural hydrologic cycle of the site, [allowing for filtration and infiltration] which can greatly reduce the volume, peak flow rate, velocity, and pollutant loads of storm water runoff."

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**Comment Response**

The San Diego Water Board agrees with the comment and has made changes in the errata to Attachment C of Tentative Order. A definition of LID BMPs has been added to the errata for Attachment C of the Tentative Order. LID BMPs may be retention or flow through. The Tentative Order allows for both types, but emphasizes retention.

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<b>Comment #</b> 14	<b>Commentor</b>	7	<b>Comment Subject</b> Action Levels
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**Specific Comment**

We understand that concerns have been raised regarding the proposed numeric action levels for non-stormwater dry weather discharges (section C of the draft Riverside County MS4 permit). However, we would point out that these requirements are consistent with requirements adopted by the SDRB in December 2009 for the MS4 permit for South Orange County. Such requirements are also consistent with our efforts to ensure MS4 permit requirements are more measurable and enforceable, and we would encourage the SDRB to retain the proposed requirements in the final Riverside County MS4 permit.

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**Comment Response**

Comment noted.

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**Comment #** 15                      **Commentor** 7                      **Comment Subject** Overirrigation

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**Specific Comment**

We also understand that concerns have been raised regarding the deletion of landscape irrigation, irrigation water, and lawn watering from the list of non-stormwater discharges which are not necessarily prohibited by the permit (section B.2). We previously supported this same revision in a letter to the SDRB dated June 18, 2009 commenting on the draft South Orange County MS4 permit; we support the revision in the Riverside County MS4 permit as well. In our previous letter, we noted that the fact sheet for the Orange County MS4 permit had identified these categories of discharges as significant sources of pollutants, and as such, it would be appropriate for the SDRB to remove these discharges from the list of non-prohibited non-stormwater discharges in the Orange County MS4 permit. The fact sheet for the draft Riverside County MS4 permit includes similar information on the discharges, and we believe removal of the discharges from the list of non-prohibited discharges would be appropriate in both counties.

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**Comment Response**

Comment noted.

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**Comment #** 16                      **Commentor** 7                      **Comment Subject** Action Levels

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**Specific Comment**

In a previous letter to the SDRB dated September 28, 2009, we supported the SALs proposed for the South Orange County MS4 permit; we noted the proposed requirements would help clarify the term "maximum extent practicable" (MEP), and would be consistent with our goal of including more measurable and enforceable requirements in MS4 permits. The proposed SAL requirements in the Riverside County MS4 permit are consistent with requirements for South Orange County, and for the same reasons noted in the case of South Orange County, we would also support the proposed requirements for the Riverside County MS4 permit.

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**Comment Response**

Comment noted.

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**Comment #** 17                      **Commentor** 7                      **Comment Subject** Retrofit

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**Specific Comment**

As you know, EPA is considering requirements for retrofitting BMPs into existing developments as one of the key components of national stormwater rulemaking currently underway to improve the stormwater program (74 FR 68621, December 28, 2009). We note that the proposed retrofitting requirements for Riverside County are very similar to the requirements of the MS4 permit adopted by the SDRB in December 2009 for South Orange County. Given the potential environmental benefits of retrofitting in reducing pollutant discharges in stormwater runoff, we strongly encourage the SDRB to retain the proposed requirements in the final Riverside County MS4 permit.

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**Comment Response**

Comment noted.

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**Comment #** 18                      **Commentor** 7                      **Comment Subject** Hydromod

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**Specific Comment**

We have reviewed the proposed requirements related to hydromodification in the draft Riverside County MS4 permit (section F.1.h), and we would encourage the SDRB to retain these requirements in the final permit. The proposed requirements in the Riverside County permit are similar to requirements in other recently-adopted Southern California MS4 permits, and the requirements will further the objectives of the LID provisions in the permit.

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**Comment Response**

Comment noted.

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**Comment #** 19                      **Commentor** 7                      **Comment Subject** Unpaved Roads

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**Specific Comment**

We understand that concerns have been raised regarding the new requirements in the draft Riverside County MS4 permit to implement additional controls for stormwater discharges from unpaved roads (sections F.Li, F.3.a.1 and F.3.c.5 of the permit). We believe the new requirements are fully supported by the fact sheet and the Findings for the permit (Finding D.1.c), which identify the discharges as a significant source of pollutants. As such, we urge the SDRD to retain the proposed requirements in the final permit. Lastly, we would note the proposed requirements are similar to requirements in the Municipal Regional Permit for MS4s in the San Francisco Bay Area adopted in 2009 by the San Francisco Bay Regional Board.

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**Comment Response**

Comment noted. The Copermittees have brought up concerns addressing the regulation of privately owned and maintained unpaved roads; therefore those regulations have been removed. Please see the errata sheet for exact language changes.

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**Comment #** 20                      **Commentor** 7                      **Comment Subject** Monitoring

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**Specific Comment**

We understand that concerns have been raised about the monitoring requirements of the draft Riverside County MS4 permit (Attachment E to the permit). However, the proposed requirements are consistent with the requirements of other recent MS4 permits adopted by the SDRB such as the 2009 South Orange County MS4 permit. We strongly encourage the SDRB to retain the requirements in the final permit. Measuring the effectiveness of the stormwater program continues to be a challenge and thus, is an important priority for EPA; we believe the proposed monitoring details and requirements will improve permittee and Regional Board's ability to measure program effectiveness.

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**Comment Response**

Comment noted.

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**Comment #** 21                      **Commentor** 9                      **Comment Subject** Finding

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**Specific Comment**

Make findings consistent with JRMP.

Provide separate sections for Construction vs. Existing Development.

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**Comment Response**

The recommendation is appreciated, but not necessary. No changes were made based on this comment.

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<b>Comment #</b> 22	<b>Commentor</b>	9	<b>Comment Subject</b> Finding
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**Specific Comment**

Definition of "urban stream" contradicts 40CFR 122.

Provide clearer definition as to what an "urban stream" is.

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**Comment Response**

The San Diego Water Board disagrees that the definition of "urban stream" contradicts 40CFR 122. 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. Please see the Fact Sheet discussion on Finding D.3.c.

The State Water Board supports this approach. In reviewing a Petition on Order No. R9-2001-0001, the State Water Board stated "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 [...]" State Water Resources Control Board Order WQ 2001-15.

The Rapanos decision further supports the conclusion that urban streams 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 CWA Section 404 and also be considered point sources of pollution discharges regulated under CWA Section 402. (See discussion in Section V of the Opinion of Justice Scalia and Section A (p.14) of the Concurring Opinion of Justice Kennedy.) No changes were made based on this comment.

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<b>Comment #</b> 23	<b>Commentor</b>	9	<b>Comment Subject</b> Discharge Prohibitions
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**Specific Comment**

Discharge category found to be a source of pollutants requires implementation of appropriate control measures to prevent the discharge of pollutants to the MS4.

Should state: Implement appropriate control measures to reduce the discharge of pollutants to the MEP.

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**Comment Response**

The commenter cited the text incorrectly. Section B.2 states, "For a discharge category determined to be a source of pollutants, the Copermittee, under direction of the San Diego Water Board, must either prohibit the discharge category or develop and implement appropriate control measures for non-anthropogenic sources to prevent the discharge of pollutants to the MS4 ..."

MEP does not apply to non-storm water discharges. The Clean Water Act specifically makes a clear distinction between the regulation of storm water and non-storm water discharges by effectively prohibiting non-storm water discharges from entering the MS4. Since non-storm water discharges are to be effectively prohibited, then clearly the very next requirement (402(p)(3)(B)(iii) that requires pollutant discharges from the MS4 be reduced to the MEP) intends that the discharge of pollutants only apply to storm water. Please see the Fact Sheet discussion for Finding C.14 for further clarification. No changes were made based on this comment.

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**Comment #** 24                      **Commentor** 9                      **Comment Subject** Discharge Prohibitions

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**Specific Comment**

Discharges into MS4 require authorization from owner and operator of the MS4 system, specifically for uncontaminated pumped ground water, foundation drains, and water from crawl space pumps

Support change, and recommend that dischargers are required to obtain authorization prior to the commencement of the discharge.

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**Comment Response**

The San Diego Water Board appreciates the support of the commenter. The commenter incorrectly cites the footnote as Footnote 8. The correct footnote, Footnote 5, clearly states “Discharges into the MS4 require authorization from the owner and operator of the MS4 system.” Please note this is a requirement for enrollees under the referenced NPDES permit (R9-2008-0002)

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**Comment #** 25                      **Commentor** 9                      **Comment Subject** Discharge Prohibitions

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**Specific Comment**

States that building fire suppression system maintenance discharges contain waste and must be prohibited.

Not clear what waste the discharges contain and the basis for prohibiting it.

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**Comment Response**

The San Diego Water Board is concerned with non-storm water discharges associated with building fire suppression system maintenance and testing. The San Diego Water Board has found that such activities do not qualify as fire fighting flows as the activities are strictly maintenance in purpose. While building fire suppression systems lines may be filled with potable water, the systems are not utilized until: a) a fire occurs and triggers the system, or b) the system undergoes required maintenance. The San Diego Water Board has found that water within the lines may contain metals that that may be a significant source of pollutants upon discharge. Furthermore, many of these discharges occur to MS4s, which discharge to receiving waters 303(d) listed for toxicity under the 2008 CWA Section 303(d) List. As such, these non-storm water discharges are no longer exempted from prohibition. The exemption from prohibition for water line flushing does not apply to building fire suppression system maintenance.

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**Comment #** 26                      **Commentor** 9                      **Comment Subject** Discharge Prohibitions

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**Specific Comment**

Must identify and control any non-prohibited discharge that creates water quality problems.

Should define what is meant by control the discharge.

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**Comment Response**

The commenter cited the text incorrectly. Section B.4 states, “Follow-up investigations must be conducted to identify and control, pursuant to section B.2, any non-prohibited discharge category(ies) listed above.” Please see the response to comment 23 or section B.2 of the Tentative Order for what is meant by “control.” No changes were made based on this comment.

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**Comment # 27**                      **Commentor**                      9                      **Comment Subject** Action Levels

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**Specific Comment**

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This requires the Copermittee to determine whether a discharge type should be exempt.

This is the responsibility of the Regional Board.

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**Comment Response**

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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 not be exempt.

The Code of Federal Regulations states at 40 CFR 122.26 (d)(2)(iv)(B)(1) explicitly states:

"... this program description shall address all types of illicit discharges, however the following category of non-storm water discharges or flows shall be addressed where such discharges are identified by the municipality as source of pollutants to water of the United States..."

Furthermore, in addition to the regulations under 40 CFR 122.26(d), the Federal Register (55 Fed Reg 48037) clearly states that "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."

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**Comment # 28**                      **Commentor**                      9                      **Comment Subject** Action Levels

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**Specific Comment**

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Copermittees must develop monitoring plans to sample a representative percentage of major outfalls and identified stations within each hydrologic subarea.

Make consistent with 40CFR.

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**Comment Response**

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The San Diego Water Board finds it difficult to respond to the comment without a more specific reference to 40 CFR. In all actions, the San Diego Water Board seeks to be consistent with State and Federal regulations.

The NPDES regulations do not specify the exact location to be used for monitoring, and the Copermittee is ultimately responsible for providing a safe and accessible sampling point that is representative of the discharge (40 CFR 122.41(j)). The San Diego Water Board has prescribed the monitoring requirements in an effort to be consistent with the current monitoring done by the Copermittees under the existing Order.

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<b>Comment #</b> 29	<b>Commentor</b>	9	<b>Comment Subject</b> Action Levels
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**Specific Comment**

The NELs as defined are receiving water standards. This would apply receiving water standards to the water within the MS4. Some of the NELs are not appropriately applied. (Fecal Coliform 400 for AMEL, this is a single sample standard not an average standard).

There needs to be a way to account for receiving water quality.

**Comment Response**

The Tentative Order does not have numeric effluent limitations, but does include numeric action levels. The establishment of the dry weather non-storm water action levels considers the discharge under critical conditions, including flow. As such, no mixing zone is allowed for discharges under the Tentative Order. For further information please see the Tentative Order Fact Sheet.

Water "within" the MS4, where also not considered receiving waters, are not required to meet receiving water standards (see Comment Response No. 22). Under the Tentative Order, the "discharge" of non-storm water from the MS4 must be effectively prohibited.

In regards to the referenced fecal coliform standard, the clarification was made in the Orange County MS4 Permit, Order No. R9-2009-0002. The standard has been included in the AMAL because it is based on a 30-day period.

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<b>Comment #</b> 30	<b>Commentor</b>	9	<b>Comment Subject</b> Action Levels
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**Specific Comment**

Non-storm water discharges from MS4 to inland surface waters

What about when an MS4 flow discharges to dry sediment and not to actual water?

**Comment Response**

The described situation would be considered critical conditions for flow. The consideration of critical flow conditions is required under 40 CFR 122.44(d). A discussion regarding flow is also found in the Fact Sheet:

"The San Diego Region has predominately intermittent and ephemeral rivers and streams (Inland Surface Waters) which vary in flow volume and duration at spatial and temporal scales. Therefore, it is assumed that any non-storm water discharge from the MS4 into the receiving water is likely to be of a quantity and duration that does not allow for dilution or mixing. For ephemeral systems, non-storm water discharges from the MS4 are likely to be the only surface flows present within the receiving water during the dry season."

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<b>Comment #</b> 31	<b>Commentor</b>	9	<b>Comment Subject</b> Action Levels
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**Specific Comment**

Need to define WARM & COLD water for DO effluent limitations.

Should use > < with specific temperatures.

**Comment Response**

Table 3.a.1 does define WARM and COLD waters for DO effluent limitations.

While the suggested use of >< for DO in the table is appreciated, this change has not been made as the language used in the table is directly from the Basin Plan for the San Diego Region.

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<b>Comment #</b> 32	<b>Commentor</b>	9	<b>Comment Subject</b> Action Levels
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**Specific Comment**

Fecal coliform AMELs are inappropriate for multiple reasons.

Imposes AB411 standards for Rec 1 waters on non-storm water, non-recreational flows. If it must be applied then B should move to Instantaneous Maximum column.

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**Comment Response**

The Tentative Order includes non-storm water action levels that are protective of receiving waters, including those downstream of the discharge. The non-storm water action levels are based on the REC-1 water quality objectives in the Basin Plan, not AB411 standards. Please note that all the receiving waters in the Upper Santa Margarita Watershed are designated as having an existing or potential REC-1 beneficial use.

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<b>Comment #</b> 33	<b>Commentor</b>	9	<b>Comment Subject</b> Action Levels
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**Specific Comment**

Enterococcus inappropriately set to Ocean Plan Designated beach area standards.

This is non-storm water, non-recreational flow. Why is it being held to beach standards when 5+ years of paired sampling data do not indicate strong links between even higher levels of bacteria than being allowed, and detected AB411 exceedances.

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**Comment Response**

Please see the response to comment 32.

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<b>Comment #</b> 34	<b>Commentor</b>	9	<b>Comment Subject</b> Action Levels
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**Specific Comment**

MDEL limits.

Where are MDELs defined in 40CFR?

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**Comment Response**

The Tentative Order does not have numeric effluent limitations, but does include numeric action levels. Although the Tentative Order does not have effluent limitations, please see 40 CFR 122.2 and 122.45. A definition for MDAL, consistent with 40 CFR 122.2 and existing State and Regional Water Board NPDES permits and resolutions is provided in Attachment C for further clarification.

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<b>Comment #</b> 35	<b>Commentor</b>	9	<b>Comment Subject</b> Action Levels
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**Specific Comment**

Table 4.a.1 does not list an instantaneous maximum for Fecal Coliform.

Should list a maximum if less than 5 samples collected in 30-day period.

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**Comment Response**

Please see the response to comment 29.

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<b>Comment #</b> 36	<b>Commentor</b>	9	<b>Comment Subject</b> Action Levels
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**Specific Comment**

Table 4.a.1 subject storm drain flows to the very stringent AB-411Rec-1 Criteria standards.

The maximums should be adjusted to attainable limits.

**Comment Response**

Please see the response to comment 32.

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<b>Comment #</b> 37	<b>Commentor</b>	9	<b>Comment Subject</b> Action Levels
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**Specific Comment**

Turbidity

What is the justification for turbidity limitations in Region 9 being so much lower than other regions in the state?

**Comment Response**

The water quality objectives for turbidity are provided in the Basin Plan for the San Diego Region. The water quality objectives in the Basin Plan have been established to protect the beneficial uses of waters within the San Diego Region. The water quality objectives in the San Diego Basin Plan were appropriately used in the development of water quality-based action levels for non-storm water discharges. Please note that issues pertaining to any proposed modifications of the water quality objectives in the Basin Plan are to be addressed under the Triennial Review process. More information may be found at: [http://www.waterboards.ca.gov/sandiego/water\\_issues/programs/basin\\_plan/tri\\_review.shtml](http://www.waterboards.ca.gov/sandiego/water_issues/programs/basin_plan/tri_review.shtml)

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<b>Comment #</b> 38	<b>Commentor</b>	9	<b>Comment Subject</b> Action Levels
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**Specific Comment**

.. freshwater criteria are based on site-specific water quality data (receiving water hardness).

Should be changed to effluent water hardness.

**Comment Response**

Site-specific water quality data (receiving water hardness) is required under State Water Board Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California. No changes were made based on this comment.

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<b>Comment #</b> 39	<b>Commentor</b>	9	<b>Comment Subject</b> Action Levels
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**Specific Comment**

pH

6.5-8.5 for freshwater 6-9 for saline waters - based on?

**Comment Response**

As cited in Table 3.a.1, pH is based upon water quality objectives found within the Basin Plan for the San Diego Region.

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**Comment #** 40                    **Commentor**                    9                    **Comment Subject** Action Levels

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**Specific Comment**

This requires "implementation of all necessary storm water controls and measures to reduce ..." when there is no evidence of a receiving water exceedance. The assessment point is "end-of-pipe" and SALs do not have any justification for applicability.

This seems to require an action when there is no evidence of a receiving water violation.

---

**Comment Response**

SALs are applicable as a tool to be used by the Copermittee(s) to determine the level of effectiveness of BMPs utilized within the drainage area discharging at the SAL outfall. This is part of the iterative process to reduce the discharge of pollutants in storm water from the MS4 to the MEP.

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**Comment #** 41                    **Commentor**                    9                    **Comment Subject** Action Levels

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**Specific Comment**

Metals SALs are in direct contradiction with statement on "table 3.a.2: Priority Pollutants" page 22

Contradiction between NEL section and SAL in terms of metals values.

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**Comment Response**

Storm Water Action Levels (SALs) are for discharges of storm water from the MS4. Section C is for non-storm water discharges. The SALs were computed utilizing USEPA nationwide MS4 discharge data (Arid West Region), and SALs for metals have been set as the 90th percentile for this dataset. Additionally, the SALs for metals incorporate synoptic water hardness measurements. Please see Attachment E Section II.B.1.b.

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**Comment #** 42                    **Commentor**                    9                    **Comment Subject** Action Levels

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**Specific Comment**

"... assessment points for determination of SAL compliance are all major outfalls ..." Seems to contradict the following sentence

"... monitoring plans to sample a representative percent of the outfalls .... "

Sentences seem to contradict each other.

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**Comment Response**

Section D of the Order has been clarified in response to the comment. The word "all" has been removed, as the Copermittees are to sample a representative percent of major outfalls within each hydrologic subarea, not all major outfalls.

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**Comment #** 43                    **Commentor**                    9                    **Comment Subject** Action Levels

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**Specific Comment**

"... to have outfall storm water discharges meet all applicable water quality standards."

This applies receiving water standards to the storm drain.

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**Comment Response**

The comment references the cited text out of context. The full text of the provision clarifies "that through the iterative and MEP process, outfall storm water discharges will meet all applicable water quality standards." This is consistent with section A.3 and State Water Board Order WQ 99-05.

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<b>Comment #</b> 44	<b>Commentor</b>	9	<b>Comment Subject</b> LID
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**Specific Comment**

It is not clear what is intended to be included in this category. A steep hillside development with known erosion soil conditions would need to address erosion. Treatment control and hydromodification requirements are not justified.

Remove this from the Priority Development Project Categories, and define elsewhere in Section F.1 how these projects would need to include measures that protect slopes from erosion.

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**Comment Response**

This requirement is identical to that in the current Riverside County MS4 Permit (Order No. R9-2004-001), the San Diego MS4 Permit (Order No. R9-2007-0001), and the Santa Ana Water Board Riverside County MS4 Permit (Order No. R8-2010-0033). These provisions are based on the Los Angeles Water Board's SUSMP upheld by the precedential State Water Board Order WQ-2000-11. The State Water Board's order found that hillside residences can be a significant source of pollutants and/or runoff following development and it is appropriate that the design standards apply so that BMPs for these categories of development result in the infiltration or treatment of a significant amount of the runoff.

Treatment control and hydromodification requirements are even more necessary for hillside developments. Hillside developments that include impervious surfaces will have surface runoff discharging at much higher volumes and velocities than developments with flatter and more gradual slopes. The treatment control and hydromodification requirements will reduce the pollutants and increased erosive forces in runoff discharging from these developments. No changes were made in response to this comment.

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<b>Comment #</b> 45	<b>Commentor</b>	9	<b>Comment Subject</b> LID
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**Specific Comment**

Retention of the 85th percentile storm event does not mimic the natural hydrology. The amount of runoff under natural conditions is dependent on soil type and other factors.

Retention requirements should be revised with intent of matching hydrology under natural conditions.

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**Comment Response**

Retention of the 85th percentile storm event provides for a high level of pollutant removal to protect water quality. This design storm does not necessarily result in zero discharge. The design storm is approximately 0.6 inches of rainfall for most of the developed area of the Riverside County portion of the San Diego Region. Larger storms will produce runoff to receiving waters. Also, retention of the design storm will begin to compensate for decades of previous, unchecked development creating impervious surfaces that have resulted in the increased runoff volumes and flow rates discharged to receiving waters. Retention of the storm value will also provide groundwater recharge that, where hydrologically connected, can create surface flows downstream.

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<b>Comment #</b> 46	<b>Commentor</b>	9	<b>Comment Subject</b> LID
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**Specific Comment**

It may be unrealistic for municipalities to implement the various processes required under this section within the amount of time allowed.

Provide a feasible time schedule for municipalities to put such a program in place.

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**Comment Response**

The San Diego Water Board disagrees that it is unrealistic to implement a LID BMP waiver program within the amount of time allowed. No changes were made in response to this comment.

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<b>Comment #</b> 47	<b>Commentor</b>	9	<b>Comment Subject</b> Construction
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**Specific Comment**

It is neither wise nor necessary to mandate use of a particular technology for managing sediment from construction sites. The Construction General Permit has adequate and more appropriate measures for ensuring sediment discharges will not create a pollution problem.

Remove the requirement that Copermittees mandate use of AST. Allow Copermittees to rely on the Risk based approach that was developed for the Construction General Permit, which does not mandate a particular technology.

---

**Comment Response**

The San Diego Water Board disagrees with the recommended change. The Tentative Order does not mandate the use of a particular technology for managing sediment from construction sites. The Tentative Order defines Active/Passive Sediment Treatment (AST) variously as using mechanical or chemical means to flocculate and remove suspended sediment from runoff at construction sites prior to discharge. Examples of coagulants include chitosan, modified starches, alum, electro-coagulation, carbonic acid, ferric chloride, and polyacrylamides. Examples of sedimentation devices include settling basins, ponds, baker tanks, weir tanks, tube settlers, and centrifuges. Examples of polishing filter types include sand, engineered media, membrane and hydrocarbon. For certain construction sites, with specific soil types that are difficult to settle, AST is likely the only method to meet the 20 NTU water quality objective specified in the Basin Plan. The requirements provide sufficient flexibility to the Copermittees to mandate the specific method of compliance and to determine which sites are required to implement AST. No changes were made based on this comment.

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<b>Comment #</b> 48	<b>Commentor</b>	9	<b>Comment Subject</b> Construction
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**Specific Comment**

This section requires inspection of construction sites of 1 acre or more at least monthly.

Propose language that is definitive and require construction site inspections monthly for sites of 1 acre or more.

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**Comment Response**

Section F.2.e.(3) requires the Copermittees to inspect at least monthly, all sites with one acre or more of soil disturbance. This language requires a minimum frequency. The Copermittees may choose to inspect these types of construction sites at a higher frequency, if warranted. No changes were made based on this comment.

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<b>Comment #</b> 49	<b>Commentor</b>	9	<b>Comment Subject</b> Municipal
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**Specific Comment**

Reduction of pesticides, herbicides, and fertilizers into the storm water to the MS4 and receiving waters.

Support inclusion of "storm water" and "and receiving waters" in the opening paragraph.

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**Comment Response**

The San Diego Water Board appreciates the commenter's support for the inclusion of "storm water" and "receiving waters" in the opening paragraph to section F.3.a.(3). "Storm water" and "receiving waters" will remain included in the opening paragraph of section F.3.a.(3).

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**Comment #** 50                      **Commentor** 9                      **Comment Subject** Municipal

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**Specific Comment**

Inspecting and cleaning all MS4 facilities between May 1 and September 30 is infeasible for those Copermittees that have tens of thousands of structures.

Inspection and removal of accumulated waste at least once a year between May 1 and September 30 of each year for (all) MS4 facilities [that receive or collect high volumes of trash and debris.]

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**Comment Response**

The Tentative Order provides in section F.3.a.(6)(iii) that, "Following two years of inspections, any MS4 facility that requires inspection and cleaning less than annually may be inspected as needed, but not less than every other year." This requirement provides the Copermittees the ability to prioritize their MS4 maintenance activities following a sufficient data collection period.

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**Comment #** 51                      **Commentor** 9                      **Comment Subject** Municipal

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**Specific Comment**

Sections (a) and (b) are redundant.

Delete Section (b) as the implementation of the provisions in Section (a) would maximize pollutant reductions by providing greater flexibility to Copermittees to manage their programs.

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**Comment Response**

Section F.3.a.(7)(b) has been retained within the Tentative Order. Please note that as an illicit discharge into the MS4, sewage infiltration is to be eliminated, not reduced. Federal regulation (40 CFR 122.26(d)) require that Copermittees use controls, as necessary, to limit the infiltration of sewage into the MS4 system. As an illicit discharge, it is expected that these controls will prevent and eliminate infiltration and seepage from the sanitary sewer. The controls listed under section F.3.a.(7)(b) are BMP measures that currently should be a part of the Copermittees' IC/ID program to prevent and eliminate illicit discharges. It is unclear how removal of this section would provide greater flexibility, as Copermittees are already required to implement these BMPs. No changes were made based on this comment.

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**Comment #** 52                      **Commentor**      5                      **Comment Subject** Economic

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**Specific Comment**

While the City shares the Regional Board's goal of protecting the quality of water in our local creeks, it is not fiscally responsible to adopt a new Model Permit that does not accurately reflect the needs of the local watershed. The Regional Board must allow the City to prioritize and balance finite public resources in order to provide numerous vital public services. The City's responsibilities also include providing for public safety (police and fire services), installing and maintaining infrastructure (roads, drainage facilities, etc.), public facilities (parks, libraries, community centers, etc.), providing recreational programs, conserving land (MSHCP), promoting habitat conservation, etc. All of these needs are equally important, but public funding mechanisms do not allow anyone of them to be funded without consideration to competing needs, priorities, and expected outcomes. New requirements must carefully weigh the benefits achieved against their real costs to implement. From a public agency perspective, all expenditures must be justified and supported by the general public.

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**Comment Response**

The San Diego Water Board is aware of the many and competing needs that the municipalities are responsible for. The mission of the San Diego Water Board, however, is to preserve, enhance, and restore the quality of the waters in the region. Our responsibility is to protect the beneficial uses of the waters of the state. The Tentative Order does reflect the water quality needs of the local watershed with requirements such as the regulation of unpaved roads and watershed specific action levels.

The Copermittees' programs have already been found to be deficient. USEPA audits conducted in January 2008 (USEPA Region IX MS4 Inspection Report Riverside County Flood Control and Water Conservation District and County of Riverside, dated 03/31/2008), and subsequent enforcement action by the San Diego Water Board (Notice of Violation No. R9-2008-0053 and No. R9-2010-0074) documented significant short-comings in the Copermittees' programs.

While we try to take other needs into consideration when developing the requirements included in the Tentative Order, the requirements must be able to fulfill our mission and responsibilities. The Copermittees must be able to meet the requirements of the Tentative Order for the protection of water quality. We understand that the provisions in the Tentative Order may require the Copermittees to modify, reduce, or find additional efficiencies in their operations, but the Copermittees are still allowed to prioritize and balance their finite public resources. As the Copermittees' regulatory and administrative requirements and responsibilities expand and increase with their population and growth, which are not limited and related to only managing the MS4 system, the Copermittees will also need to identify ways to expand and increase their resources for those ever increasing and/or changing needs.

Please see the responses to comments 8 and 9 for a discussion about the Copermittees' revenue sources for funding their storm water programs.

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**Comment #** 53                      **Commentor**      9                      **Comment Subject** IDDE

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**Specific Comment**

Paragraph makes a reference to attachment E, which does not in fact contain a description of this particular program.

Include a description of the Dry Weather Field Screening and Analytical Monitoring Program in Attachment E.

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**Comment Response**

The commenter is incorrect that Attachment E does not contain a description of this program. Section II.C of the MRP (Attachment E) includes a description of the dry weather field screening and analytical monitoring of MS4 detect illicit discharges and connections.

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**Comment #** 54                      **Commentor** 9                      **Comment Subject** IDDE

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**Specific Comment**

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... based on results of field screening ...

Field screening is not included as a component of any monitoring programs and should be removed from this sentence.

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**Comment Response**

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The San Diego Water Board disagrees, as field screening is the quantitative and/or qualitative monitoring of MS4 outfalls for non-storm water discharges and associated observations regarding a discharge. For example, if a field screening of an MS4 major outfall detects a high turbidity from sediment in a non-storm water discharge, Section F.4.e directs that this screening should be used for investigating and inspecting that portion of the MS4. According to Section II.C.1.b of the MRP (Attachment E), "Each Copermittee must develop and/or update written procedures for effluent analytical monitoring including field observations, monitoring, and analyses to be conducted." "[F]ield observations, monitoring and analyses" all can be performed by sampling personnel in the field, with visual observations and with portable monitoring and water quality analysis equipment (e.g. YSI meter, turbidity meter, pH strips). These components of the monitoring program would be part of the "field screening". No changes were made based on this comment.

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**Comment #** 55                      **Commentor** 9                      **Comment Subject** IDDE

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**Specific Comment**

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References a monitoring effort that does not exist anywhere else in the permit (field screening)

The inconsistency in the permit for the different programs and the referenced sections need to be straightened out. Add description of referenced program to Attachment E.

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**Comment Response**

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Please see the response to comment 54.

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**Comment #** 56                      **Commentor** 9                      **Comment Subject** IDDE

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**Specific Comment**

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Contradictory paragraph. Numeric action levels must be developed, but "the criteria must consider numeric effluent limitation (see Section C)".

The NELs from Section C or develop numeric action levels? Recommend selecting one criteria.

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**Comment Response**

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The commenter cited the text incorrectly. Section F.4.e.(1) clearly states, "The criteria must include required non-storm water action levels (see Section C) and a consideration of 303(d)-listed waterbodies and environmentally sensitive areas (ESAs) as defined in Attachment C."

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**Comment #** 57                      **Commentor** 9                      **Comment Subject** Watershed Workplan

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**Specific Comment**

The workplan is for development of a BMP strategy and implementation of BMPs to improve urban runoff water quality contributions to the receiving water. Calling it a "Water Quality" workplan is misleading because the regulated parties under this permit are not responsible for every contribution to every water body in the entire watershed.

The requirements should focus on urban runoff contributions to the receiving waters for which the regulated parties are responsible.

Revise the section to state: The Watershed Workplan shall describe the Permittees' development and implementation of a collective watershed strategy to assess and prioritize the water quality problems due to runoff discharging to the watershed's receiving waters, identify and/or model sources of the highest priority water quality problem(s), develop a watershed-wide BMP implementation strategy to abate highest priority water quality problems and the relative contribution from runoff discharges, and a monitoring strategy to evaluate BMP effectiveness and changing water quality prioritization in the WMA.

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**Comment Response**

The Tentative Order is for the discharges from the Copermitees' MS4s. Pollutant contributions that are not discharged from the Copermitees' MS4s are not addressed by this permit or required to be addressed by the Watershed Workplan section. No changes were made based on this comment.

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**Comment #** 58                      **Commentor** 9                      **Comment Subject** Watershed Workplan

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**Specific Comment**

The use of the word "proper" for installation of BMPs is subjective and not defined by this permit. There may be many different ways to "properly" design and install a BMP, and the regulated parties may or may not choose to test different ways for each BMP to determine which works best.

Revise to state: Develop a strategy to model and/or monitor improvements in runoff discharge quality resulting from implementation of the BMPs described in the Watershed Workplan. The modeling and/or monitoring strategy shall generate the necessary data to report on the measured pollutant reduction that results from BMP implementation.

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**Comment Response**

The term "proper" for describing BMP implementation is purposely left undefined in the Tentative Order. The Copermitees must determine what is the proper BMP implementation through manufacturer suggestions or BMP guidance manuals (e.g. CASQA). In some cases, "proper" BMP design and implementation may later be found to be faulty. The Tentative Order provides the Copermitee the flexibility to adjust and maintain BMPs to improve pollutant removal effectiveness. No changes were made based on this comment.

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**Comment #** 59                      **Commentor** 9                      **Comment Subject** General

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**Specific Comment**

The reference to a watershed workplan should use a consistent naming convention. It is referred to as a "Watershed Workplan" in Section K.1.b., and a "Watershed Water Quality Workplan" in Section G.2.

The reference to a watershed workplan should use a consistent naming convention.

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**Comment Response**

Section G is for the "Watershed Water Quality Workplan (Watershed Workplan)." Therefore, the "Watershed Water Quality Workplan" is subsequently referred to as the "Watershed Workplan" throughout the remainder of the Tentative Order. After the term "Watershed Water Quality Workplan" is defined as "Watershed Workplan", the term "Watershed Water Quality Workplan" is no longer used in Section G, nor Section K. No changes were made based on this comment.

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**Comment #** 60                      **Commentor** 9                      **Comment Subject** Monitoring

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**Specific Comment**

Typo at the base of the table: "Nitrate and nitrate may be combined..."

Change to" "Nitrite and nitrate may be combined..."

**Comment Response**

The correction made been made to the text as shown in the errata.

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**Comment #** 61                      **Commentor** 9                      **Comment Subject** Monitoring

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**Specific Comment**

Comparing Metals SALs with CTR values

Question is if you can use the "1 hour maximum concentration" criteria in this way?

**Comment Response**

Although the SALs have been set at a conservative level, it is possible that a SAL for metals may be exceeded but, given the hardness of the receiving water, applicable CTR water quality criteria may not be exceeded. The 1 hour CTR criteria was chosen for storm events as this CTR criteria represents the highest concentration of pollutant which aquatic life can be exposed to for a short time without deleterious effects. The continuous CTR criteria is less representative of pollutants in storm water as the continuous criteria represents the maximum concentration over an extended time period (4 days).

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**Comment #** 62                      **Commentor** 9                      **Comment Subject** Monitoring

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**Specific Comment**

"Stations must be all major outfalls" plus "other outfall points..."

This far exceeds CWA 500 point maximum for dry weather monitoring.

**Comment Response**

The section referenced by the commentor does not read "stations must be all major outfalls." It reads: "Sampling Stations must be located at major outfalls pursuant to section C of this Order."

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**Comment #** 63                      **Commentor** 9                      **Comment Subject** Monitoring

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**Specific Comment**

If flow is evident a 1 hour composite sample may be taken.

Should elaborate on sampling procedures for flowing outfalls.

**Comment Response**

This section does not require the collection of a 1-hour composite sample, but suggests that one may be taken. This lends the Copermittee(s) maximum flexibility in evaluating if a composite is required to address IC/ID investigations on a case-by-case basis. If a composite sample is taken, it also is up to the Copermittee(s) to determine if a time or flow-based composite should be taken.

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**Comment #** 64                      **Commentor**     9                      **Comment Subject** Monitoring

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**Specific Comment**

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"if flow is evident a 1 hour composite sample may be taken"

There is not definition of what comprises a composite sample. This would significantly increase this program.

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**Comment Response**

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Please see the response to comment 63.

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**Comment #** 65                      **Commentor**     5                      **Comment Subject** Economic

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**Specific Comment**

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Although the Order has been slightly modified from the previous version issued to the South Orange County permittees, it continues to retain numerous provisions that do not apply to this region and are unnecessarily costly and administratively burdensome to the City and, ultimately, to our citizens.

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**Comment Response**

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The San Diego Water Board disagrees that there are provisions in the Tentative Order that do not apply to the portion of Riverside County in the San Diego Region and the commentor does not explain which provisions are allegedly unnecessary and costly. All of the provisions in the Tentative Order are applicable and can be applied in this part of the San Diego Region, as well as all other parts of the region. The San Diego Water Board has also modified the Tentative Order in several ways, in response to recommendations by the Riverside County Copermittees, to align it more with regional needs and to minimize or reduce the incremental increase in costs that will be necessary to improve their programs to meet the new and enhanced requirements. These modifications are discussed in the response to comment 9.

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**Comment #** 66                      **Commentor**      5                      **Comment Subject** General

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**Specific Comment**

It is important to note that the federal regulations regulating MS4 discharges have not changed since 1987. There is no policy basis for the significant changes proposed by this Tentative Order. The majority of the changes proposed to this Tentative Order are to accommodate Regional Board staff wishes to move to a model MS4 Permit that treats Riverside, Orange and San Diego County's equally. These changes were not specifically designed to address the local needs of this watershed.

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**Comment Response**

The San Diego Water Board agrees that the federal regulations regulating MS4 discharges have not changed since 1987. There are two main reasons for the changes that have been made. The first and foremost reason is to correct deficiencies in the requirements to be more protective of receiving waters, which is more consistent with the federal regulations. The second reason is to make the requirements for the three counties in the San Diego Region more consistent among each other. In addition, although the federal regulations for MS4 discharges have not changed since 1987, the water quality in the Upper Santa Margarita watershed has continued to deteriorate along with a subsequent increase in urban development within the watershed during the same time period. The receiving waters within the Upper Santa Margarita watershed continue to not meet water quality standards as evidenced by increased number of CWA section 303(d) listed waterbodies.

As the City is aware, the San Diego Water Board met with the Riverside County Copermittees on more than a dozen occasions between March and July 2010 to modify the requirements to be more specific to the needs of the Upper Santa Margarita watershed. While we acknowledge that the requirements are now more consistent with the San Diego County and Orange County MS4 Permits, many of the changes were specifically designed to address the local needs of the Upper Santa Margarita watershed.

The increased complexity in a fourth round MS4 permit is consistent with federal regulations and guidance; and appropriate where numeric effluent limitations are not required as explained in the USEPA's Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits, "The interim permitting approach uses best management practices (BMPs) in first-round permits, and expanded or better-tailored BMPs in subsequent permits, where necessary, to provide for the attainment of water quality standards."

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**Comment #** 67                      **Commentor**      10                      **Comment Subject** General

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**Specific Comment**

The Bay Council appreciates and welcomes the opportunity to comment on the Regional Water Quality Control Board's ("Regional Board") draft Municipal Storm Water Permit ("Permit") for Riverside County. As with the recently adopted Orange County permit (Order No. R9-2009-0002), this draft Permit represents a significant improvement to past storm water permits in not only the San Diego region, but the entire state. The Bay Council applauds the Regional Board for its leadership in advancing municipal storm water permits to reflect the iterative approach of the maximum extent practicable ("MEP") standard mandated by the Clean Water Act.

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**Comment Response**

Comment noted.

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<b>Comment #</b> 68	<b>Commentor</b>	10	<b>Comment Subject</b> Hydromod
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**Specific Comment**

Bay Council member San Diego Coastkeeper was part of the Technical Advisory Committee for the San Diego region Hydromodification Management Plan (HMP) development. Many of Coastkeeper's concerns, as well as committee member NRDC's, focused on the standard set in the San Diego HMP. The hydromodification susceptibility and the resulting BMP sizing tools were set to meet predevelopment standards, not the naturally occurring condition. It was ultimately the San Diego MS4 Permit language—which defines predevelopment as the condition onsite immediately before the planned development—that constrained the development of the HMP. (Order No. R9-2007-0001, C-7). This Permit, however, is in line with Coastkeeper and NRDC's view that predevelopment and preproject are the naturally occurring condition—as opposed to simply the condition immediately preceding the new development. This definition will create a more robust and effective HMP for the Riverside area, protecting natural stream hydrology as opposed to merely preventing further degradation. (Permit, F.1.h). Further, the required prioritization of BMPs will ensure the most effective BMPs are evaluated first, instead of the least expensive or easiest to implement BMPs. (Permit, F.1.g.(2)).

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**Comment Response**

Comment noted.

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<b>Comment #</b> 69	<b>Commentor</b>	10	<b>Comment Subject</b> Unpaved Roads
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**Specific Comment**

A new addition to this Permit is the regulation of unpaved roads, which now require implementation of BMPs. (F.1.i.; F.3.a.(10); F.3.c.(5)). Not only will these new permit provisions help alleviate sediment and erosion problems; they will also promote smart maintenance and planning. For example, the permit requirement that BMPs include “[u]npaved roads and culvert designs that do not impact creek functions and where applicable, that maintain migratory fish passage” will help maintain natural water courses. (F.1.i). The following requirement will also serve to promote long-term maintenance and planning to protect water quality and geomorphology:

"Through their regular maintenance of unpaved roads, the Copermittees must examine the feasibility of replacing existing culverts or design of new culverts or bridge crossings to reduce erosion and maintain natural stream geomorphology."

(F.3.a.(10)(e)). These types of Permit conditions will incentivize municipalities to plan ahead, and will prevent the perpetuation of the currently fragmented maintenance activities.

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**Comment Response**

Comment noted. The Copermittees have brought up concerns addressing the regulation of privately owned and maintained unpaved roads; therefore those regulations have been removed. Please see the errata sheet for exact language changes.

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<b>Comment #</b> 70	<b>Commentor</b>	10	<b>Comment Subject</b> General
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**Specific Comment**

In addition, municipal flood control structure BMP implementation will also serve to benefit Copermittees in maintaining their storm water systems. (F.3.a.(4)(a)-(c)). The requirement that Copermittees assess flood management project impacts on water quality, evaluate existing flood control structures as part of ongoing maintenance, and inventory such activities in the JRMP Annual Report is particularly important to avoid poor planning such as evidenced in the City of San Diego's Master Storm Water System Maintenance Program. (Id.)

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**Comment Response**

Comment noted.

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**Comment #** 71                      **Commentor**      10                      **Comment Subject** Retrofit

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**Specific Comment**

Largely ignored in the past, the retrofit requirements in the Permit will help Copermittees tackle the storm water issues that cannot be solved through new construction and development standards alone. Many water quality issues are historical, due to poor planning and the proliferation of impervious surfaces. Permit-required assessment of retrofit opportunities, and permissive language with regard to implementation of retrofits will spur Copermittees to action, but allow them flexibility to choose the most effective projects. (F.3.d.). The novel idea of using retrofits as an enforcement or mitigation measure will also likely prove more appealing than simple monetary penalties.

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**Comment Response**

Comment noted.

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**Specific Comment**

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**1. THE TENTATIVE ORDER ATTEMPTS TO REDEFINE WHAT CONSTITUTES A WATER OF THE UNITED STATES**

Section 3.C of the Findings section on page 11 of the Tentative Order states:

"Historic and current development makes use of natural drainage patterns and features as conveyances for urban runoff. Urban streams used in this manner are part of the municipalities MS4 regardless of whether they are natural, man-made, or partially modified features. In these cases, the urban stream is both an MS4 and a receiving water."

The City does not believe that such a finding is warranted or lawful under either the clear statutory provisions of the Clean Water Act or recent judicial interpretations of the Act. The language in the Tentative Order could be construed as seeking to regulate all discharges into MS4s, changing the very nature of MS4s so as to constitute a receiving water.

This is contrary to the plain language of section 402(P)(3)(B) of the Clean Water Act, which requires: "Permits for discharges from municipal storm sewers ..." 33 U.S.C. § 1342(P)(3)(B) (emphasis added.). Based on this assertion, the Regional Board does not have the authority to regulate water entering into MS4s as receiving waters of the United States.

Furthermore, even if the statutory language indicated that Permits were required for discharges into MS4s, recent holdings from the United States Supreme Court conclusively show such structures would not constitute a water of the United States. According to the plurality decision in *Rapanos v. United States* (2006) 126 S. Ct. 2208, 2225:

"In sum, on its only plausible interpretation, the phrase 'the waters of the United States' includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] ... oceans, rivers, [and] lakes.' See Webster's Second 2882. The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall. The Corps' expansive interpretation of the 'the waters of the United States' is thus not 'based on a permissible construction of the statute.'"

(Emphasis added.). The MS4 systems and urban streams that the Regional Board is seeking to regulate as receiving waters are intermittent, ephemeral, and used only periodically as drainage for rainfall. As such, these systems and streams would not constitute a water of the United States. Because the Clean Water Act extends solely to waters of the United States, the Regional Board has no authority to regulate MS4s or urban streams as defined in its Permit.

Even under Justice Kennedy's more lenient interpretation of what constitutes a water of the United States, the Regional Board has still not adequately met the requirements for establishing that an MS4 or urban stream is subject to regulation as a Water of the United States. According to Justice Kennedy, the Regional Board must establish that the MS4 system and urban streams bear a significant nexus to the other regulated waters so as to qualify for regulation as a water of the United States. *Rapanos*, 126 S. Ct. at 2249. Such a determination must be made on a case-by-case basis, and must contain some measure of the significance of the connection for downstream water quality. *Id.* at 2250-2251. In other words, the Regional Board must conduct an analysis of the "quantity and regularity of flow" in the relevant MS4s and urban streams prior to holding that these structures merit regulation under the Clean Water Act. *Id.* at 2251. Absent conclusive findings, the Regional Board is without authority to regulate MS4s and urban streams as receiving waters under the Clean Water Act.

The City requests that the Board members direct staff to modify the language in the Tentative Order to ensure regulations of only those systems and streams discharging directly into waters of the United States as defined according to the Supreme Court's holding in *Rapanos* in order to avoid random interpretations of the CWA.

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**Comment Response**

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The Tentative Order does not attempt to redefine what constitutes waters of the United States (waters of the U.S.). Section D.3.c of the Findings defines what constitutes the MS4. In some cases, waters of the U.S. and waters of the state may be considered part of the MS4.

The San Diego Water Board is authorized to regulate storm water discharges from the MS4, which are considered point sources under the Clean Water Act, to waters of the U.S. Discharges from the MS4 that are not composed entirely of storm water (i.e. non-storm water discharges) are prohibited. Pollutants that are deposited in the MS4 that can be conveyed by

storm water cannot cause or contribute to a condition of nuisance, pollution, or contamination in waters of the U.S. Thus, discharges into the MS4 that are not composed entirely of storm water (i.e. pollutants in storm water and non-storm water) and can be a significant source of pollutants are prohibited.

The definition of the MS4 and waters of the U.S. are consistent with the Clean Water Act and NPDES regulations in the Tentative Order. Please also see the response to comment 22.

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<b>Comment #</b>	<b>Commentor</b>	<b>Comment Subject</b>
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73	10	Overirrigation
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**Specific Comment**

Bay Council has been collectively, and through its individual organizations, advocating for conservation and smart water use for years. Every drop of water that remains at its source is a drop that has not contributed to urban runoff. Nonetheless, many municipalities have been reluctant to enforce over-irrigation as either a water supply or water quality issue, citing the previous permit exemption as authority for such practice. Now, with the removal of this exemption, municipalities will not only be required to enforce over-irrigation runoff, but will be able to use the revised Permit as authority for urging residents, developments, and commercial and industrial facilities to conserve water.

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**Comment Response**

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Comment noted.

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**Specific Comment**

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**2. THE TENTATIVE ORDER UNLAWFULLY PURPORTS TO RESTRICT THE LOCATION OF TREATMENT OPTIONS**

Section F.1.d.(6)(d) on page 35 of the Tentative Order states:

"All treatment control BMPs for Priority Development Projects must, at a minimum, be implemented close to pollutant sources (where shared BMPs are not proposed), and prior to discharging into waters of the U.S."

The implementation of this provision presents a number of potentially serious problems. First, this provision of the Tentative Order violates Water Code section 13360. According to Water Code section 13360(a):

"No waste discharge requirement or other order of a regional board or the state board or decree of a court issued under this division shall specify the design, location, type of construction, or particular manner in which compliance may be had with that requirement, order, or decree, and the person so ordered shall be permitted to comply with the order in any lawful manner."

(Emphasis added.) As noted above, the Regional Board is already attempting to define MS4s and urban streams as waters of the United States. *Supra*, p. II. The proposed regulation would therefore effectively limit the ability for Permittees to implement any BMPs in any area except at the exact location of the source generating pollutants and would exclude Permittees from choosing to implement what may be less-costly, more effective BMPs in other areas, but Water Code section 13360(a) expressly prohibits this type of regulation.

Second, the comparison to wetlands regulation misconstrues USEPA guidance on this issue. The USEPA guidance document referenced by the Regional Board does not preclude Permittees from locating structural controls within a natural wetland. Rather, the guidelines simply state:

"To the extent possible, municipalities should avoid locating structural controls in natural wetlands. Before considering siting of controls in a natural wetland, the municipality should demonstrate that it is not possible or practicable to construct them in sites that do not contain natural wetlands .... "

(Fact Sheet, p. 96, fu. 154, citing USEPA, 1992. Guidance Manual for the Preparation of Part II of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems. EPA 833-B-92-002. (Emphasis added.) While the Permittees may agree that they should generally avoid in stream treatment to the extent possible, outright prohibition of an option would be counterproductive.

The City requests that the Board members direct staff to modify the language in the Tentative Order to allow permittees to make the determination of the exact placement location of BMPs.

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**Comment Response**

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The Tentative Order is consistent with the California Water Code. The Tentative Order does not specify the exact placement location of BMPs. The Tentative Order does, however, include some limitations for the placement location of BMPs to minimize or eliminate the discharge of pollutants to waters of the U.S. Additionally, treatment BMPs must not be constructed in waters of the U.S. or state unless the runoff flows are sufficiently pretreated to protect the values and functions of the water body. Federal regulations at 40 CFR 131.10(a) state that in no case shall a state adopt waste transport or waste assimilation as a designated use for any waters of the U.S. The limitations for the placement location of BMPs are appropriate. No changes were made based on this comment.

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<b>Comment #</b> 75	<b>Commentor</b>	10	<b>Comment Subject</b> Action Levels
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**Specific Comment**

As with the Orange County permit, this Permit is a great leap forward in achieving the MEP standard. With the Orange County permit paving the way, the Regional Board has created a mechanism to evaluate BMP effectiveness and ensure the iterative approach is truly progressive. As Bay Council members have previously commented on the Orange County permit, the Regional Board has broad authority to impose numeric effluent limits.<sup>1</sup> The Bay Council fully supports the Regional Board in requiring both non-storm water dry weather action levels (“NALs”) and storm water action levels (“SALs”). (Permit, C. and D.).

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**Comment Response**

Comment noted.

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**Specific Comment**

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3. THE TENTATIVE ORDER IMPROPERLY INTRUDES UPON THE CITY'S LAND USE AUTHORITY IN VIOLATION OF THE TENTH AMENDMENT OF THE U.S. CONSTITUTION

To the extent that this Tentative Order relies on federal authority under the Clean Water Act to impose land use regulations and dictate specific methods of compliance, it violates the Tenth Amendment of the U.S. Constitution. Furthermore, to the extent the Tentative Order requires a Municipal Permittee to modify its city ordinances in a specific manner; it also violates the Tenth Amendment.

According to the Tenth Amendment:

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

Article XI, section 7 of the California Constitution, California guarantees municipalities the right to "make and enforce within [their] limits all local police, sanitary and other ordinances and regulations not in conflict with general laws." The United States Supreme Court has held that the ability to enact land use regulations is delegated to municipalities as part of their inherent police powers to protect the public health, safety, and welfare of its residents. See *Berman v. Parker* (1954) 348 U.S. 26, 32- 33. Because it is a constitutionally conferred power, land use powers cannot be overridden by State or federal statutes.

From the City's perspective, under the guise of federal law, the Regional Board is attempting to dictate the precise manner in which cities must exercise their police powers. The City does not believe that such a requirement is consistent with the Tenth Amendment.

The City requests that the Board members direct staff to modify the language in the Tentative Order to ensure consistency with the Tenth Amendment, rather than applying random interpretations of it, with regard to issuing requirements which dictate the precise method of compliance.

**Comment Response**

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The San Diego Water Board disagrees that the Tentative Order intrudes upon the City's land use authority. The Tentative Order requires the City to be protective of water quality in the City's land use decisions. The requirements of the Tentative Order provide the Copermittees with sufficient flexibility to choose how they will achieve compliance. The requirements provide the Copermittees with numerous compliance options. As such, the requirements do not specify design, location, type of construction, or particular manner in which compliance may be had.

Where the Tentative Order includes detailed requirements, it is to be in compliance with CWA section 402(p)(3)(B)(iii), which mandates that MS4 permits "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 the State determines appropriate for the control of such pollutants." Clearly, the CWA provides the San Diego Water Board with the discretion to include specific requirements in the Tentative Order. This discretion is supported in the preamble to the Phase I NPDES storm water regulations, which states "this rule sets out permit application requirements that are sufficiently flexible to allow the development of site-specific permit conditions" (FR 48038). USEPA has issued regulations and guidance documents that discuss the types of BMPs, for example, that must be included in storm water permits in order to reduce the discharge of pollutants in storm water to the maximum extent practicable. Thus, federal law mandates that permits issued to MS4s must require management practices that will result in the reduction of pollutants to the maximum extent practicable. The state is required, by federal law, to select the BMPs. See *NRDC v USEPA* (9th Cir. 1992) 966 F .2d 1292; *Environmental Defense Center v USEPA* (9th Cir. 2002) 344 F .3d 832, 855; *City of Rancho Cucamonga v Regional Water Quality Control Bd., Santa Ana Region* (2006) 135 Cal.App.4th 1377, 1389.

The Copermittees are able to implement effective runoff management programs because they possess land use authority. Municipal NPDES requirements compel Copermittees to exercise that authority in a manner that protects water quality from adverse effects of MS4 discharges. The Tentative Order therefore does not conflict with the Tenth Amendment of the U.S. Constitution. Copermittees are responsible for accepting flows into their MS4. For each Copermittee that accepts flows into their MS4, federal NPDES regulations 40 CFR 122.26(d)(2)(i)(B,C,E, and F) provide that each Copermittee's permit



application “shall consist of: (i) Adequate legal authority. A demonstration that the applicant can operate pursuant to legal authority established by statute, ordinance or series of contracts which authorizes or enables the applicant at a minimum to: [...] (B) Prohibit through ordinance, order or similar means, illicit discharges to the municipal separate storm sewer; (C) 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; [...] (E) Require compliance with condition in ordinances, permits, contracts or orders; and (F) 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 Tentative Order includes the requirements of the federal regulations and does not conflict with the Tenth Amendment of the U.S. Constitution. Nor do its requirements infringe on municipalities' police power rights under Article XI, section 7 of the California Constitution. Failure of a municipal discharger to develop and implement appropriate and effective runoff management programs that comply with the NPDES requirements for MS4s would subject the municipal discharger to enforcement by the San Diego Water Board, and potentially by its citizens. The burden of proving the deficiency of the runoff management programs would be defined by the provisions describing the necessary elements of the program, and by the extent to which the program reduces pollutants in the MS4.

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**Specific Comment**

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**4. THE TENTATIVE ORDER CONSTITUTES AN UNFUNDED STATE MANDATE**

The Regional Board seeks to impose new provisions that require a higher level of service of existing programs that are not required or mandated under the Clean Water Act or any federal regulations thereunder. Yet, according to the Fiscal Analysis provided in Section H.1. of the Tentative Order:

"Each Copermittee must exercise its full authority to secure the resources necessary to meet all requirements of this Order."

(Tentative Order, p. 74.) To the extent the Tentative Order imposes additional programs on the Permittees without providing additional funds, they are unfunded mandates. The Commission on State Mandates recently held that both the Los Angeles County MS4 Permit and the San Diego County MS4 Permit contained provisions that constituted unfunded state mandates. In re Test Claim on Los Angeles Regional Quality Control Board Order No. 01-182 (July 31, 2009); In re Test Claim on San Diego Regional Water Quality Control Board Order No. R9-2007-0001 (March 26, 2010). As such, the Regional Board cannot merely dismiss the suggestion that the Tentative Order does contain provisions that constitute unfunded state mandates.

The imposition of unfunded programs and mandates in the Tentative Order is inconsistent with the provisions of the California Constitution, specifically Article XIII.B, Section 6, which requires a state agency mandating a new program or a higher level of service to provide a "subvention" of funds to reimburse local governments for the costs of the program or increased level of service.

Article XIII.B, Section 6 of the Constitution prevents the state from shifting the cost of government from itself to local agencies without providing a "subvention of funds to reimburse that local government for the costs of the program or increased level of service ... " State agencies are not free to shift state costs to local agencies without providing funding merely because those costs were imposed upon the state by the federal government. If the state freely chooses to impose additional costs upon a local agency as a means of implementing its policy, then those costs should be reimbursed by the state agency. See *Hayes v. Commission on State Mandates* (1992) 11 Cal. App. 4th 1564, 1593-1594. If the state refuses to appropriate money to reimburse a city, the enforcement of the state mandate can potentially be enjoined by a court. See *Lucia Mar Unified School District v. Honig* (1988) 44 Cal. 3d 830, 833-834.

The Tentative Order will require a substantial capital investment, which individual cities will have to fund, despite the fact that no funding mechanism, nor any assistance, financial or otherwise, from the Regional Board is provided to the Permittees. To our knowledge, the Regional Board has made no provision to provide any level of financial relief to the permittees for any of the provisions proposed in the Tentative Order.

The Tentative Order explicitly provides that the Tentative Order does not constitute an unfunded state mandate for four reasons in paragraph 6 of page 14 of the Tentative Order. The City disagrees with all four stated reasons. To the extent the Tentative Order imposes additional programs on the City and its co-permittees without providing additional funds, they are unfunded mandates.

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**Comment Response**

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The San Diego Water Board disagrees that the Tentative Order constitutes an unfunded mandate. The San Diego Water Board disagrees that the provisions in the Tentative Order are not required or mandated under the Clean Water Act. We acknowledge that several of the elements of the Tentative Order have been improved upon by including more specific requirements. The additional specificity which will likely require modifications to the Copermittees' existing programs, however, does not mean that there are now unfunded state mandates.

We also acknowledge that the Commission on State Mandates (Commission) recently held that the San Diego County MS4 Permit contained provisions that constituted unfunded state mandates and so partially approved the San Diego County MS4 claimants' Test Claim. First, the Commission did not determine the validity of those permit provisions; it only addressed funding and determined that the State must reimburse the claimants for the costs of complying with them. Second, the Commission's decisions only affect those Orders (MS4 permits) directly identified by the Commission. No other permits are affected, even if those permits have similar provisions. Third, the San Diego Water Board is not precluded from adopting similar or identical provisions in the Riverside County MS4 permit and the State is not required to provide funding for any permit provisions unless and until the Commission, through a Test Claim proceeding, makes a determination that

one or more provisions in the Riverside County MS4 permit are unfunded state mandates requiring reimbursement. Finally, the State Water Board and San Diego Water Board have challenged the Commission's determination in Sacramento Superior Court on grounds including that the affected permit provisions are in fact federal, and not state, mandates. The San Diego Water Board maintains at this time that the provisions of the Tentative Order are not unfunded state mandates and will continue to include appropriate provisions in the MS4 Permits to protect the water quality and beneficial uses of the waters of the region.

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**Specific Comment**

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## A. The Tentative Order Imposes Requirements that Go Beyond Federal Law

To the extent the Tentative Order imposes requirements that go beyond what is required by federal law, the Regional Board is required to consider and address among other things the constitutional prohibition on unfunded state mandates. In fact, there are many specific obligations in the Tentative Order that are not federally mandated.

For example, Section E, on page 24 of the Tentative Order, requires that each permittee submit a certification statement, signed by its chief legal counsel, that the permittee has taken the steps necessary to obtain and maintain full legal authority to implement and enforce each of the requirements in 40 CFR 122.26(d)(2)(i)(A-F) and the Tentative Order. The Clean Water Act does not require the certification statement mandated by the Regional Board. 40 CFR 122.26(d)(2)(i) only requires "[a] demonstration that the applicant can operate pursuant to legal authority established by statute, ordinance or series of contracts ...." Arguably, the City can demonstrate its legal authority by submitting copies of ordinances, resolution or contracts certified by the City Clerk. The Clean Water Act does not require permittees to submit a certification statement.

Furthermore, the Tentative Order goes beyond federal law in that it is at least twice as long, and in some cases, three times as long as other MS4 Permits developed by other Regional Boards in the State of California such as the Lahontan Regional Board and the Central Valley Regional Board. This means that either some Regional Boards are failing to impose federally mandated requirements pursuant to the Clean Water Act, or the San Diego Regional Board is imposing requirements that go beyond federal law.

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**Comment Response**

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The Tentative Order is consistent with federal requirements and does not go beyond federal law. The provisions of the Tentative Order represent the MEP with specific requirements that are necessary to protect water quality.

MS4 Permits from different regions cannot be compared without looking at the different issues facing each region. The length of a permit is not indicative of consistency with the Clean Water Act. The discharges that the Lahontan and Central Valley Regions are most concerned with are typically nonpoint source discharges that cannot be regulated under NPDES requirements (e.g., agriculture and silviculture). There are, however, examples of MS4 Permits with similar provisions and lengths in the Los Angeles and San Francisco Bay Regions. Each region implements the requirements of the Clean Water Act by including provisions in the MS4 Permits with the specificity that is necessary to protect water quality and beneficial uses for the waters in that region.

The requirements in the Tentative Order include the specificity that has been demonstrated to be necessary to direct the programs of the Copermittees to be protective of water quality. Without the additional specificity, which would make the language subject to greater interpretation and less enforceable, the Copermittees often assert that they have "met the minimum requirements of the permit" and do not attempt to go any further to try and improve water quality. Thus, additional specificity to the provisions of the MS4 Permit are warranted to direct the Copermittees to implement requirements that will be more protective of water quality, consistent with the Clean Water Act, and do not constitute an unfunded mandate.

Finally, a municipality's legal counsel appears to be the most appropriate official to interpret the municipality's legal authorities and to make the demonstration, that based upon his or her legal evaluation, that the municipality's legal authorities are adequate to carry out the federal requirements. Simply providing copies of ordinances, resolutions or statutes is insufficient to make the necessary demonstration that the municipality has and will maintain full legal authorities.

Please also see the response to comment 77.

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**Specific Comment**

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B. The Fact that Industrial Dischargers are More Strictly Regulated than Municipal Dischargers is Irrelevant to the Unfunded Mandate Issue

The Tentative Order asserts that the Order does not constitute an unfunded mandate because the Order regulates discharges of waste from municipal sources more leniently than they could regulate discharges from non-governmental dischargers. See paragraph 6 on page 14 of Tentative Order. The City fails to see how this statutory distinction between the regulation of municipal dischargers and industrial dischargers affects whether the Order imposes requirements on co-permittees that go beyond federal law. Municipalities are not industrial sites. Municipal discharges are not industrial discharges.

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**Comment Response**

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The San Diego Water Board disagrees that the fact that industrial dischargers are more strictly regulated than municipal dischargers is irrelevant to the unfunded mandate issue. The fact that the obligations of non-governmental and new dischargers who are issued NPDES permits for storm water and non-storm water discharges are more stringent is very pertinent. The NPDES requirements for non-governmental dischargers typically include numeric effluent limitations for a discharge so it will not cause or contribute to a condition of pollution in the receiving waters. Any excursion above these numeric effluent limitations in the discharge is a violation of the permit. Compliance is achieved when the numeric effluent limitations are met.

The NPDES requirements in the MS4 Permit do not include such effluent limitations, but allows compliance through iterative implementation of BMPs and improving storm water management programs, which is less stringent. Compliance means improving BMPs and storm water and non-storm water management programs when water quality is not adequately protected.

To date, the Copermittees have been unable to adequately protect water quality in the receiving waters, as demonstrated by the increasing number of Clean Water Action section 303(d) listed impaired water bodies. The Copermittees often state that they have “met the minimum requirements of the permit” and do not attempt to go any further to try and improve their programs to protect water quality. In the absence of numeric effluent limitation, the provisions of the MS4 Permit must include the level of specificity to direct the Copermittees to improve their storm water and non-storm water management programs to be more protective of water quality. The additional specificity does not go beyond federal law.

In addition, one of the statutory bases for establishing that a permit provision amounts to an unfunded state mandate requiring reimbursement is for the municipality to show that the requirements are unique to local government and do not apply generally to all residents and entities in the state. The federal mandate in the Clean Water Act applies to many dischargers, both public and private, and is not unique to local government. In addition, CalTrans, for example, is a state, not local, governmental entity and is subject to MS4 permits throughout the state. Industrial dischargers are also subject to storm water regulation, albeit more stringent than is typically applied to municipal dischargers. Thus, it appears that the commenter misunderstands at least one of the bases for establishing the existence of an unfunded state mandate when it states that it fails to see how this statutory distinction affects whether the Order imposes requirements that exceed federal law.

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**Specific Comment**

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**C. The City Does Not Have the Authority to Randomly Levy Fees at Will to Pay For Compliance With the Order**

The Tentative Order also alleges that the Order does not constitute an unfunded mandate because copermitees have the authority to levy service fees to pay for compliance with the Order. See paragraph 6 on page 14 of Tentative Order. Pursuant to Government Code Section 17556(d), if a local agency can levy service fees to pay for a State mandate, the State is not required to provide funding for the mandate.

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

Because storm water running off of real property and into the MS4 is not a precise measurement, it would be impossible to meet the direct usage requirements of the City of Salinas. Accordingly, without voter approval, which would be almost impossible to successfully obtain during the current economic crisis, the City of Temecula does not have the authority to levy service fees to pay for compliance with the Order.

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**Comment Response**

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Please see the responses to comments 8, 9 and 77. In addition, the San Diego Water Board disagrees with the Commission on State Mandates that San Diego County MS4 Test Claimants lacked appropriate authority to levy fees sufficient to pay for some unfunded state mandates if adoption of the fee is contingent on the outcome of an election and believes that those claimants have sufficient fee authority within the meaning of Government Code section 17556, subdivision (d). Section 6 of article XIII B of the California Constitution requires subvention only when the costs in question can be recovered solely from tax revenues. When local agencies have the legal authority to levy charges, fees or assessments, they do not have to spend tax proceeds to fund activities and no subvention is therefore required. The San Diego Water Board notes that this issue is one of first impression for the court and has not been finally adjudicated. In any event, even if the Commission were ultimately to determine that provisions in this Tentative Order require reimbursement and that Copermitees lack fee authority under Government Code section 17556, subdivision (d), the San Diego Water Board is not precluded from adopting provisions in the Tentative Order in the first place and is not required to first provide a funding source before or upon adoption of the Tentative Order. There is a process in place for establishing what are appropriate amounts for reimbursement to carry out particular permit provisions that the Commission has determined requires subvention by the State.

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**Specific Comment**

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D. The City Does Not Have a Real Choice in Requesting Permit Coverage

The fourth reason provided in the Tentative Order for why the Order does not constitute an unfunded mandate is that co-permittees requested permit coverage under the Order. Thus, according to the Tentative Order, co-permittees have not been mandated to do anything.

The City adamantly disagrees. It is disingenuous for Regional Board staff to suggest that copermittees have voluntarily chosen coverage under the Order and that the Order cannot be considered a State mandate.

The City requests that the Board members direct staff to modify the language in the Tentative Order to include State-sponsored relief for the permittees to carry out the requirements in the Order. To the extent that these requirements will require additional funds, the Board should direct staff to assist the permittees in securing such funds.

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**Comment Response**

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The Copermittees do have a choice. The Copermittees may request coverage under the MS4 Permit or comply with the complete prohibition against the discharge of pollutants contained in Clean Water Action section 301, subdivision (a) (33 U.S.C. § 1311(a)). These choices are provided by the federal Clean Water Act, not state laws. Thus, meeting the requirements of the MS4 Permit is a federal mandate, and not an unfunded state mandate. Please see the responses to comments 77 and 80.

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**Specific Comment**

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**5. THE TENTATIVE ORDER IMPROPERLY ATTEMPTS TO HOLD THE CITY RESPONSIBLE FOR SEWAGE SPILLS WHEN THIS RESPONSIBILITY HAS BEEN CLEARLY ASSIGNED TO LOCAL WATER DISTRICTS**

Section F.4.h. of the Tentative Order states:

"Each Copermittee must implement management measures and procedures (including a notification mechanism) to prevent, respond to, contain and clean up all sewage (see below) and other spills that may discharge into its MS4 from any source (including private laterals and failing septic systems.) Copermittees must coordinate with spill response teams to prevent entry of spills into the MS4 and contamination of surface water, ground water and soil. Each Copermittee must coordinate spill prevention, containment and response activities throughout all appropriate departments, programs and agencies so that maximum water quality protection is available at all times."

(Tentative Order, p. 69).

For many cities, implementation of this provision is simply not feasible. The City of Temecula does not own or operate its own sewage system. All of the sewer systems in the City's jurisdiction are owned, operated, and maintained by water districts, specifically the Rancho California Water District and Eastern Municipal Water District. These water districts have their own separate Regional Board Orders/NPDES permits. The City does not have the equipment or expertise to manage a sewage spill of any size, and its staff is not adequately trained to respond to potential spills. All of the water districts in the City's jurisdiction already respond to sewer spills (including sewer spills from private laterals). Furthermore, this provision is duplicative because the Regional Board is seeking to make the City responsible for a task already delegated to the water districts. By making the City responsible for sewer spills, there is a high risk of creating confusion in determining who (water districts or the City) will respond to a spill and who is responsible for associated costs and reporting requirements. Such an act would result in a tremendous waste of scarce public resources.

The State Water Resources Control Board has previously issued a stay on this exact issue. After extensive hearings and briefing on the matter, the State Board issued Order WQO 2002-0014 on August 15, 2002, granting a stay as to this provision. In that Order, the State Board held:

"The record shows that three separate water districts operate these sewers within Mission Viejo, and are regulated by a sanitary sewer NPDES permit issued by the Regional Board. Mission Viejo alleged that the duplication of effort that would ensue by having Mission Viejo also be responsible for preventing and responding to sanitary sewage spills could lead to delayed responses as agencies try to determine jurisdiction and primary responsibility. Orange County's cost table for the upcoming year estimated total copermittee costs at \$56,512 to implement this requirement. While these costs, by themselves do not constitute substantial harm, we find that the duplicative nature of the costs, combined with potential response delay and confusion, do."

(State Board Order WQO 2002-0014, p. 6).

In deciding to grant a stay as to this provision, the State Board concluded:

"The regulation of sanitary sewer overflows by municipal storm water entities, while other public entities are already charged with that responsibility in separate NPDES permits, may result in significant confusion and unnecessary control activities. For example, the Permit appears to assign primary spill prevention and response coordination authority to the copermittees. While the federal regulations clearly assign some spill prevention and response duties to the copermittees, we find that the extent of these duties is a substantial question of law and fact."

(State Board Order WQO 2002-0014, p. 8. (Emphasis added).

Given the previous findings of the State Board on this same issue, the City requests that the Board members direct staff to modify the language in the Tentative Order to reduce duplicity of effort and the implementation of unnecessary control activities.

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**Comment Response**

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The Tentative Order does not hold the Copermittees responsible for sewage spills. Section F.4.h of the Tentative Order requires each Copermittee to “prevent, respond to, contain and clean up” spills that may discharge into its MS4. The Tentative Order holds the Copermittees responsible for preventing sewage spills from entering and/or responding to spills that have entered their MS4. Preventing sewage from entering the MS4 may be done in coordination with the sanitary sewer agencies, who are responsible for responding to sewage spills, but ultimately each Copermittee is responsible for whatever enters its MS4. This is consistent with State Water Board Order WQO 2002-0014.

When the State Water Board stayed the sewage provision from San Diego Water Board Order No. R9-2002-01, it found that the costs of the requirement did not constitute harm, but agreed that harm could ensue from potential response delay and confusion (State Water Board Order WQO 2002-0014). Subsequently, the Copermittees and the local sewer agencies have developed mature relationships regarding sewage spill response. As a result, the concerns expressed by the State Water Board are no longer warranted. For instance, the Copermittees have developed and implemented procedures for spill response and sewage spill response. Regardless of where the spill originates, if the spill has entered or may enter the storm drain system, the Copermittees must respond to assist with the cleanup and remediation of the area.

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<b>Comment #</b> 83	<b>Commentor</b>	5	<b>Comment Subject</b> Overirrigation
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**Specific Comment**

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6. THE TENTATIVE ORDER IMPROPERLY DELETES CATEGORIES OF EXEMPT NONSTORMWATER DISCHARGES

Federal law requires that MS4 permits include a requirement that the Permittees effectively prohibit the discharge of non-stormwater into the MS4. 33 U.S.C. 1342(p)(3)(B)(ii). Federal regulations exempt certain discharge categories from this effective prohibition requirement. 40 C.F.R. 122.26(d)(2)(iv)(B)(1). A Permittee must address a discharge in one of these exempt categories only when a Permittee identifies the discharge as a source of pollutants to waters of the United States. Id.

The Tentative Order impermissibly deletes three of the non-stormwater discharge categories - landscape irrigation, irrigation water, and lawn watering (collectively, "irrigation"). (See subparagraphs a-n on page 19 of Tentative Order.) The federal regulations require that permittees address discharges within an exempt category when they identify a discharge as a source of pollutants to waters of the United States. Neither the regulations nor EPA's guidance allow the Regional Board to delete entire categories of exempt non-stormwater discharges then the Permittees identify a discharge within one of the categories as a source of pollutants.

Accordingly, since the permittees have not identified irrigation runoff as a source of pollutants, the City requests that the Board members direct staff to restore the irrigation categories of exempt nonstormwater discharges in the Tentative Order.

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**Comment Response**

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The San Diego Water Board may also identify a discharge as a source of pollutants to waters of the United States. Please see the response to comment 27.

In this case, the San Diego Water Board has identified non-storm water runoff from landscape irrigation, irrigation water, and lawn watering (collectively, "irrigation") as a significant source of pollutants discharging to the MS4. We have cited a number of documents, from the state and all three counties of the San Diego Region, in the Fact Sheet (see Discussion of Finding C.15) 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.

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**Specific Comment**

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**7. THE TENTATIVE ORDER'S RETROFITTING REQUIREMENT IMPOSES POTENTIALLY SIGNIFICANT COSTS WITHOUT ANY CORRESPONDING GAINS IN WATER QUALITY**

The Tentative Order requires the Permittees to develop and implement a program to retrofit existing development with additional structural measures to control runoff. (See Section F.3.d (Retrofitting Existing Development) on page 64 of the Tentative Order). This new provision is in addition to the New Development/Redevelopment provisions in the Tentative Order. However, the City does not have the ability under existing statutes and under the California and the United States Constitutions to force private landowners to retrofit existing developments to improve water quality when these landowners didn't have any plans to retrofit their properties in the first place. As such, the expense entailed in developing and implementing a retrofitting program will not be matched by any gains in water quality. Federal law does not require retrofitting of existing development. In fact, EPA's regulations acknowledge that MS4 regulation would have to be limited largely to undeveloped sites and sites being developed/redeveloped. Accordingly, the City requests that the Board members direct staff to either remove this provision in its entirety from the Tentative Order, or modify the language to exclude private property.

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**Comment Response**

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The San Diego Water Board disagrees that the retrofitting requirements impose significant costs without any corresponding gains in water quality. As recognized in USEPA guidance, waters in the region cannot be protected without also addressing degradation caused by storm water discharges from existing development. The USEPA recommends that storm water programs include a retrofit plan or program for retrofitting existing development. To actually improve the quality of receiving waters, discharges from existing developed sites need to be mitigated, which generally means implementation of measures to retrofit existing development sites with storm water control measures that can retain and/or treat storm water on site. Retrofitting existing development is possible and reasonable to significantly improve water quality in receiving waters.

The retrofitting requirements in the Tentative Order do not, as the commenter asserts, require the Copermittees "to force" private landowners to retrofit existing development. Implementing retrofitting projects is not actually required by the Tentative Order. The retrofitting requirements do, however, require the Copermittees to identify areas of existing development where retrofitting projects are feasible and to find ways to cooperate with and encourage private land owners to implement retrofitting projects.

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**Specific Comment**

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**8. THE TENTATIVE ORDER LACKS FLEXIBILITY IN IMPLEMENTING LOW IMPACT DEVELOPMENT AND HYDROMODIFICATION REQUIREMENTS**

The Tentative Order requires that development projects include prescriptive Low Impact Development ("LID") requirements. (See, e.g., Section F.1 of the Tentative Order). The Tentative Order also requires the Permittees to develop and implement a Hydromodification Management Plan ("HMP") for the same development projects. (Section F.1.h. of the Tentative Order) However, the LID and HMP provisions are not required by federal law and violate state law in that, among other things, they prescribe how the Permittees are to comply with the MEP standard. See Water Code §13360(a). Moreover, the LID and HMP provisions in this Tentative Order are overbroad and will not necessarily result in any improvement to the quality of water entering Waters of the U.S.. For example, HMP requirements for hardened channels will not have any water quality benefits. Finally, to the extent the LID requirements would interfere with downstream or upstream water rights holders, compliance with the requirements potentially expose the Permittees to common law liability.

In addition, the Regional Board's imposition of a highly prescriptive Low Impact Development strategy may have an unintended consequence-potential lawsuits from downstream users of the surface water that the City is now purportedly "diverting for reuse or infiltration." As one attorney expert in the field of water law has put it:

"First, to the extent that one can obtain a right to capture diffuse surface waters ... any capture of diffuse surface waters without a permit from the State Water Resources Control Board could well be a trespass against the State of California. Second, even if one cannot obtain a 'right' to diffuse surface waters, though, the capture of such waters in a manner that interferes with the diversion of the same water once it reaches a watercourse constitutes injury to legal users of water that rely on such diffuse surface water contributing to the water that they are able to divert."

D. Aladjem, "Who Owns the Water? The Looming Conflict Between Low Impact Development and the Water Rights System" at p.5 (paper presented at American Bar Association 17th Environmental Law Fall Section Meeting, Sept. 24, 2009).

The City believes that the law in this area, particularly with respect to ownership of diffuse surface waters, is quite uncertain. The City also believes that, to the extent that the Regional Board imposes these additional obligations upon the City pursuant to the Permit, then the Regional Board should insert sufficient findings and authorization for the capture of surface water through LID systems to protect the City against claims of either a trespass against the State or claims of unlawful diversion of stormwater that would otherwise flow into watercourses that might be the subject of claims of diversion rights by downstream users.

Because the LID and HMP provisions are not required by federal law and violate state law, the City requests that the Board members direct staff to insert sufficient findings and authorization for the capture of surface water through LID systems to protect the City against claims of either a trespass against the State or claims of unlawful diversion of stormwater. In addition, the City also requests that the Board members direct staff to modify the language in the Tentative Order to provide the Permittees with required flexibility in implementing the LID and HMP requirements.

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**Comment Response**

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The Tentative Order provides flexibility to implement the LID and HMP requirements. We fail to understand how the commenter can assert that the LID and HMP provisions are too prescriptive (implying too little flexibility), and then assert that the same provisions allow too much flexibility. The LID and HMP provisions provide flexibility that is consistent with both federal and state laws.

The Tentative Order includes design and performance standards for the LID requirements. The Tentative Order requires the Copermittees to develop an HMP which must include design and performance standards. The Tentative Order does not specify the methods for implementation of those design and performance standards. The method of compliance is left to the discretion of the Copermittees. The Tentative Order also allows a waiver of design and performance standards providing more flexibility to Copermittees and project proponents. The Tentative Order does not mandate method of compliance and is consistent with state laws.

The LID and HMP provisions have been included to provide more specificity, in the form of design and performance criteria, to direct the Copermittees to improve their storm water and non-storm water management programs to be more

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protective of water quality. The additional specificity is consistent with federal law.

In regards to the potential water rights issues, the San Diego Water Board does not perceive a conflict and the commenter has not established that implementation of LID and HMP requirements in fact has the potential to impair existing water rights or that the San Diego Water Board is precluded from adoption water quality provisions that may potentially impair existing water rights. The concept of LID is to infiltrate and retain as much of the water on site. The concept for the HMP is to mimic the natural infiltration, runoff and drainage patterns as much as possible. In both situations, the expected and desired result is more groundwater recharge and more natural in-stream flow conditions. More groundwater and higher groundwater levels would provide more water supply to water purveyors in the watershed, and would also likely result in more downstream flow when the groundwater re-surfaces in the lower parts of the watershed. The LID and HMP provisions also provide higher quality water in downstream flows.

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**Specific Comment**

9. THE TENTATIVE ORDER DOES NOT CONSIDER COSTS TO IMPLEMENT THE STORMWATER AND NON-STORMWATER ACTION LEVELS AS REQUIRED BY FEDERAL LAW, AND THE WATER QUALITY BENEFITS ACHIEVED BY THESE REQUIREMENTS HAVE NOT BEEN ADEQUATELY CONSIDERED BY THE REGIONAL BOARD

Federal law requires that permittees effectively prohibit the discharge of pollutants in nonstormwater into the MS4 and to reduce the discharge of pollutants in stormwater from the MS4 to the maximum extent practicable. To assist the Permittees in meeting these two standards, the Tentative Order imposes action levels on pollutants in the discharge of stormwater (SALs) and nonstormwater (NALs) from the MS4. (Sections C and D on pages 20 and 23, respectively, of the Tentative Order.) Ideally, action levels would be a tool that would help the City focus resources on more significant water quality problems. However, the City is concerned that, depending on how the provisions are interpreted, the cost to implement the action levels may far outweigh any benefit to water quality. Moreover, rather than a tool to help the Permittees, the action levels may be used against the Permittees.

As an initial matter, the City objects to the distinction made in the Tentative Order between the discharge of stormwater from the MS4 and the discharge of non-stormwater from the MS4. Federal law does not support this distinction. Under federal law, permittees must control the discharge of pollutants from the MS4 to the maximum extent practicable, regardless of whether the pollutants are in storm water or non-stormwater. Permittee's obligation with respect to non-stormwater is to effectively prohibit the discharge of pollutants in non-stormwater into the MS4. To the extent the Permit imposes separate requirements on the discharge of pollutants in non-stormwater from the MS4, such requirements must be supported by state law.

Because neither the SALs or NALs are required by federal law, the Regional Board must comply with state law in imposing these requirements. For example, in issuing waste discharge requirements under State law, the Regional Board must consider certain factors, including the water quality conditions that could be reasonably achieved and economic considerations. Water Code §§ 13263(a) and 13241. The City is hopeful that the Tentative Order's SAL and NAL provisions will provide the City with flexibility to prioritize its response to any actual exceedances. However, if the City is required to respond to and address all exceedances without reasonable prioritization, the cost will be significant. Because some exceedances will not be indicative of impacts to water quality, the cost to implement the SALs and NALs may have little if any commensurate environmental benefit. There is nothing in the record that suggests that the Regional Board has considered these water quality and economic factors.

Accordingly, the City requests that the Board members direct staff to provide the analysis required under state law to ensure that economic factors are considered and that the water quality goals are reasonably achievable through implementation of the SALs and NALs.

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**Comment Response**

The provisions of the MS4 Permit are based on and fully supported by federal requirements, as demonstrated by the broad and specific legal authority cited in the Fact Sheet. The San Diego Water Board considered economic information in developing the Tentative Order, but federal NPDES regulations do not require that the San Diego Water Board conduct a cost-benefit analysis. The San Diego Water Board did, however, modify the requirements in the Tentative Order based on the economic considerations provided by the Copermittees. Please see the response to comment 9 for additional discussion about modifications made to the Tentative Order based on the economic considerations.

The Clean Water Act makes a clear distinction between the regulation of stormwater and non-stormwater discharges by requiring that MS4 Copermittees effectively prohibit non-stormwater discharges from entering the MS4. Since non-stormwater discharges are to be effectively prohibited, then clearly the very next requirement (402(p)(3)(B)(iii) that requires pollutant discharges from the MS4 be reduced to the MEP) intends that the discharge of pollutants be limited to storm water. Please see the Fact Sheet discussion for Finding C.14 for further clarification.

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**Specific Comment**

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**10. THE TENTATIVE ORDER IMPROPERLY INCORPORATES TOTAL MAXIMUM DAILY LOAD WASTELOAD ALLOCATIONS**

The Tentative Order includes limitations based on wasteload allocations ("WLAs") developed in fully approved and adopted Total Maximum Daily Loads ("TMDLs"). (Section I of the Tentative Order.) The Tentative Order characterizes the limitations as Water Quality Based Effluent Limitations. However, the WLAs are to be achieved in the receiving water. Accordingly, the City considers the limitations to be receiving water limitations. See, e.g., State Board Order WQ 2009-0008. The Permittees are to comply with the limitations by implementing best management practices ("BMPs").

Federal and state policy provide that an iterative BMP approach is appropriate in MS4 permits for achieving receiving water limitations. See, e.g., State Board Order WQ 99-05. Where existing BMPs are not sufficient to meet the receiving water limitations, permittees are to implement more effective BMPs. This approach is consistent with the MEP standard governing the discharge of all pollutants from the MS4. The City submits that to be consistent with federal and state policy, the Permit must be clarified to provide for compliance with WLAs through an iterative BMP approach. To the extent the Regional Board can rely on state law to support the TMDL provisions, the City submits that the Regional Board has not complied with relevant requirements (e.g., Water Code §§ 13000, 13263(a), 13241, etc.). Accordingly, the City requests that the Board members direct staff to revise the Tentative Order's TMDL provisions to be consistent with federal and state law and policy.

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**Comment Response**

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The Tentative Order properly characterizes wasteload allocations (WLAs) assigned to MS4s for fully approved and adopted Total Maximum Daily Loads (TMDLs) as water quality based effluent limitations (WQBELs). Federal regulations (40 CFR 122.44(d)(1)(vii)(B)) require that NPDES requirements incorporate WQBELs that must be consistent with the requirements and assumptions of any available WLAs. In accordance with 40 CFR 122.44(k)(2)&(3), WQBELs may be expressed as numeric effluent limitations, when feasible, and/or as a BMP program of expanded or better-tailored BMPs. Currently, no TMDLs have been developed for the Upper Santa Margarita Watershed. When a TMDL is developed, it will be included in Section I of the Order. Depending on how the TMDL is developed, and the requirements and assumptions included in the TMDL to assign the WLA to the MS4 discharges, the WQBELs included in the MS4 Permit may be in the form of numeric effluent limitations, receiving water limitations, an expanded or better-tailored BMP program, or a combination of them.

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<b>Comment #</b> 88	<b>Commentor</b>	10	<b>Comment Subject</b> Economic
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**Specific Comment**

Though the Permit, as other past permits, requires a Fiscal Analysis, the Copermittees are surely to view this component of the Permit as another draconian measure that requires them to “check the box” as opposed to viewing this Permit condition as a tool. Copermittees should rather use the Fiscal Analysis requirement to plan ahead, financing necessary projects and measures not only for Permit compliance, but to achieve actual water quality improvements. (H.1.).

The current practice with respect to the Fiscal Analysis component of storm water permits is exemplified in the City of San Diego’s 2009 Annual Report. This Report provides a “Future Projection” analysis consisting of two paragraphs which simply reiterate funds are generated from general fund and non-general fund sources, and costs will continue to rise. Earlier in the same section, the City provides an explanation of how funds are generally used, but provides no insight into the amount of money applicable to each funding source.

Such cursory fiscal analysis is common in Annual Reports, while municipalities refuse to face the real problem. They continuously fail to adequately pass on the true costs of compliance. Time and again, environmental groups and the Regional Board are faced with the same excuse: protecting water quality and restoring beneficial uses is too expensive. From Permit approval to Permit implementation, the same excuse persists. Nonetheless, the reluctance of the Copermittees to adequately fund their respective storm water programs is not the result of a lack of desire to improve water quality by municipal staff or managers, but rather poor decisionmaking and lack of political will. Decisionmakers at the city and county level must pass their costs on to those reaping the benefits. Recent news articles highlight the City’s reluctance to increase storm water fees, requiring 95 cents per month per residence across the board, while to recoup its costs, the City should be charging \$3 per month.

Now is the time for the Regional Board to clearly articulate in the Permit: noncompliance due to cost will not be tolerated. The Permit is a tool underutilized by Copermittees to obtain necessary funds and plan for the future. If the Copermittees once again fail to use Permit section H., they risk enforcement action. We urge the Regional Board to make clear that noncompliance due to cost is not an excuse. After almost three decades, Copermittees should no longer be allowed to claim poverty as an excuse for post-approval weakening of permits and the requirements therein.

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**Comment Response**

The San Diego Water Board does not consider the ability of a Copermittee to fund a program in determining compliance with the provisions of the MS4 Permit. We agree that the Copermittees are responsible for securing the resources necessary for meeting the requirements of the Tentative Order. Please see the responses to comments 8 and 9. In addition, the "Need to halt or reduce activity is not a defense" per the standard provisions in Attachment B.1(b) and 40 CFR 122.41(c). Also, at Attachment B.(7)(m) and 40 CFR 122.41.(a) states that "ANY noncompliance with this Order constitutes violation of the CWA and is grounds for denial of an application or modification of the Order."

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<b>Comment #</b> 89	<b>Commentor</b>	10	<b>Comment Subject</b> General
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**Specific Comment**

Individual residential car washing is currently listed as exempt from the prohibition against nonstormwater discharge. However, this allowance contradicts other permit sections that evidence the negative water quality impact residential car washing poses. Indeed, car washing is specifically listed as a threat to water quality in the residential permit section. (F.6.b.(3)). It is also provided as an example topic for discussion in the education component for residential and general public outreach. (F.6.b.(4)). Clearly a threat to water quality, and a water supply issue, residential car washing should not be made exempt simply because it requires a change in public behavior. Just as over-irrigation should not be exempt non-storm water, neither should this source of urban runoff.

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**Comment Response**

Neither the San Diego Water Board nor the Copermittees have yet identified residential car washing as a significant source of pollutants that must be prohibited. We invite the commentor to provide the San Diego Water Board with data and studies to satisfy their request in future permits. Please see the response to comment 27.

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<b>Comment #</b> 90	<b>Commentor</b>	10	<b>Comment Subject</b> Action Levels
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**Specific Comment**

As mentioned above, the Bay Council is extremely supportive of the inclusion of NALs and SALs in this Permit. However, the vague Permit language leaves much to be desired. The Permit requires investigation and source identification for a NAL exceedance in a “timely manner”. (Permit C.2. and C.3.). It is entirely unclear what constitutes a “timely manner”. Further, because the NALs are an illicit discharge identification and elimination tool, time is of the essence. (C.2.b.). In many instances, a NAL exceedance must be investigated contemporaneously with the return of monitoring results, or the source will evade detection. Therefore, the Regional Board should impose a strict numeric deadline for “timely action”. We suggest the Copermittee begin investigation of the source of the exceedance the business day following receipt of the monitoring results. The investigation should be expedited, and should not take more than two weeks.

**Comment Response**

The San Diego Water Board chose the phrase "timely manner" to allow Copermittees flexibility to prioritize investigations and source identification when a multitude of action level exceedances are identified. Also, the phrase "timely manner" allows for the differing return times of field data and lab data. Certainly, field analysis indicating an exceedance should be immediately responded to whereas lab analysis may take weeks to return data which then would initiate an investigation. It is unacceptable to wait for a lengthy QA/QC analysis prior to initiating an investigation; nor is it acceptable to solely rely on subsequent monitoring actions to address the cause of an exceedance.

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<b>Comment #</b> 91	<b>Commentor</b>	10	<b>Comment Subject</b> Monitoring
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**Specific Comment**

In addition, development of the monitoring plan for dry weather is largely left to the Copermittees. (Permit, Attachment E, C.1.b.). Sampling frequency must simply be “representative” of major outfalls and identified stations within each hydrologic subarea. (Id.). The actual frequency of sampling is not mentioned at all. As with most plans developed by Copermittees, this monitoring plan will surely be greatly and artificially constrained by costs. Therefore, we urge the Regional Board to set a minimum monitoring frequency that is scientifically sound, as opposed to a cost-driven frequency.

**Comment Response**

The referenced section has been written to provide flexibility to the Copermittees when selecting the number and frequency of monitoring major outfalls and identified stations that are a “representative percentage.” Thus, the San Diego Water Board expects that the Copermittees will utilize current 303(d) listings, land use, the history of IC/ID complaints and the sensitivity of receiving waters in the selection and sampling of outfalls in order to, at a minimum, obtain a representative percentage over the permit term. The Copermittees have also identified in their ROWD that their current monitoring approach is not consistent with IC/ID requirements. It should be noted that the Copermittees, by being extended a chance to propose the program, have an opportunity to examine other MS4 non-storm water IC/ID programs in the region. Finally, the San Diego Water Board requires the Copermittees to submit their proposed monitoring plan for review prior to implementation.



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**Specific Comment**

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Prior to the submittal of the ROWD, the Copermittees met with Board staff to propose changes to the Monitoring and Reporting Program (MRP). In these discussions, Board staff identified two areas for needed improvement:

- Relocation of Illicit Connection I Illicit Discharge (IC/ID) monitoring stations to MS4 outfalls, and
- Incorporation of Action Levels

In more recent discussions, Board staff noted that the MRP needed significant modification to reflect the South Orange County MRP, but would be scaled to be appropriate to the smaller Santa Margarita Region.

[Per Capita Monitoring Cost Comparison Table]

Unfortunately, the final MRP requirements have been expanded well beyond the South Orange County MRP requirements, resulting in a program that is completely out of proportion with the needs and resources of the Santa Margarita Region. In fact, the proposed MRP requirements will result in a 500% increase in monitoring program costs, costing our residents over two and a half times the per capita costs for South Orange County.

The Copermittees recognize that monitoring and data collection is necessary. However, the MRP requirements exceed what is necessary to address management questions related to water quality, are beyond requirements dictated in the South Orange County MRP, and are beyond the Copermittees' ability to fund. Not only are the level of requirements inappropriate for the Santa Margarita Region, but they disregard the economic realities faced by the Copermittees. As such, the MRP falls far short of meeting the Executive Officer's stated goals of affordability.

In the interest of finding ways to offer Board staff a comparable program in a more cost effective and appropriate manner, the Copermittees have identified nine adjustments to the MRP that will save approximately seven hundred and eighty thousand dollars (\$780,000) annually and bring per capita monitoring costs more in line with the South Orange County MRP, while maintaining the core components of the MRP. Table I summarizes the key changes and the respective cost savings. It is important to note that any change highlighted in RED reflects bringing the program in line with the South Orange County MRP. Figure I below shows graphically the comparative costs for the draft MRP with and without the requested adjustments. Please note that the 100% baseline in Figure 2 reflects the current cost of the Copermittees' current MRP.

[Table 1 - Cost Savings resulting from proposed MRP changes]

[Figure 1 - graph comparing draft permit costs with Requested Changes]

[Cost comparison table with Proposed Changes]

Although the requested adjustments to the MRP will not eliminate cost increases, and will result in an MRP which is more expensive, on a per capita basis, than the South Orange County MRP, they provide a more manageable program for the Copermittees.

The City requests that the Board make the adjustments identified above before Permit adoption.

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**Comment Response**

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The two areas discussed during the ROWD meetings were identified because they were proposed by the Copermittees in the ROWD. San Diego Water Board Staff also have made it clear through the process that water quality monitoring requirements under the Tentative Order were expected to be relatively consistent with San Diego and Orange County, as well as the 2004 SMC Report.

San Diego Water Board staff contend that the monitoring required in the Tentative Order has not been expanded "well beyond the South Orange County MRP requirements." The MRP in the Tentative Order has actually been scaled back where appropriate, and many elements of the San Diego and Orange County MRPs are absent from the Riverside MRP. Furthermore, San Diego and Orange County MRPs in 2007 and 2009, respectively, had reduced monitoring requirements based upon the level of data collection during the previous permit terms. USEPA audits conducted in January 2008 (USEPA Region IX MS4 Inspection Report Riverside County Flood Control and Water Conservation District and County of Riverside, dated 03/31/2008), and subsequent enforcement action by the San Diego Water Board (Notice of Violation No. R9-2008-0053 and No. R9-2010-0074) documented significant short-comings in the Copermittees MRP. Thus,

reductions similar to those for Orange and San Diego County are not warranted.

The San Diego Water Board agrees that monitoring and data collection is necessary, and would go farther to state that water quality monitoring is a critical component of MS4 permits. The San Diego Water Board is attempting to make monitoring requirements for MS4 permits relatively consistent for Copermittees throughout the San Diego Region (see Finding E.12 and Discussion in the Fact Sheet). This is also consistent with Senate Bill 72 (Kuehl), which addressed the standardization of sampling and analysis protocols in municipal stormwater monitoring programs. In response to Senate Bill 72, the Stormwater Monitoring Coalition's Model Monitoring Technical Committee developed a Model Monitoring Program for Municipal Separate Storm Sewer Systems in Southern California in 2004. The San Diego Water Board, as well as Riverside County Copermittees, were represented during the development of the model monitoring program. The monitoring program under the current order (R9-2004-0001) includes some, but not all, recommended monitoring program elements in the 2004 report. In contrast, the San Diego and Orange County MS4 permits contain monitoring programs whose structure and requirements are built upon the 2004 report.

The MRP in the draft tentative order is built upon the 2004 report, and program elements mirror those in the San Diego and Orange County MRPs. Similar to the San Diego and Orange County MRPs, flexibility has been included to aid the Copermittees in determining some level of cost, as well as monitoring direction and focus. It is important to note that the MRP in the current Order does not meet the level of water quality monitoring required in San Diego and Orange County, as well as that prescribed in the 2004 report. Thus, it is expected that additional resources will be required for the Copermittees to develop a MRP that will sufficiently characterize water quality while meeting the goals and objectives in the 2004 report. As noted above, during the term of the current Order, the Copermittees MRP were audited for permit compliance. These audits found significant deficiencies in the Copermittees MRP. In response, the Copermittees have stated that funds have been spent to meet monitoring requirements under the current Order. It is unknown if the increase in monitoring costs stated by the Copermittees is based upon levels of spending before or after money was allocated in the Copermittees' attempts to bring monitoring into compliance with the current MRP.

Furthermore, USEPA (61 Fed Reg 43761) has addressed the question regarding the quantity of storm water monitoring required for MS4 NPDES permits: "The amount and types of monitoring necessary will vary depending on the individual circumstances of each storm water discharge. EPA encourages dischargers and permitting authorities to carefully evaluate monitoring needs and storm water program objectives so as to select useful and cost-effective monitoring approaches. For most dischargers, storm water monitoring can be conducted for two basic reasons: 1) to identify if problems are present, either in receiving water or in the discharge, and to characterize the cause(s) of such problems; and 2) to assess the effectiveness of storm water controls in reducing contaminants and making improvements to water quality." Again, 2008 USEPA audits found that the monitoring in the current MRP to be insufficient. For example:

"it is unclear how the District is using its monitoring programs to measure the effectiveness of the BMPs it has implemented and to accordingly identify modifications and improvements needed to its SWMP (or DAMP as it is referred to by the permittee)."

And:

"The number and location of illicit discharge monitoring stations did not appear to be effective or sufficient to represent the MS4 and detect illicit discharges that may occur throughout the system."

It is also important to note that while the San Diego Water Board is attempting to make MRP requirements relatively consistent, there are differences in the Riverside MRP when compared to Orange and San Diego County. First, although the Copermittees permit area includes Santa Margarita HU and the San Mateo HA, which drains to portions of San Diego County, the MRP within the Tentative Order does not require any monitoring of downstream receiving waters outside of Riverside County. This is despite the fact that these areas are subject to the discharge from MS4s in Riverside County. While Orange and San Diego County MRPs include monitoring requirements for bays, estuaries, lagoons, and the ocean, the Riverside MRP does not. MRP requirements under the draft Tentative Order are limited to inland surface waters.

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**Specific Comment**

The requirements for unpaved roads are particularly cumbersome, onerous and unreasonable. In summary, the proposed unpaved road requirements may result in substantial and unnecessary additional Copermitee costs that are not justified by the facts in the Santa Margarita Region. The Copermitees believe that the existing MS4 Permit requirements for new development, construction, maintenance and

IC/ID adequately address regulation of unpaved roads that threaten water quality. If the Regional Board believes that unpaved roads require further regulation, the Copermitees believe that the appropriate regulatory mechanism is a general permit (Waste Discharge Requirements or NPDES permit) that would apply to all unpaved roads in the San Diego Region, rather than only those that are under the jurisdiction of the Copermitees.

The City requests that Sections F.1.i, F.3.a.(11) and F.3.c.(5) regulating unpaved roads be deleted from the draft MS4 Permit.

However, should the Water Board insist on retaining unpaved road requirements in this Permit, the Copermitees request the following revisions. These revisions are needed to ensure that all parties have a clear understanding of the requirements. In summary, the Copermitees request:

- Clarification that these requirements apply to those unpaved roads that the Copermitees maintain in their road system.
  - This should be commonly understood, but the clarification is important to include due to complex legal limitations and rights associated with access, ownership, and maintenance of unpaved roads.
- Removal of language that specifies specific BMPs that must be implemented.
  - Specifying the method of compliance is prohibited pursuant to CWC section 13360, and inappropriately forces the Copermitees to adopt paliicular solutions that may not best fit the situation.
- Removal of requirement for BMPs for private unpaved roads.
  - The proposed requirements would require the creation of an additional and unnecessary program element addressing privately owned unpaved roads. The Copermitees believe that a focused public outreach program should be implemented to educate property owners and associations about the need to properly maintain unpaved roads. This education program combined with existing IC/ID enforcement capabilities seems a more reasoned and responsible response to addressing this issue.

Should Sections F.1.i, F.3.a.(11) and F.3.c.(5) regulating unpaved roads not be removed from the Permit, the City requests they be modified as noted above.

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**Comment Response**

Please see the responses to comments 101, and 138-141.

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**Specific Comment**

Section F.1.f of the draft MS4 Permit includes new requirements for the Copermittees to verify that Post-Construction BMPs are being appropriately maintained. The new requirements appropriately develop a risk-based approach to inspections, defining eight factors that the Copermittees must consider in determining 'high-priority' projects.

However, language in Section F.1.f.(2)(a) removes that discretion by stating:

'At a minimum, high priority projects include those projects that generate pollutants (prior to treatment) within the tributary area of a 303(d) listed waterbody impaired for that pollutant; or those projects generating pollutants within the tributary area for an observed action level exceedance of that pollutant.'

This language is excessively broad, and will require virtually all sites in the watershed to be designated as 'high priority' and therefore subject to annual inspections. This language is inconsistent with the goals of a socially responsible and affordable permit and should be modified for several reasons:

- Inspections frequencies should be based on risk of discharge. Annual inspections are not needed for all sites that generate a specific pollutant. For example, if a site generates a pollutant associated with 303(d) listing, but the site retains runoff onsite or stores those pollutants indoors, annual inspections would be unnecessary. However, sites that store 303(d) listed pollutants outdoors or otherwise have a high risk of discharge should be inspected more frequently.
- The language dilutes Copermittee resources by requiring annual inspections of low-risk sites, preventing the Copermittees from appropriately concentrating resources on problematic sites/sources. This is because when an action level is exceeded then all parties in the watershed are assumed guilty until proven innocent.

While the Copermittees are not opposed to implementing a program to verify that these BMPs are being maintained, it is critically important that they be provided the flexibility to determine which sites warrant annual inspections. Specifically, the City requests that the language in F.1.f.(2)(a) be amended as follows prior to adoption of the Permit:

'At a minimum, high priority projects include those projects that have been determined to be the source of an observed action level exceedance.' [final proposed text - proposed amended language in underline/strikeout text not shown]

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**Comment Response**

The San Diego Water Board recognizes that the language in F.1.f.(2)(a) may be too broad and may result in identifying many SSMP projects as high priority projects. Thus, we have revised the language to provide more specificity, which will limit the number of SSMP project sites that will need to be inspected.

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**Specific Comment**

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Most Copermittees expend tremendous resources on preparing and submitting their Annual Reports, but view this requirement as overly burdensome and largely an exercise in futility. After reading numerous and varied municipality Annual Reports, we tend to agree. Annual Reports are massive documents with surface-level detail, no depth, and very little substance. Copermittees are loath to point out any failures or inadequacies in their storm water programs, and virtually never highlight deficiencies. Instead, systemic issues such as lack of enforcement and funding, evident during field visits, remain unmentioned in Annual Reports.

Therefore, the Bay Council suggests a more appropriate tool for public involvement, reporting, and monitoring progress would be real-time or quarterly electronic reporting. The State Water Resources Control Board has moved into the digital age, making a variety of documents and reports publicly available via the internet. We encourage the Regional Board to work with Copermittees, utilizing the permissive Permit language to explore such a possibility. Neither the Regional Board, nor the individual Copermittee, is served by rigid reporting requirements that result in largely unread or useless documents. (Permit, K.)

Specifically, the dry and wet weather monitoring results should be available publicly online as soon as the results are received. NAL and SAL exceedance real-time reporting would benefit Copermittees as the public could aid in investigations or prove an otherwise valuable source of information. Such real-time reporting might also prove a successful deterrent to illicit discharges. The Copermittees should further report inspections, BMP maintenance tracking, and SSMP project inventories quarterly. Construction site, municipal, industrial, and commercial inspections should also be reported quarterly. This type of information is invaluable to the public and the Regional Board, but is largely unavailable to either as Annual Reports are an attempt to summarize such information compiled over long periods of time. Smaller doses would prove more useful and easily digestible.

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**Comment Response**

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The San Diego Water Board agrees with the comment regarding the importance of making information, especially water quality monitoring results, available to the public for review. Although real-time data reporting is an admirable goal, the feasibility of real-time uploading is unknown. The San Diego Water Board does not want to include permit requirements where real-time uploading somehow limits IDDE monitoring and response which may be time-sensitive.

The MRP (Attachment E to the Tentative Order) requires the data collected to be SWAMP compatible, and other Regional Water Boards have already required Copermittees to upload data into on-line databases. Thus, the MRP section has been modified to require the Copermittees to upload water quality data into the California Environmental Data Exchange Network (CEDEN, <http://www.ceden.org/>) to facilitate the exchange of data between resource agencies, Copermittees, research institutions, and the public.

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**Specific Comment**

Sections F.3.b.(1)(a)(i) and (ii) identify forty-two (42) categories of businesses that must be inventoried and inspected based on risk of pollutant discharge. However, Section F.3.b.(1)(a)(iii) adds virtually any business in the Permit area, independent of pollutant discharge risk:

'All other commercial or industrial sites/sources within or directly adjacent to or discharging directly to receiving waters within environmentally sensitive areas (as defined in Attachment C of this Order) or that generate pollutants tributary to an observed exceedance of an action level.'

In effect, section F.3.b.(1)(a)(iii) adds the following additional businesses:

- EVERY business that is adjacent to (or within) an Environmentally Sensitive Area (ESA), regardless of whether the business generates or discharges any pollutants, and
- EVERY business that 'generates' pollutants which happens to be upstream of an action level exceedance, regardless of whether the site has ever discharged any pollutants.

This language expands the list of sites far beyond the current requirements, and well beyond those sites that actually pose a threat to water quality. This is clearly unnecessary and should be removed for several reasons:

- It inappropriately separates 'risk' from the 'response' , by requiring the Copermitees to inspect businesses irrespective of the risk that the business poses to water quality. For example, this language would require the Copermitees to expend resources and time inspecting hair salons, office buildings and other activities that happen to be adjacent to an ESA. This inappropriate broad-brush approach to permitting actually works to discredit the Copermitees NPDES programs and dilute resources, rather than enhancing protection of water quality.
- It will further remove the flexibility that the Copermitees need to be able to re-allocate resources to inspecting and following up with sites/sources that are problematic.

Therefore, the City requests that the language in F.3.b.(1)(a)(iii) be amended as follows prior to adoption of the Permit:

'All other commercial or industrial sites/sources that have been determined to be the source of an observed exceedance of an action level.'

[final proposed text - proposed amended language in underline/strikeout text not shown]

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**Comment Response**

The San Diego Water Board recognizes that the language in F.3.b.(1)(a)(iii) may be too broad and may result in including too many commercial/industrial sites in the inspection requirements. Thus, we have revised the language to provide more specificity, which will limit the number of commercial/industrial sites that will need to be inspected.

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**Comment #** 97                      **Commentor**      10                      **Comment Subject** Hydromod

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**Specific Comment**

As with the San Diego HMP, the exemption for conveyance channels whose bed and bank are concrete lined all the way from the point of discharge to water storage reservoirs and lakes will prevent rehabilitation of these areas, especially in light of the retrofit requirements elsewhere in the Permit. (Permit, F.1.h.(4)(b)). Moreover, this exemption encourages continued channelization efforts. We urge the Regional Board to remove this exemption.

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**Comment Response**

The San Diego Water Board does not agree that this exemption encourages continued channelization efforts. The exemption may only be used if the concrete lined channels already exist and does not prevent future retrofitting or rehabilitation. Also, the exemption cannot be used as justification to install additional concrete lined channels if they do not already exist. We also do not expect there to be many existing concrete lined channels that can be utilized for the exemption. Removal of this exemption may be considered in future iterations of the MS4 Permit.

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**Specific Comment**

Section F.3.b.(4)(a) specifies what the Copermittees must review when performing an inspection. The new requirements in sub sections (i) and (ii) to review BMP implementation plans, and review facility monitoring data, respectively, are an unnecessary new mandate. They should be removed for several reasons:

- The requirements burden the Copermittees with reviewing information that is required under General Permits and is the responsibility of the Regional Board to enforce.
- The requirements would significantly increase the inspection time for sites with General Permits and endanger an existing collaborative inspection program (Compliance/ Assistance Program (CAP)) that leverages the time that highly trained Environmental Health Inspectors spend onsite for Certified Unified Program Agencies (CUPA) and Food Services inspections to also conduct NPDES inspections. The CAP program not only utilizes highly trained Environmental Health inspectors, but also regionalizes the inspections and therefore provides multiple benefits including uniformity, reduction in total number of inspections and higher-quality inspections. The Environmental Health HazMat inspection program administrators have indicated that they cannot accommodate the additional time required to implement the new requirements, as they would unduly cut into their ability to meet their own state-mandated inspection frequencies.
- By virtue of eliminating the CAP program, the requirements would effectively mandate a more fractured and disconnected set of inspections for the businesses, contrary to CAL EPA mandates for consolidated inspections, and in turn diluting the effectiveness of the program.

The City requests that the language in F.3.b.(1)(a)(iii) be amended as follows prior to adoption of the Permit:

(a) Inspection Procedures: Inspections must include but not be limited to:

(i) [Delete]

(ii) [Delete]

(iii) Check for coverage under the General Industrial Permit (Notice of Intent (NOI) and/or Waste Discharge Identification Number), if applicable;

(iv) Assessment of compliance with Copermittee ordinances and Copermittee issued permits related to runoff;

(v) Assessment of the implementation, maintenance and effectiveness of the designated minimum and/or enhanced BMPs;

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**Comment Response**

The San Diego Water Board disagrees with the proposed changes. The San Diego Water Board disagrees that including a review of the BMP management plans and monitoring data, if available, would significantly increase inspection times and endanger the Copermittees' CAP program. Availability of BMP management plans and monitoring data are expected to be limited to few industrial sites not otherwise inspected by the CAP.

Inspectors can obtain valuable information for conducting their site inspections if a BMP management plan (e.g., SWPPP or SPCC) is available for review, and if the site has collected monitoring data. Reviewing a BMP management plan can actually reduce inspection time by providing the inspector information about where BMPs and storm drain inlets are implemented and/or located. Reviewing monitoring data can inform the inspector of the types of pollutants that may be generated at a site and compliance with local ordinances, and will only take a few minutes to review. HazMat inspectors should already be inspecting these types of information. CAP inspectors can easily be trained to review these types of information. The Tentative Order does not prohibit the Copermittees continued coordination with CAP to conduct inspections and compliance oversight.

The Copermittees expressed some concern that BMP implementation plans may be interpreted as the SSMP that is developed for the site. The Tentative Order has been modified to clarify that BMP management plans do not include SSMPs (or WQMPs) that are developed for the development of the site. As such, clarifying language has been included in the errata for the Tentative Order.

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**Specific Comment**

Section F.3.d, proposes a program to develop an inventory of existing developments that may be candidates for future water quality retrofits. The requirement goes on to encourage the Copermittees to collaborate with local property owners to promote urban retrofit in an effort to accelerate reductions in pollutant loading from existing urban areas.

Although laudable, this requirement has two significant problems:

1) The program is self-defeating as it contains no "carrots" to lure private property owners into participating in the program. Any property owner that is interested in volunteering in this effort would be required to fully comply with all provisions of the draft MS4 Permit. This includes preparation of compliance documents such as SSMPs, LID and hydromodification studies, subjecting themselves to additional regulatory scrutiny through business and BMP inspection programs required by the MS4 Permit, and otherwise incurring a myriad of costs and requirements. These costs and requirements would provide a strong disincentive to participate in a retrofit program. This program will only work if it is modified to remove these disincentives.

2) Current and projected economic conditions will limit the interest and participation of private property owners. Long-term economic predictions for Riverside County indicate that assessed valuations and property values will likely remain stagnant for the term of this Permit. Similarly, sales tax and unemployment are not expected to significantly improve either.

Without Co-Permittee resources to supplement private retrofit projects, the current economic disincentives for private redevelopment that are built into the program and the current impact of the economy on private property owners, there is no real value to the program.

**PREFERRED POLICY CHOICE:** The City strongly requests that this program be deleted for the aforementioned reasons.

Alternatively, and at minimum, the Copermittees request that the schedule for completion of the retrofit program be revised to provide for development during the term of the Permit and submittal of the proposed program with the next ROWD. This will allow the Copermittees to defer expenditures related to development of the program until later in the Permit term when it is hoped that economic conditions and local revenues will improve. The Copermittees expect few opportunities for retrofit until the economy improves. Due to the Copermittee's limited ability to require retrofit on private property, our best opportunities for retrofit may be associated with approvals of proposed modifications of existing developments.

**ALTERNATE POLICY CHOICE:** If the Retrofit requirements are not removed, the City requests that the Regional Board modify Section F.3.d. as follows:

Each Copermittee must develop and implement a retrofitting program that meets the requirements of this section upon submittal of the ROWD.

**Comment Response**

The San Diego Water Board disagrees with the commenter's concerns. First, the San Diego Water Board disagrees that all retrofit projects on privately owned properties will be or must be subject to SSMP redevelopment requirements. Most retrofit projects will easily be less than 1 acre in size and not create, add, or replace 5,000 square feet of impervious surface. Thus, those projects would not be subject to the SSMP, LID, and HMP requirements.

Second, the San Diego Water Board disagrees with the assumption that the current economic conditions will limit interest from private property owners. Retrofit interest already exist through the CWA Section 401 certification program, Supplemental Environmental Projects (SEPs), and grant programs. Retrofits do not have to be expensive. Retrofits could be as simple as redirecting downspouts from roofs to pervious or landscaped areas instead of to hardscaped areas discharging directly to the MS4. Private property owners will show interest if they become educated about the benefits of retrofits, especially if they are inexpensive and easy to implement.

The San Diego Water Board disagrees with the commenter's request to remove or delay the retrofitting requirements from the Tentative Order. Discharges from existing development sites need to be mitigated, which generally means implementation of measures to retrofit existing development sites with storm water control measures that can retain and/or treat storm water on site. Retrofitting existing development is possible and reasonable to significantly improve water

quality in receiving waters. The USEPA supports including the retrofitting existing development requirements in the Tentative Order (see comment 17).

Finally, the San Diego Water Board has already reduced the scope of this effort, and delayed submittal requirements as a result of discussions with the Copermitees prior to release of the Tentative Order. Any further reduction or delay would result in significant missed opportunities for implementing feasible retrofitting projects. The Copermitees must begin the planning and preparation sooner rather than later to identify opportunities for implementing retrofit projects to protect water quality from discharges of pollutants from existing development. No changes were made based on this comment.

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**Specific Comment**

The Draft MS4 Permit categorically prohibits the discharge of landscape irrigation; irrigation water; lawn watering; (collectively 'irrigation runoff') and non-emergency fire fighting flow runoff to the MS4. The basis for this requirement comes from the current Orange County storm water permit within the San Diego Region (NPDES No. CASOI08740), which prohibits such discharges.

Although irrigation runoff may have been shown to be a problem in South Orange County, it has not been shown to be causing problems in receiving waters in the Santa Margarita Region. Attachment 6 summarizes the unique conditions and other facts that warrant the restoration of irrigation runoff as a nonprohibited non-storm water discharge category. It is important to reiterate the three key points made in Attachment 6

- Unlike the watersheds in South Orange County, the Santa Margarita Region is an ephemeral watershed;
- Unlike South Orange County, the Copermittees have not identified landscape irrigation, irrigation water or lawn water as an actual source of pollutants or conveyance of pollutants to waters of the U.S.;
- The draft MS4 Permit requires Copermittees to eliminate irrigation runoff TO THE MS4, which by definition, requires elimination of discharges to streets, curbs and gutters.

As noted above, the prohibition appears to hold the Copermittees responsible for any amount of irrigation runoff discharged to the curb and gutter, regardless of whether or not the discharge ever reaches receiving waters or causes or contributes to the exceedance of a water quality standard. This fact, combined with the fact that irrigation runoff has not been shown to be causing impairments in the local receiving waters, will make enforcement difficult to justify with residents and will likely result in community outrage over bans on irrigation. Further the Copermittees are not water purveyors, and as such, have little control over residential irrigation runoff outside of sending code enforcement officers out to look for incidents of excessive irrigation runoff. This is a very inefficient use of resources. In any event, the provisions as written will do little for water quality but potentially much for community outrage against water quality programs. The Copermittees do not believe this is the intent of the Board. It is further worth noting that the Permit already contains an investigation and remediation process via Non-Storm water Action Levels (NALs) by which the Copermittees will identify the source of problematic non-storm water discharges. Should the source be found to be a conditionally exempt nonstorm water discharge, the permit requires the Copermittees to address that discharge or the entire category of discharges as appropriate. By allowing the NAL process to determine when and where conditionally exempt discharges need to be prohibited, the Copermittees are better positioned to justify any enforcement actions.

**PREFERRED POLICY CHOICE:** The City requests that the Regional Board restore the conditional exemption for landscape irrigation, irrigation water and lawn watering.

Alternatively, if the Regional Board nevertheless insists on prohibiting Irrigation Runoff, the Copermittees request that the draft MS4 Permit be revised to allow for irrigation runoff to be managed as a JRMP program, rather than as a prohibited discharge to the MS4. This alternative request is consistent with how the Permit currently deals with non-emergency fire fighting discharges, which was also removed from the list of non-prohibited non-storm water discharges. The Executive Officer stated that he would be open to consideration of a program for irrigation runoff that would address discharges from the MS4. This alternative approach allows the Copermittees to develop a program that focuses on irrigation runoff problem areas, as opposed to holding the Copermittees responsible for eliminating any instant case of over-irrigation to a street independent of threat to receiving water quality.

**ALTERNATIVE POLICY CHOICE:** The City requests that the Regional Board clarify that irrigation runoff is only prohibited where it is discharged from an MS4 (into receiving waters) by adding the following language:

B.4. As part of the JRMP, the Copermittees must develop and implement a program to address pollutants from landscape irrigation, irrigation water and lawn watering identified as significant sources of pollutants to waters of the United States.

## **Comment Response**

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The San Diego Water Board agrees, in part, that the basis for prohibiting the discharge of overirrigation runoff and non-emergency fire fighting flow runoff into the MS4 is the Orange County MS4 Permit. The San Diego Water Board has also cited several other sources to justify the prohibition in the Fact Sheet. The San Diego Water Board does not agree with the commenter's recommendation to restore the overirrigation runoff categories as non-prohibited non-storm water categories. Please see the responses to comment 25, 27, 83, and 175.

The San Diego Water Board disagrees that the prohibition will make enforcement difficult to justify with residents and will likely result in community outrage over bans on irrigation. This is not a ban on irrigation; rather, overirrigation discharging to the MS4. The prohibition is consistent with the Water Conservation in Landscaping Act (AB1881), which already required cities and counties to adopted landscape water conservation ordinances prohibiting runoff from inefficient landscape irrigation by January 1, 2010. The cities and counties are 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 are already required to enforce these ordinances.

The San Diego Water Board disagrees with the the commenter's "Preferred Policy Choice". The change proposed by the commenter's "Alternative Policy Chioce" is not necessary. In the event that overirrigation runoff is identified as an illicit discharge to "adjacent property, non-irrigated areas, walks, roadways, parking lots, or structures", which includes the Copermittees' MS4s, the Copermittees are expected to address the illicit discharge through their IC/ID programs. No changes were made based on this comment.

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**Specific Comment**

There are many different categories of unpaved roads within the unincorporated County area. These include County-Maintained unpaved roads, dedicated and accepted public roads (which are not County maintained), roads dedicated but not accepted, private roads, utility access roads, roads through tribal lands, and others. These roads are maintained by numerous entities besides the County, such as Homeowners Associations, quasi-public entities like County Service Areas, Community Service Districts, public and private utilities, Tribes, and in many cases, individual property owners. The County in fact is prohibited by law from spending general gas tax dollars (our main funding source) for maintenance of roads not in the County Maintained Road System, and is not financially able to take on new unpaved roads into the County Maintained System until they are improved to County Standards.

The proposed permit requirements would therefore impose an undue and substantial regulatory burden on the County and would create a class of potential unwitting "violators" that are not familiar with these requirements, including hundreds if not thousands of property owners that have been maintaining unpaved roads for many decades as needed to access their property. The special requirements for development and maintenance of unpaved roads were proposed by Regional Board staff for inclusion in the draft MS4 Permit very late in the process, after a number of weeks of discussions on the overall permit language and just prior to release for the Santa Margarita Region for public comment. During those discussions, unpaved roads were not raised by Regional Board staff as a source requiring additional regulatory attention.

Given the complexity of these jurisdictional issues, and the number of stakeholders that would be impacted, we respectfully request that the regulation of unpaved roads be removed from this permit. Alternatively, unpaved roads could be considered as part of a separate general permit to allow for proper stakeholder involvement and vetting, at the least within those areas of the permit (see below) that have to do with maintenance provisions. Given the complexity of this issue and the impact on thousands of properties, another option is to achieve a water quality benefit through education programs, not using limited resources on regulation and enforcement. We also note that unpaved road regulation was not included in the recent Orange County permit. Orange County receives approximately 8 times the amount of funding on a per mile basis towards their County-Maintained roads as does Riverside County, so imposing additional requirements on the Riverside County permit magnifies the undue regulatory and financial burden.

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**Comment Response**

The Tentative Order's requirements for the maintenance of unpaved roads does not require the County to maintain any roads that are not within the County's Maintained Road System. Rather, if a road is not maintained by the County, the Tentative Order requires the County to ensure the party(ies) responsible for maintaining the road conduct road maintenance for the protection of water quality. As such, the commenter's concern about spending general gas tax dollars or taking on new unpaved roads into the County Maintained System is unfounded.

Contrary to the commentor's assertion, the unpaved roads requirements were not proposed "very late" in the process. It was proposed and discussed prior to the release of the Tentative Order, and modifications were made as a result of these discussions (also prior to the release of the Tentative Order). The County Department of Transportation had the same public comment period timeframe to review and comment on the Tentative Order's provision as any other public or private agency or individual, if not more. Furthermore, any concerns about process does not diminish or negate the water quality impacts currently caused by unpaved roads. Please also see the response to comment 104.

Within south Orange County, unpaved roads were not identified as a source or potential source of water quality pollution; therefore the requirements were not included in the Orange County MS4 Permit (Order No. R9-2009-0002). South Orange County is mostly in a built-out condition and has very few unpaved roads in comparison to Riverside County. In addition, the San Diego Water Board has not received the same level of complaints or investigations for unpaved roads in Orange County.

Nevertheless, the San Diego Water Board is sensitive to the Copermittee's perceived difficulties with protecting water quality from runoff from privately maintained unpaved roads and has removed the regulation of unpaved roads maintained by private parties, section F.3.c.(5). The San Diego Water Board reserves the right to include provisions for unpaved roads that protect water quality in future MS4 permits, WDRs or individual/general NPDES permits.

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**Specific Comment**

Requirements for the development of unpaved road projects are addressed in section F.1.i. on page 45 of the Draft MS4 Permit. This requirement states:

## i. Unpaved Roads Development

The Copermittees must develop, where they do not already exist, and implement or require implementation of erosion and sediment control BMPs after construction of new unpaved roads. At a minimum, the BMPs must include:

- (1) Practices to minimize road related erosion and sediment transport;
- (2) Grading of unpaved roads to slope outward where consistent with road engineering safety standards;
- (3) Installation of water bars as appropriate;
- (4) Unpaved roads and culvert designs that do not impact creek functions and where applicable, that maintain migratory fish passage;

It is our contention that construction of new unpaved roads is already adequately regulated through development regulations. New unpaved roads built through development fall under the definition of a "project", and as such are already required to develop and implement project-specific SUSMPs, which include identification of BMPs in the same manner as required of other development projects. Unpaved road projects are also required to comply with the General Permit-Construction which requires preparation of a SWPPP. These requirements are implemented by the Permittees during the development review process and in issuance of grading permits. We also note that the development process already achieves a gradual "retirement" of unpaved roads, as the County requires in many cases that new development replace unpaved access roads with paved access.

Additional separate requirements for development of unpaved roads are redundant to these requirements and may only complicate compliance. However, if the Board wishes to include permit language to further clarify what is already required through these permits, we would be pleased to work with the Board to help craft appropriate language.

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**Comment Response**

The definition of a new development Priority Development Project requiring a SSMP only addresses roads with impervious surfaces or ones that are greater than one acre. Further, the Construction Stormwater Permit (Order 2009-0009-DWQ) and associated SWPPP, do not address post-construction BMPs in areas that are already regulated by a Phase I MS4 permit.

The requirements are not redundant but rather specific to the unique water quality impacts caused by unpaved roads development. To whatever extent there exists overlap with the existing SSMP and grading permit approval processes, this should result in minimal additional efforts for the Copermittees to implement.

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**Specific Comment**

This is our primary issue of major concern, particularly since the proposed language would appear to impose regulatory requirements on roads that are not part of the County Maintained Road System that we operate.

Requirements for the maintenance of unpaved road projects are addressed in section F.3.a.(10) on page 56 of the Draft MS4 Permit. This requirement states:

(10) Unpaved Roads Maintenance

- (a) The Copermittees must develop, where they do not already exist, and implement or require implementation of BMPs for erosion and sediment control measures during maintenance activities on unpaved roads, particularly in or adjacent to receiving waters.
- (b) The Copermittees must develop and implement or require implementation of appropriate BMPs to minimize impacts on streams and wetlands during unpaved road maintenance activities.
- (c) The Copermittees must regularly maintain their unpaved roads adjacent to streams and riparian habitat to reduce erosion and sediment transport;
- (d) Re-grading of unpaved roads during maintenance must be sloped outward where consistent with road engineering safety standards;
- (e) Through their regular maintenance of unpaved roads, the Copermittees must examine the feasibility of replacing existing culverts or design of new culverts or bridge crossings to reduce erosion and maintain natural stream geomorphology.

As we have stated, this issue should be addressed through a broad general permit or an education program. However, if the Board finds it necessary to impose additional permit requirements on maintenance activities, which go well beyond the Board's previous definitions of a "project", we respectfully request that this language be rewritten to make it clear that it applies to those roads within the County (or City) Maintained Road System.

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**Comment Response**

The Copermittees are encouraged to include unpaved roads as part of their education program. The San Diego Water Board reserves the right to issue a broad general permit regulating the discharges from unpaved roads. Until such time, it is appropriate to regulate unpaved roads through the MS4 permit per 40 CFR 122.26 (d)(iv)(A)(3) which does not distinguish between paved or unpaved roads. This is supported by the San Francisco Bay Area MS4 permit adopted in 2009. Please also see the response to comment 101.

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**Specific Comment**

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Findings D.I.C, pg 57-59, states:

"During the previous permit period, the San Diego Water Board identified, through investigations and complaints, sediment discharges from unpaved roads as a significant source of water quality problems in the Riverside County portion of the San Diego Region. Enforcement and inspection activities conducted by the San Diego Water Board during the previous permit term have found a lack of source control for many unpaved roads within the jurisdiction of the Copermittees".

The Department supports the continued application of development and construction requirements and maintenance of temporary post-maintenance erosion and sediment control BMPs as specified in existing permits. However, we do not believe that sufficient justification has been presented to support the identification of unpaved roads as a Significant source of water quality problems in the Santa Margarita Region. In these days of uncertain state funding and dwindling local funding sources, every dollar spent on additional regulatory requirements needs to be weighed against the benefit of otherwise using funding on basic public health-and-safety needs such as road maintenance and safety improvements.

The discussion of Finding D.1.c. states that the inclusion of unpaved road requirements were based on findings by the San Diego Regional Board during typical compliance assurance activities, audits, or receipt of complaints. However no feedback from these activities were reported to the Permittees at the MS4 Permit discussions prior to the proposal of the unpaved road requirements just before the draft permit was released.

The Department has reviewed the documents cited by Regional Board staff in the discussion of Finding D.1.e. and the conditions in the Santa Margarita River are vastly different from those in Pennsylvania and Northern California cited in those documents. Nevertheless, these documents do not suggest that unpaved roads are a significant source requiring special attention in MS4 permits. Further, neither the Permittee's monitoring data nor our observations support a conclusion that unpaved roads are a significant source of pollutants warranting special regulatory attention and we request that this finding be deleted unless significant data specific to the Santa Margarita Region can be produced. In particular, the Department requests a copy of the investigations and complaints along with the data that supports a significant source of water quality problems on unpaved roads, including a listing of roadways where water quality problems have been identified.

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**Comment Response**

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The San Diego Water Board disagrees with the commenter about the events leading to the inclusion of the unpaved road requirements in the Tentative Order. While the inclusion may not have been discussed at the beginning of the more than a dozen meetings that took place before the Tentative Order was released to the public, it was discussed multiple times before the release. The need to include the unpaved road provisions was identified after an early meeting with the Copermittees about the municipal program component of the Tentative Order. The Copermittees were provided the draft unpaved roads provisions as soon as they were drafted. After the Copermittees reviewed the draft language, it was discussed during at least two subsequent meetings. After the discussions with the Copermittees, the language was modified significantly based on the comments and recommendations of the Copermittees. Please also see the response to comment 101.

The San Diego Water Board has received several complaints about and observed several instances where sediment from unpaved roads has discharged into waters of the U.S. and/or State, causing a condition of pollution and/or nuisance. The commenter is welcome to review the documentation and records regarding these complaints and investigations, which are available to the public at the San Diego Water Board. Please also see the response to comment 138.

The San Diego Water Board took into consideration the Copermittees' concerns in the development of the unpaved roads requirements. The San Diego Water Board worked with the Copermittees in the development of the unpaved roads requirements and made changes where appropriate (in addition, see the responses to comments 101 and 139-141). The San Diego Water Board maintains that the Tentative Order should include provisions that specifically address pollutants from unpaved roads.

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<b>Comment #</b> 105	<b>Commentor</b>	12	<b>Comment Subject</b> LID
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**Specific Comment**

The exclusion of economic feasibility in provisions F.1.d.(4)(a), F.1.d.(4)(c), and F.1.d.(7)(b) is readily apparent (only technical feasibility is mentioned) and we urge correction and explicit recognition of conducting both technical and economic feasibility analysis when evaluating the appropriate combination of LID controls that meet the Permit's performance sizing criteria as defined in F.1.d.(4)(c). In particular, the Tentative Order requires in F.1.d.(4)(a) that "each copermitttee must require LID BMPs or make a finding of technical infeasibility for each priority development project" and in F.1.d.(4)(c) that "if onsite infiltration LID BMPs are technically infeasible per section F.1.d.(7)(b), other LID BMPs may be allowed for use to treat stormwater onsite provided that other LID BMPs are sized to hold the design storm volume that is not infiltrated." In both instances, economic feasibility is excluded and this omission must be corrected given the importance of balancing technical and economic feasibility. In fact, the San Diego Regional Board recognized the importance of economic feasibility in the South Orange County MS4 permit and included the following language in the adopted permit (R9—2009-0002, Section F.(7)(b)):

"For each PDP participating, a technical feasibility analysis must be included demonstrating that it is technically infeasible to implement LID BMPs that comply with the requirements of Section F.1.(d)(4). The Copermitttee(s) must develop criteria for the technical feasibility analysis including a cost benefit analysis, examination of LID BMPs considered and alternatives chosen."

We ask that the Board make the south Riverside County permit language at least consistent with that included in the adopted south Orange County MS4 permit and explicitly allow economic feasibility to be considered when evaluating appropriate LID BMPs to meet the onsite performance standard.

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**Comment Response**

The San Diego Water Board found the addition of an economic feasibility analysis on a project proponent could be unnecessarily burdensome. A cost benefit analysis for LID BMPs is unnecessary because USEPA studies have demonstrated that LID is both fiscally and environmentally beneficial (USEPA, "Reducing Stormwater Costs through Low Impact Development (LID) Startegies and Practices, December 2007, EPA 841-F-07-006). In the vast majority of cases, significant savings were realized due to reduced costs for site grading and preparation, stormwater infrastructure, site paving, and landscaping.

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<b>Comment #</b> 107	<b>Commentor</b>	12	<b>Comment Subject</b> LID
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**Specific Comment**

We appreciate the Board's recognition in the Fact Sheet that properly engineered LID filtration BMPs are available to a project developer to meet the LID performance standard. However, we are troubled by the pervasive use of the terms "without runoff" and "hold the design storm volume that is not infiltrated" in the Tentative Order. These terms continue to propagate the incorrect application of LID in that stormwater that has undergone filtration and/or treatment cannot be of equal or better quality than that retained on site given the performance criteria specified in F.1.d.(4)(c). We again urge the Regional Board to eliminate these terms and expressly allow biofiltration and biotreatment LID practices to meet the onsite performance standard without having to perform an exhaustive technical and economic feasibility analysis and to not relegate these controls to a lesser status.

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**Comment Response**

Comment noted. The errata in the Tentative Order clarifies that LID filtration BMPs that provide equal or better quality than that retained on site may be used and are preferred to conventional post-construction storm water treatment BMPs.

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**Comment #** 108

**Commentor** 11

**Comment Subject** LID

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**Specific Comment**

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The Office of Water Resources Supports Low Impact Development (LID) in Concept:

The Office of Water Resources (OWR) supports the concept of LID from a water quality perspective. Cleaner water coming onto Camp Pendleton not only sustains healthy ecosystems, but also ensures water in Camp Pendleton's aquifers is safe and suitable for potable use. Although, implementation of LID is expected to improve the quality of water that reaches Camp Pendleton via the Santa Margarita River (SMR), if improperly structured, LID has the potential to reduce the volume of high quality water that would otherwise arrive downstream to support beneficial uses on Camp Pendleton. Beneficial uses on Camp Pendleton, which are supported by historic baseflows in the SMR, include-but are not limited to--providing seventy percent of Camp Pendleton's water supply and sustaining populations of threatened and endangered species.

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**Comment Response**

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Comment noted.

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**Specific Comment**

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The Proposed Tentative Order Remains Problematic From a Water Supply Perspective:

OWR appreciates that the Regional Board has already included provisions in the Proposed Tentative Order that appear oriented towards protecting downstream water users from encroachment of historical flows. However OWR remains concerned that some provisions in the Proposed Tentative Order could be read to incentivize removal of native SMR water from the watershed in a manner that has the potential to reduce SMR baseflows. We have suggested revisions to the Proposed Tentative Order at the end of this memorandum that we believe will further reduce the risk to our water supply.

Treatment of Runoff Before Discharge into Receiving Waters:

Finding E.7 on (page 14) raises a potential dilemma for MS4 operators that could facilitate large scale impoundment and export of stormflows for "runoff treatment" to the detriment of downstream water right holders. Specifically, Finding E.7 states that "[t]reatment and/or mitigation must occur prior to the discharge of runoff into receiving waters." Because achieving water quality standards may require extensive treatment-particularly to achieve the existing nutrient standards in the Basin Plan, there is real risk that developers of large scale development/retrofit projects will impound large amounts of water onsite in lined facilities or export the water to a watershed with less stringent water quality objectives where the water can be discharged (or reclaimed for consumptive use) at significant savings to the MS4 or project developer.

To address this concern, the Regional Board should consider adding a section to the Findings in the Proposed Tentative Order which clarifies that impoundment or export of stormwater/rainwater for the purpose of avoiding pertinent discharge standards and/or basin plan objectives is not a proper use of stormwater absent demonstration of compliance with California Water Code Sections 1200-1225.

Along these lines, and to reduce risk that stormwater capture will reduce historic baseflows or otherwise diminish the water rights of downstream water users, we recommend the following additional revisions to the Proposed Tentative Order:

1. Revise Section F.l.c.8 (page 29) to read as follows:

Rain water harvesting, where feasible and fully protective of downstream water rights, must be implemented as part of the site design and construction, and to supplement offsite beneficial uses.

2. Amend Section F.3.d.2 to add an additional criterion, along the lines below for prioritizing retrofit of existing development:

(k) the extent such projects are fully protective of downstream water rights

[footnote to F.3.d.(2)(k): This recommended amendment will promote consistency with Section F.3.d.6(d) and ensure that the prioritization of retrofit projects properly considers the ramifications of retrofit on downstream baseflows.]

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**Comment Response**

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The San Diego Water Board believes that significant export of stormwater flows outside of the watershed will require waste discharge requirements. Section F.1.c.(8), Infiltration and Groundwater Protection, has been modified to include language that is intended to be protective of downstream water rights.

Section F.1.c.(8) has been modified to clarify that the requirement is for the reduction of pollutants in storm water discharges to the MEP. The San Diego Water Board does not have the water rights expertise to evaluate the full scope and legal implications of the commenter's water rights. The San Diego Water Board's understanding is that through current agreements Camp Pendleton is guaranteed base flows from the upstream water districts regardless of the amount of runoff. The Tentative Order clarifies under section E.1 that nothing within the Tentative Order authorizes an action that reasonably anticipated harm downstream water rights holders.

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**Comment #** 110      **Commentor** 10      **Comment Subject** Hydromod

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**Specific Comment**

With the HMP and with all other plans required by the Permit, such as monitoring, it is imperative that the Regional Board play the lead role. Bay Council understands, given budget constraints and furlough restrictions, the Regional Board has fewer resources and more work to do. Nonetheless, as permit requirements are delegated to Copermittees for development and planning, water quality suffers and NGOs and the public are left out of the process.

As with the San Diego HMP, this Permit requires Copermittee-driven HMP development. However, the San Diego process serves to shed light on the likely result: an artificially cost-constrained plan with frequent exercise of exemptions. Therefore, it is critical that the Regional Board play a lead role in the development of the HMP and all other plans.

If the current practice remains, Copermittees will expend large sums of money in developing a plan made publicly available (and indeed reviewed by the Regional Board) at the end of the process. Often the Regional Board and public are faced with two equally unappealing options: force the Copermittees to start anew and delay implementation; or accept an inadequate plan. The final product in this type of planning further represents a financial commitment by Copermittees. Because of this financial investment, Copermittees that may have been able to proceed in a different direction at the beginning stages of development, are unable to afford (or unwilling to pay for) repeating the process after the plan is fully developed.

A possible remedy is a cost-share plan, or outside consultant who is employed by the Regional Board, reports to the Regional Board, but is paid via Copermittee funds. In order to foster a truly public process, and scientifically driven compliance (as opposed to cost-constrained), the Regional Board must remain the ultimate decisionmaker, with staff developing plans—not Copermittees. Therefore, we urge the Regional Board to commit to heavy oversight if not a cost-share mechanism to take charge of the development of these plans in order to ensure timely completion and true advancement of water quality.

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**Comment Response**

The San Diego Water Board understands and appreciates the concern expressed by the commenter. While we appreciate the recommendations provided, they are not necessary at this time. Because of their current economic issues, the Riverside County Copermittees have expressed, on many occasions, their desire to borrow heavily from the HMPs already developed (e.g., San Diego County, Santa Clara County, Contra Costa County) or are in development (e.g., Orange County), and work already performed by SCCWRP. The Tentative Order allows this. The San Diego Water Board remains the ultimate decision maker for approving the elements included in the Riverside County HMP, and as such, will ensure that the requirements of the Tentative Order are met for the development of the Riverside County HMP.

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**Comment #** 111      **Commentor** 10      **Comment Subject** Watershed Workplan

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**Specific Comment**

The Permit requires identification of sources causing the highest water quality problems within the Upper Santa Margarita Watershed. (Permit, G.1.c.). A relatively easy aid to identification of such sources is expanded public outreach. We urge the Copermittees to survey the public and NGOs in the area in ranking water quality problems. In addition, Copermittees should provide bilingual public notice of annual watershed workplan meetings by sending such notices directly to area residents or holding special semi-annual workshops, especially in underserved communities. Copermittees might find the public particularly useful in source identification and BMP implementation strategies. This could further serve as an effective tool to meet the education and public participation Permit requirements. (Permit, G.4.). Lastly, we urge the Copermittees in Riverside County to reach out to Copermittees in the lower portion of the Watershed to coordinate source identification and monitoring activities.

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**Comment Response**

Comment noted.

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<b>Comment #</b> 112	<b>Commentor</b> 4	<b>Comment Subject</b> General
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**Specific Comment**

This document highlights the agreed upon revisions resulting from detailed discussions between Water Board Staff and the Copermittees on program implementation. The intent of these revisions is to ensure that requirements in the Draft MS4 Permit continue to be protective of water quality while allowing the Copermittees flexibility in resource allocation and cost efficiencies. This collaborative process enhanced a mutual understanding of these goals and, consequently, many of the Permit's requirements are streamlined, clearer, implementable and protective. This document highlights specifically the Low Impact Development (LID) and the Interim Hydromodification requirements that have been revised from the Orange County NPDES MS4 Permit in order to recognize the Copermittees' advanced efforts.

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**Comment Response**

Comment noted.

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**Specific Comment**

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[From Attachment 1 to RCFC&WCD comment letter]

Summary of Proactive Efforts to Manage Stormwater

Introduction

Murrieta and Temecula Creeks and their tributaries are an important economic, environmental and social resource for the Santa Margarita Region. As an example, Murrieta Creek serves as the backdrop for Old Town Temecula, an important local tourist attraction. Several ecological preserves that are utilized by local residents and tourists are also located within the Santa Margarita Region. The Permittees are cognizant of these resources and their benefits and have implemented or initiated proactive programs beyond the requirements of the NPDES MS4 Permits to ensure that these resources remain viable and are protected for future generations.

Integrated Planning

- Upper Santa Margarita River Integrated Water Management (IRWM) Plan
- Santa Margarita River Executive Management Team
- Murrieta Creek Flood Control, Environmental Restoration and Recreation Project

Management of New Development

- LID BMP Design Manual
- Public BMP Maintenance Mechanism

Management of New Development

- LID BMP Testing and Demonstration Facility
- Southern California Stormwater Monitoring Coalition

Statewide Stormwater Leadership

- Pesticide Regulation
- California Stormwater Quality Association (CASQA)

Habitat and Aquatic Resource Conservation

- Western Riverside County Multiple Species Habitat Conservation Plan (MSHCP)
- Special Area Management Plan (SAMP)

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**Comment Response**

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The San Diego Water Board is aware of the Copermitees' efforts to manage storm water as listed in Attachment 1. The Copermitees characterize these efforts as "proactive" because they were not specifically required in Order No. R9-2004-001. In many cases, these efforts were in response to findings during the implementation of Order No. R9-2004-001, in response to the requirements of the recently adopted Santa Ana Water Board Order No. R8-2010-0033, in response to efforts initiated by the Orange County and/or San Diego County Copermitees, in response to USEPA contracted audits and/or in anticipation of the requirements expected to be in the Tentative Order. We expect that the efforts of the Riverside County Copermitees listed in Attachment 1 will facilitate the implementation of several elements of the Tentative Order, but we also expect the Copermitees to continue identifying efforts and opportunities that will improve their storm water management programs to improve water quality in the Upper Santa Margarita Watershed.

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**Comment #** 114      **Commentor** 4      **Comment Subject** Economic

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**Specific Comment**

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[From Attachment 2 to the RCFC&WCD comment letter]

Due to their reduced revenues, the Copermittees budgets and staffing have been significantly reduced for virtually all services and programs operated by the Copermittees, including police, fire, and paramedic services. Funding has been focused on essential public safety and existing state and federally mandated programs. Increases in funding for the water quality mandates contained in the draft Permit can only come from reduced funding for these basic priorities. Therefore, the expanded compliance requirements proposed in the draft Permit are economically infeasible.

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**Comment Response**

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Please see the response to comment 9.

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**Comment #** 115      **Commentor** 4      **Comment Subject** Economic

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**Specific Comment**

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[From Attachment 2 to the RCFC&WCD comment letter]

POPULATION

Riverside County, which is subject to three NPDES MS4 permits, has a total population of 2,153,186. However, only 289,765 persons (approximately 13 percent) reside within the Santa Margarita Region. Population and housing projections for the Santa Margarita Region are summarized in Table 1. MS4 discharges in Riverside County are regulated by separate NPDES stormwater permits issued by the Colorado River, Santa Ana, and San Diego Regional Water Quality Control Boards. Although these three MS4 permits address the same federal regulatory requirements, the provisions in the draft Permit are often not well aligned with the requirements of the other two MS4 permits. As such, the cost for complying with those requirements is borne entirely by the 289,765 residents within the Santa Margarita Region.

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**Comment Response**

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The San Diego Water Board is aware that Riverside County is subject to regulation by three MS4 Permits from three separate Regional Water Boards. The San Diego Water Board agrees that the costs for complying with the requirements of the Tentative Order should be borne primarily by the residents in the Upper Santa Margarita Watershed, but we do not agree the provisions of the permit are not well aligned with the requirements of the other MS4 Permits.

As the RCFC&WCD is aware, the San Diego Water Board met with the Riverside County Copermittees on more than a dozen occasions between March and July 2010. The San Diego Water Board modified the Tentative Order in several ways, in response to recommendations by the Riverside County Copermittees during those meetings, to make it more aligned and compatible with Santa Ana Water Board Order No. R8-2010-0033.

The commenter cites figures for the population of the Upper Santa Margarita Watershed compared to all of Riverside County. The commenter, however, fails to acknowledge that the population growth in this part of Riverside County has also grown substantially since 2000. According to the 2000 census, the population in the Upper Santa Margarita Watershed was approximately 150,000. As reported by the Copermittees in their 2008-2009 Annual Report, the population in the Upper Santa Margarita Watershed was over 250,000 as of January 1, 2009, an increase of at least 65 percent since 2000. According to the commenter, the projected population for the Upper Santa Margarita Watershed is approximately 290,000 in 2010, an additional increase of approximately 15 percent since January 1, 2009. The population has almost doubled in the last 10 years. Such a significant increase in population also means a significant increase in development and need for expanded storm water and non-storm water management programs.

Because many of the provisions of the Tentative Order have been modified to be more aligned with the requirements of Santa Ana Water Board Order No. R8-2010-0033, the Riverside County Copermittees will be able to benefit from efforts that are being implemented for the Santa Ana Region, which will provide some cost efficiencies for complying with the requirements for both regions.

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**Specific Comment**

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[From Attachment 2 to the RCFC&WCD comment letter]

**CURRENT ECONOMIC CONDITIONS****Unemployment**

Higher unemployment directly impacts the revenue streams available to the County and the Cities for funding programs and services. As illustrated in Figure 1, the unemployment rate in Riverside County is currently 15.3 percent, which is 42 percent higher than the unemployment rate in San Diego County (9.8 percent) and 56 percent higher than the unemployment rate in Orange County (9.8 percent).

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**Comment Response**

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The San Diego Water Board recognizes that Riverside County is currently experiencing economic difficulties and high unemployment. The unemployment figure cited from Figure 1 may be true for Riverside County as a whole, but does not necessarily provide an accurate representation of the unemployment rate in the Upper Santa Margarita Watershed. The Upper Santa Margarita Watershed area is located between San Diego and Orange Counties, with lower than average unemployment rates for the state, which could have a localized influence on the unemployment rate in the Upper Santa Margarita Watershed. Unemployment in Riverside County, as a whole, is also heavily influenced by agriculture, and seasonal agricultural workers that are not currently employed affects the overall unemployment rate.

Also, as noted in the response to comment 115, the population in the Upper Santa Margarita Watershed is projected to grow approximately 15 percent in 2010 compared to January 1, 2009. This growth may indicate that there will soon be additional economic activity and unemployment will decrease in the near future.

Please see the responses to comments 8 and 9 for a discussion about the Copermittees' revenue sources for funding their storm water programs.

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<b>Comment #</b> 117	<b>Commentor</b>	4	<b>Comment Subject</b> LID
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**Specific Comment**

The Copermittees strongly support the language in the draft Permit with regard to Low Impact Development (LID) BMPs (Section F.1.d.(4)). Through discussions with staff, the Copermittees have presented their commitment and vision for LID, emphasizing that their programs' goals are in line with the intent of the LID language found in the Orange County permit. The District and the County, with input from the Copermittees, have invested five years into developing a well thought through LID program including: The design of a detailed and thoroughly researched LID BMP Manual, An implementation policy focused on a tiered approach to BMP selection, Incorporation of a public maintenance mechanism, and Construction of a \$3,000,000 LID BMP retrofit, demonstration and testing facility.

These various features are already in effect in the unincorporated County, or in the process of being finalized, for broader use.

Regional Board Staff has recognized the efforts, thoughtfulness, and funding that the County has invested in their LID BMP approach, and have, in coordination with the Copermittees, developed a prioritization process that supports the Copermittees' investment in a plan for LID, while ensuring that an appropriate prioritization for the most effective BMPs is implemented. As such, infiltration BMPs must be used for all sites unless it is technically infeasible to infiltrate. Technical infeasibility will be based on criteria that will be developed by the Copermittees and approved by the Regional Board. Only when infiltration is deemed infeasible through the approved analysis can other LID BMPs be used in place of infiltration. These LID BMPs must be consistent with the Copermittees design manual or other regional LID manuals, which have been developed to ensure these LID BMPs are designed to have the greatest pollutant removal over the life of a project. If LID BMPs are found to be technically infeasible due to poor site or other conditions, then conventional BMPs must be implemented and the project must participate in the LID waiver/mitigation program that will ensure pollutant removal effectiveness consistent with the preferred LID BMPs.

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**Comment Response**

The San Diego Water Board appreciates the support of the commenter. Based on several comments received during the public comment period, minor changes were made to the provisions in section F.1.d.(4) of the Tentative Order without affecting the overall intent of the language or the Copermittee's existing programs. Please see the errata sheet for the specific changes made.

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<b>Comment #</b> 118	<b>Commentor</b>	4	<b>Comment Subject</b> LID
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**Specific Comment**

One other important consideration for new development and LID requirements in MS4 permits is the ability for the project proponent (developer) to understand and easily comply with the requirements, such that they can easily be incorporated into projects. Recently adopted MS4 permits, such as the south Orange County MS4 Permit, have very complicated new development and LID requirements. The result of such requirements is a WQMP guidance document that can be confusing, and may be difficult to implement consistently and in a way that will provide consistent protection of water quality. The Copermittees and Regional Board staff, working together, have crafted new development LID requirements that are easily understood, and will ensure the highest likelihood of integration of LID features consistently into projects.

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**Comment Response**

Comment noted. Through several meetings with the Copermittees, the requirements for LID implementation were clarified and streamlined to reduce confusion and easily understand. To that end, the requirements are similar to the South Orange County MS4 Permit to consistently apply LID requirements throughout the San Diego Region.

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**Comment #** 119      **Commentor** 4      **Comment Subject** Hydromod

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**Specific Comment**

Pursuant to discussions between the Copermittees and Water Board staff, the proposed interim hydromodification criteria is aligned with the Copermittees' existing hydromodification program. This agreed language ensures that adequate hydromodification protection measures continue to be in place, while allowing the Copermittees to focus resources and funds on developing the Final Hydromodification Management Program and avoid diversion of scarce resources to developing new interim criteria that will only be in effect for a short duration. In addition, this approach will save the development community from confusion as to which requirements are in effect.

The Copermittees' current hydromodification mitigation program is described in the WQMP, but has been slightly modified as presented in the draft MS4 Permit. Although the Copermittees request the minimal changes to the language shown in the attached redlines, the Copermittees otherwise support the currently drafted interim hydromodification requirements. Under the proposed interim requirements, project applicants must either demonstrate numerically that the project will not adversely impact downstream alluvial channels, or, they must mitigate both the two-year and 10-year recurrence interval storms to pre-project levels in the post-project condition. All analysis must be performed by a registered civil engineer specializing in water resources. Mitigation of both the two-year and the 10-year storms to pre-project levels has been demonstrated to be consistent with the range of flows that are the primary determinants of the stream geomorphology in the southern California area. By maintaining these storm events at pre-project levels, impacts to the downstream alluvial channel should be mitigated to a level of less than significant. Additionally, the Copermittees believe that the onsite LID requirements will further reduce the need for on-site hydromodification controls that would otherwise be required with conventional treatment BMPs. The final comprehensive hydromodification mitigation program will further develop more detailed analysis methods, as well as establish a monitoring program to help verify the effectiveness of the HMP requirements.

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**Comment Response**

The San Diego Water Board agrees that the interim hydromodification criteria in the Tentative Order are aligned with the Copermittees' existing hydromodification program. The minor proposed modifications to Tentative Order sections F.1.h.(2) and F.1.h.(3) as shown on Attachment 3 to the RCFC&WCD's comment letter are acceptable. The San Diego Water Board does not agree to the proposed modifications to Tentative Order section F.1.h.(6)(a) as shown on Attachment 9 to the RCFC&WCD's comment letter.

Also, the commenter states that "project applicants must either demonstrate numerically that the project will not adversely impact downstream alluvial channels, or, they must mitigate both the two-year and 10-year recurrence interval storms to pre-project levels in the post-project condition." This is an incorrect statement. To clarify, projects subject to the interim hydromodification criteria must mitigate to "pre-development" levels, not "pre-project" levels. The use of the term "pre-development" is used in section 4.4 of the Riverside County Copermittees WQMP, and is assumed to mean the same as "pre-development" as used in the Tentative Order.

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**Comment #** 120      **Commentor** 4      **Comment Subject** General

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**Specific Comment**

Revisions tentatively agreed to with Board Staff  
Per discussions between the Water Board Staff and Copermittees the following revisions were agreed upon.

See table in Riverside County Flood Control Comment Letter Attachment 3, page 4.

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**Comment Response**

Comment noted. Please see the errata sheet for changes that the San Diego Water Board agreed to make to the Tentative Order.

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**Comment #** 121      **Commentor** 4      **Comment Subject** General

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**Specific Comment**

The process needed to be cut short as the Board expected the draft MS4 Permit to be heard in October. Copermittee staff requested that the hearing be delayed to allow the process to complete several times, but these requests were denied;

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**Comment Response**

The San Diego Water Board disagrees that the process was cut short. The existing Order was scheduled for renewal in 2009. The San Diego Water Board originally intended to release the Tentative Order for public comment in March 2010 and hold a public hearing in June 2010. At the request of the Riverside County Copermittees, the San Diego Water Board agreed to delay the release to allow the Riverside County Copermittees to meet with the San Diego Water Board to discuss issues they were concerned about. The San Diego Water Board met with the Copermittees over a dozen times between March and July 2010, on a weekly basis. During those meetings, practically every provision contained in the directives in the Tentative Order, as well as in the Monitoring and Reporting Program in Attachment E, was discussed. The Copermittees were given great latitude in choosing the topic and length of discussions at those meetings. Additional meetings were held with the Copermittees in August following the public release of the Tentative Order to further discuss the Copermittees' concerns. During many of the later meetings the Copermittees were repeating several of their concerns without new information and recommending the same changes to the Tentative Order that the San Diego Water Board would not agree to.

The San Diego Water Board has spent a significant amount of time and resources meeting with the Copermittees. The process was long enough for the San Diego Water Board to listen to and consider all of the concerns expressed by the Copermittees prior to releasing the Tentative Order.

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**Comment #** 122                      **Commentor**      4                      **Comment Subject** Economic

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**Specific Comment**

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[From Attachment 2 to the RCFC&WCD comment letter]

SOURCES OF LOCAL REVENUE

The Copermittee's primary revenue sources for implementation of programs and services are property taxes, sales taxes, and development/construction permit fees. Each of these sources has declined substantially since the beginning of the recession in FY 2006/2007. The 2009 per capita income in Riverside County (\$29,177) is 31% lower than the per capita income in San Diego County (\$42,094) and 32% lower than the per capita income in Orange County (\$46,898). The population of the Santa Margarita Region (289,765) is 48% lower than the population of South Orange County (553,1615) and 91% lower than the population of San Diego County. As a less affluent area with relatively small population, the Santa Margarita Region has far less revenue than South Orange County and San Diego County to fund local programs and services, and MS4 permit compliance costs.

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**Comment Response**

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The San Diego Water Board recognizes that the per capita income of the different counties vary. The per capita income cited may be true for Riverside County as a whole, but does not necessarily provide an accurate representation of the per capita income in the Upper Santa Margarita Watershed. The Upper Santa Margarita Watershed area is located between San Diego and Orange Counties, which could have a localized influence on the per capita income in the Upper Santa Margarita Watershed as a commuter community. Riverside County, as a whole, is heavily influenced by agriculture, and agricultural workers typically receive low wages, which may affect the per capita income for Riverside County as a whole.

As noted in the response to comment 115, the commenter fails to acknowledge that the population growth in the Upper Santa Margarita Watershed has also grown substantially since 2000. The population has almost doubled in the last 10 years. The population of South Orange County has grown at a significantly lower rate. Such a significant increase in population also means a significant increase in property and sales tax revenues. If the Copermittees choose to fund their storm water programs solely through revenues generated by sales and property taxes and developer fees, then they must be able to plan and prepare for times when those revenues decrease by setting aside funds when there are significant increases in revenue.

Please see the responses to comments 8 and 9 for a discussion about the Copermittees' revenue sources for funding their storm water programs.

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**Comment #** 123                      **Commentor**      4                      **Comment Subject** General

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**Specific Comment**

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Regional Board staff indicated that the Board had adopted the South Orange County MS4 Permit as a model permit and, therefore, the Board would have to approve any major revisions to the provisions established in that MS4 Permit; and

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**Comment Response**

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The San Diego Water Board must approve and adopt all MS4 NPDES permits regardless if the revisions or changes are major or minor.

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**Comment #** 124                    **Commentor**    4                    **Comment Subject** General

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**Specific Comment**

Regional Board staff indicated that the Board would have to resolve our issues with several new provisions of the draft MS4 Permit addressing unpaved roads, inspection programs and monitoring requirements, all requirements that exceed the provisions of the Orange County MS4 Permit.

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**Comment Response**

To the extent that the Copermittees disagree with the San Diego Water Board regarding the Tentative Order's provisions, the Copermittees have the right to submit both written and oral comments directly to the San Diego Water Board at the adoption hearing.

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**Comment #** 125                    **Commentor**    4                    **Comment Subject** Legal

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**Specific Comment**

The Copermittees note that despite being directed to take several important issues to the Board, we have not been provided an opportunity for a formal or informal workshop before the Board. By contrast, the South Orange County MS4 Copermittees had at least three workshops and five formal hearings prior to adoption of that permit. Although we do not want to duplicate the Orange County renewal process, it is common practice to allow at least one workshop on significant permit issues before holding an adoption hearing. Given the issues outlined in this letter and in the attachments, there are numerous issues worthy of at least one workshop.

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**Comment Response**

The decision whether or not to hold a workshop is discretionary and the decision not to hold a workshop in the matter was due to the general lack of public interest in the permit, the similarity between the Tentative Order and the recently adopted South Orange County MS4 Permit and the several weeks of meetings with the Copermittees between March and July of 2010. San Diego Water Board members generally do not attend public workshops. When they do attend, they listen to discussion but do not provide feedback. No San Diego Water Board members were present at any of the Orange County workshops. The Orange County workshops were held because of the broad public interest and were held in tandem with meetings with those Copermittees. All issues important to the Copermittees and addressed in the comment letter were discussed with San Diego Water Board staff during the many, frequent meetings held prior to public release of the Tentative Order.

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**Specific Comment**

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[From Attachment 2 to the RCFC&WCD comment letter]

Home Values/Property Tax Revenue

Property tax revenue, which is a major source of funding for the County and Cities, is a direct function of the total inventory of real estate and the assessed values of the real estate. With a small population relative to South Orange County and San Diego County and a limited amount of commercial and industrial property, the Santa Margarita Region is supported by a much smaller inventory of real estate from which to obtain property tax revenue. The high rate of foreclosures in Riverside County has also resulted in significant declines in real estate values and, consequently, property tax revenue. The Riverside County Auditor-Controller projects that property values will fall over 10 percent in FY 2009-10 and could fall further in FY 2010/2011. Figure 3 illustrates the decline in median home values in the Santa Margarita Region and South Orange County. Although home values in both areas have declined, home values in the Santa Margarita Region have declined at a greater rate and the difference in home values between the two areas has grown with the recession.

The Inland Empire (Riverside and San Bernardino Counties) registered more defaults and foreclosures than any other area of Southern California.<sup>9</sup> The Inland Empire was ranked No. 5 in nationwide foreclosure activity during the first half of 2010, with almost 4.5 percent of households in default. A total 63,717 mortgage default notices, auction sale notices, and bank repossessions were recorded in the Riverside-San Bernardino-Ontario metropolitan area between January and June 2010, according to RealtyTrac. Accordingly, one in 23 households were in some stage of foreclosure during this six-month period. Additionally, almost 45 percent of homeowners with a mortgage in Riverside and San Bernardino Counties owe more on their homes than the homes are worth. As illustrated in Figure 3, Orange County and San Diego County have not been impacted by "upside-down mortgages" to the same extent as has Riverside County.

One expert, Professor Mason Gaffney of the UC Riverside Economics Department believes that the housing market is in a vicious cycle simply because there are too many homes. According to Professor Gaffney, because demand is down, prices will go down, and more people will go "upside-down" on their mortgage, and then go into foreclosure. Professor Gaffney estimates that the bottom of the housing market will not be seen for another three years, due to the previous overbuilding in Riverside County.<sup>10</sup>

Although the recession has impacted property values throughout Southern California, Riverside County remains at a distinct disadvantage relative to Orange and San Diego Counties. The average home value in Riverside County is \$207,900, which is 58% less than the average home value in South Orange County (\$499,500) and 45% less than the average home value in San Diego County (\$378,800).<sup>11</sup> As a result, property tax revenues per home in Riverside County are 58% less than in Orange County and 45% less than in San Diego County. The larger populations and number of homes in Orange and San Diego Counties multiply this disparity in property tax revenue that can be used to help fund NPDES compliance programs. Based on population and average home value, South Orange County generates over four times the property tax revenue generated in the Santa Margarita Region, and San Diego County generates 20 times the property tax revenue of the Santa Margarita Region. Clearly, the Copermittees in the Santa Margarita Region receive significantly less property tax revenue than either Orange or San Diego Counties and are less able to fund additional MS4 permit compliance costs.

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**Comment Response**

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The San Diego Water Board recognizes that Riverside County is currently experiencing economic difficulties. If, however, the Copermittees choose to fund their storm water programs primarily through revenues generated by sales and property taxes and developer fees, then they must be able to plan and prepare for times when those revenues decrease by setting aside funds when there are significant increases in revenue. The Upper Santa Margarita Watershed had a substantial increase in the total inventory of taxable properties during the past housing boom of the early 2000s. Even while assessed values have decreased, the valuation has not dropped below 2004 levels and the inventory continues to increase.

Please see the responses to comments 8 and 9 for a discussion about the Copermittees' revenue sources for funding their storm water programs.

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**Comment #** 127      **Commentor** 4      **Comment Subject** Economic

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**Specific Comment**

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[From Attachment 2 to the RCFC&WCD comment letter]

**Sales Tax Revenue**

The next most significant revenue source for program funding is sales tax. Sales tax revenue is a function of population and relative income. As described, the Santa Margarita Region has a less affluent and smaller population than South Orange County and San Diego County on which to generate sales tax revenue.

The high levels of unemployment in Riverside County have reduced disposable income which has further depressed sales tax revenues. Retail sales in Riverside County fell by nearly 27% in 2008 and 2009.<sup>12</sup> Statewide sales and use tax revenues for the second quarter of 2010 declined approximately 10.4 percent. Additionally, taxable sales for the first quarter of 2010 remained flat compared to a year earlier. Although data specific to the Santa Margarita Region is not available, it is anticipated that taxable sales have been impacted more significantly than in Orange and San Diego Counties due to the higher unemployment rate in Riverside County.

Taxable sales are directly proportional to sales tax revenue. Based on data presented in the Los Angeles Economic Development Corporation's July 2010 Economic Forecast, South Orange County generates 2.6 times the taxable sales generated in the Santa Margarita Region and San Diego County generates 13.3 times the taxable sales of the Santa Margarita Region. Clearly, the Copermittees in the Santa Margarita Region receive significantly less sales tax revenue than either Orange or San Diego Counties and are less able to fund additional MS4 permit compliance costs.

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**Comment Response**

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The San Diego Water Board recognizes that Riverside County is currently experiencing economic difficulties. If, however, the Copermittees choose to fund their storm water programs primarily through revenues generated by sales and property taxes and developer fees, then they must be able to plan and prepare for times when those revenues decrease by setting aside funds when there are significant increases in revenue.

Please see the responses to comments 8 and 9 for a discussion about the Copermittees' revenue sources for funding their storm water programs.

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**Comment #** 128      **Commentor** 4      **Comment Subject** Economic

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**Specific Comment**

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[From Attachment 2 to the RCFC&WCD comment letter]

**New Fees or Taxes**

Another potential source of funding would be the establishment of a new fee or tax. Such revenues would be subject to the requirements of Proposition 218. Recent efforts to pass supplemental fees have been mixed and given the current economic conditions, this option appears infeasible. For example, on the March 2006 ballot, an attempt by the City of Encinitas to pass a Clean Water Fee was defeated by the voters. It is notable that this rejection of a Clean Water Fee occurred prior to the recession in a relatively affluent coastal city.

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**Comment Response**

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Please see the response to comment 8.

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**Comment #** 129

**Commentor** 4

**Comment Subject** Economic

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**Specific Comment**

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[From Attachment 2 to the RCFC&WCD comment letter]

Economic Forecasts

The Riverside County Executive Office assessed Riverside County's economy in a report to the Board of Supervisors submitted with the FY 2010/2011 Recommended Budget. In this assessment, it was noted that the economy is still staggering and that economic news has been mixed. Although a slightly rising stock market and other nationwide measures could be interpreted to signal improvement, persistently high unemployment and personal and national debt call for caution, and a double-dip recession is possible. Locally, while some experts project revenues will shrink again in FY 2011/2012, Riverside County's economic consultants foresee a long and gradual muted recovery and the County will be managing with drastically reduced budgets for an extended period. Budget reductions of approximately \$21 million are projected for FY 2011/2012. The County projects that it will see a balanced but significantly reduced budget in FY 2012/2013, with a total budget of \$670 million (compared to \$736 in 2007). Based on this assessment and reports in the media, it appears that the economy in Riverside County will stabilize at a reduced level and may not recover during the term of the SMR MS4 Permit.

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**Comment Response**

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Please see the response to comment 9.

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**Specific Comment**

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[From Attachment 2 to the RCFC&WCD comment letter]

**Projected Increases in Compliance Costs**

The draft Permit proposes a significant expansion of compliance requirements that would significantly increase the Copermittee compliance costs. The draft Permit was developed by starting with the MS4 Permit for South Orange County. The requirements proposed in the draft Permit that would significantly increase compliance costs include:

**Regional Compliance Requirements**

- Monitoring and special studies (See Attachment 4)
- Hydromodification Management Plan (including monitoring)
- Retrofit study
- Other general program updates (JRMP)

**Individual Copermittee Compliance Requirements**

- Enforcement of Irrigation runoff prohibition (See Attachment 6)
- Significantly Increased business and BMP inspections
- BMP retrofit requirements
- Regulation of unpaved roads (See attachment #5)
- Hydromodification requirements
- Monitoring Source Identifications
- Expanded IC/ID requirements

Estimates for implementation of the regional compliance requirements have been prepared and Figure 4 illustrates the disparity between projected Copermittee revenues and costs for implementation of the proposed regional programs. Due to the fact that calculating costs for implementing entirely new programs is excessively difficult, cost estimates for the implementation of individual Copermittee compliance requirements have not been completed, although it is expected that their individual costs will parallel the regional costs presented in Figure 4.

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**Comment Response**

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The San Diego Water Board has been sensitive to the current economic hardships that are being experienced by the Riverside County Copermittees. Between March and July 2010, we met with the Copermittees over a dozen times and modified the requirements and schedules for implementation to phase in the requirements with these economic concerns in mind. Many of the modifications were made because the Copermittees requested the changes. Many of the modifications to the implementation schedule that were agreed upon during those meetings between the Copermittees and the San Diego Water Board were also based on prioritizing the permit requirements to address the most critical issues. The Tentative Order now provides the Riverside County Copermittees more time than the San Diego County and Orange County Copermittees to develop and implement several elements of the permit, as well as reducing the potential development costs for those elements.

The San Diego Water Board recognizes there will be increases in costs to improve the Copermittees' storm water management programs. The improvements are necessary, especially given the intense growth and development that has occurred in the Upper Santa Margarita Watershed during the third-term of the MS4 Permit. We do not agree that the increases in costs will be as projected in Figure 4 since the Copermittees have already begun developing several of the program elements (as listed in Attachment 1 to the RCFC&WCD comment letter), and will be able to benefit from the experiences and the work already completed by the San Diego County and Orange County Copermittees.

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**Comment #** 131      **Commentor** 4      **Comment Subject** General

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**Specific Comment**

The Copermittees also have significant concern with the use of the South Orange County MS4 Permit as a model for our MS4 Permit area. As outlined in more detail throughout this letter and the attachments, the South Orange County and Santa Margarita Region MS4 Permit areas vary widely with regard to the water resources to be protected and available tax revenue to fund local programs and services, including compliance with MS4 permit requirements. Orange County has substantial coastal water resources with active recreational use, twice the population, and significantly higher tax revenues. The per capita cost for the residents within the Santa Margarita Region to comply with the requirements of the draft MS4 Permit is significantly greater than the per capita cost faced in South Orange County, with each dollar spent effectively hitting our residents three to four times harder. The expansion of regional program elements (e.g., coordination, monitoring, reporting, program development, effectiveness assessment) will result in an annual doubling of these costs, with a peak increase of nearly 300% for these programs alone. The Copermittees simply cannot economically support, nor does the Santa Margarita Region warrant, the same level of programs as South Orange County to protect our local receiving waters.

**Comment Response**

The federal requirements regulating MS4 discharges from Orange County and Riverside County are the same, providing flexibility for regional differences in implementation. To that extent, the Tentative Order has significant differences from the adopted South Orange County MS4 Permit to address Riverside County. These differences were identified by the San Diego Water Board or requested by the Copermittees. These changes include requirements addressing unpaved roads, watershed specific non-storm water dry weather action levels, specific monitoring provisions, special studies, street sweeping provisions, streamlined LID requirements, Hydromodification Management Plan changes, a lengthened implementation timeline, more specific action level response language, specific education requirements, standard roadway designs, specific LID waiver provisions, a HMP waiver provision, specific interim hydromodification criteria, requirement of Passive Sediment Treatment Systems, specific reporting requirements, retrofitting examination of areas of development, and unique program effectiveness assessment requirements. To some extent, the discharges, programs and land use from the Copermittees' MS4s are similar and thus have similar requirements.

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**Comment #** 132      **Commentor** 4      **Comment Subject** General

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**Specific Comment**

In summary, the meetings between Regional Board staff and Copermittee staff were honest, good faith and productive efforts to bridge the gaps between the requirements of the Orange County MS4 Permit and the specific needs of, and resources available to, the Upper Santa Margarita Watershed (the draft MS4 Permit area). However, given the constraints identified herein, the differing impacts on beneficial uses and current economic realities, the current draft MS4 Permit cannot be supported by the Copermittees.

The Copermittees, therefore, request that the Board direct staff to work with the Copermittees to resolve the issues identified in this letter prior to considering adoption of the Permit.

**Comment Response**

Please see the response to comment 121.

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<b>Comment #</b> 133	<b>Commentor</b> 4	<b>Comment Subject</b> General
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**Specific Comment**

Unlike several of the watersheds in South Orange County, which exhibit perennial flow, the Santa Margarita Region is an ephemeral watershed. The only areas of perennial flow in the Santa Margarita Region are located at the formation of the Santa Margarita River right at the County line and in mountain areas outside of the urbanized areas serviced by the MS4s. The creeks in the urbanized areas of the watershed serviced by the MS4s are ephemeral and flows are only observed during and immediately after significant storm events. Any non-stormwater flows quickly disappear by seepage into the alluvial sands. Additionally, rising groundwater has been observed in Murrieta and Temecula Creeks for a short distance at various locations upstream of the confluence with the Santa Margarita River; however such conditions existed prior to urbanization.

**Comment Response**

Please see the response to comment 175.

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**Specific Comment**

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[From Attachment 2 to the RCFC&WCD comment letter]

**ECONOMIC SUMMARY**

As all sources of revenues have been reduced significantly, the Copermittees have been required to reduce staffing through layoffs, attrition and furlough; reduce funding across the board for public services and programs, and, in some cases, completely eliminate public services and programs. For example, it is estimated that County of Riverside staffing has been reduced by 2,500 since FY 2006/2007 mostly in the form of early retirement and layoffs. It is estimated that an additional 500-700 staff positions will be eliminated by the County in FY 2011/2012.

Due to the loss of revenue, virtually all Copermittee programs or services have been reduced, including fire and police. As an example, the Riverside County FY 2010/2011 Recommended Budget for Riverside County proposes:

- Public safety department cuts of 3 – 5 percent
- Other department cuts averaging 19 percent
- Continued staff reductions

After three years of modest cuts culminating in a 25% decrease, the Board of Supervisors approved an additional 19% cut in the general fund and a 4% cut to public safety for FY 2010/2011. These additional cuts will decrease spending by an additional \$71 million. The remaining budget gap will be filled from general fund reserves set aside for economic uncertainty. Since FY 2006/2007 Riverside County general fund reserves have declined from over \$300 million to \$30 million. The County cannot decrease the reserve fund any further without affecting the County's ability to obtain credit. According to the Associated Press Economic Stress Index, of counties with populations of at least 25,000, Riverside County was identified as the eleventh most economically stressed county in the nation based on its June 2010 stress scores.

All County departments have been directed to only provide those core services that the County is mandated to provide. At this point, the Copermittees are struggling to maintain the existing compliance programs required by the 2004 MS4 Permit with available staff and funding. Implementation of expanded or new Permit compliance requirements would require the Copermittees to either further reduce implementation of other mandated programs or reduce the level of implementation of MS4 Permit compliance programs - at risk of receiving an NOV and ACL. In other words, the Copermittees cannot increase MS4 Permit compliance expenditures without directly impacting compliance with other state or federally-mandated programs.

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**Comment Response**

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The San Diego Water Board is aware of the many and competing needs that the municipalities are responsible for. The mission of the San Diego Water Board, however, is to preserve, enhance, and restore the quality of the waters in the region. Our responsibility is to protect the beneficial uses of the waters of the state.

While we try to take other needs into consideration when developing the requirements included in the Tentative Order, the requirements must be able fulfill our mission and responsibilities. We understand that the provisions in the Tentative Order may require the Copermitttees to modify, reduce, or find additional efficiencies in their operations, but the Copermittees are still responsible for implementing and improving their storm water and non-storm water programs to protect water quality.

The San Diego Water Board has been sensitive to the current economic hardships that are being experienced by the Riverside County Copermittees. Between March and July 2010, we met with the Copermittees over a dozen times and modified the permit requirements and schedules for implementation to phase in the requirements with these economic concerns in mind. Through this process and series of meetings, the San Diego Water Board has tried to accommodate the needs of the Riverside County Copermittees as much as possible.

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**Specific Comment**

Since the initial MS4 permit was issued in 1990, the Copermittees have been actively and successfully implementing programs to manage their MS4 discharges. As described in the 2009 report of waste discharge (ROWD) submitted by the Copermittees, there have been no statistically significant increases in pollutant concentrations since issuance of the initial MS4 permit in 1990, despite the fact that the Santa Margarita Region has experienced over 300% population growth over the same time period. Further, although staff points out several recent 303(d) listings as basis for the need to enhance regulations, these listings were based on data that mostly predates our existing management programs implemented under the 2004 NPDES MS4 Permit. Further, the Permittees have submitted additional data for the current round of listings that should result in the removal of some of these additional listings based on more recent data. Additionally, the likely sources of these impairments include natural background concentrations in soils and groundwater (iron and manganese), natural and/or agricultural source loads (nutrients, total dissolved solids, sulfates and bacteria), and/or federally authorized uses of products (pesticides and copper). Although all of these sources can have urban components, it is also clear that these sources are mostly non-point in nature and not solely urban sourced, as implied in the Fact Sheet and Findings.

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**Comment Response**

The San Diego Water Board disagrees that the Copermittees' programs have been successfully implemented. The San Diego Water Board disagrees that there have been no statistically significant increases in pollutant concentrations. The Copermittees' ROWD states that not enough data has been collected to date by the current and past MRPs to statistically detect any change or trend in water quality. If not enough data has been collected, how can any statistically significant increases in pollutant concentrations be detected?

Enough data, however, have been collected to see a statistically significant increase in 303(d) listings for the waters in the Upper Santa Margarita Watershed. On the 2002 303(d) List there were 3 water body/pollutant combinations listed. On the 2008 303(d) List there were over 50 water body/pollutant combinations listed. This significant increase in 303(d) listings indicates that water quality has degraded, not improved.

The San Diego Water Board would be pleased if the data provided by the Copermittees supports the removal of some of these listings. Even if some listings are removed, there would be a significant number of listings that would still need to be addressed. In any case, the Copermittees must continue to improve their programs to prevent discharges of pollutants from their MS4s and protect the water quality of the receiving waters of the Upper Santa Margarita Watershed.

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**Specific Comment**

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[From Attachment 2 to the RCFC&WCD comment letter]

**CONCLUSION**

The draft Permit was developed by starting with the MS4 Permit for South Orange County. This represented a significant expansion of compliance requirements and compliance costs relative to the 2004 Permit issued to the Copermittees in the Santa Margarita Region, and by no means are the costs incremental in nature. South Orange County is a permit area with twice the population, 2.6 times the sales tax revenue, and over four times the property tax revenue of the Santa Margarita Region. The draft Permit was then expanded to include additional compliance and monitoring requirements, further increasing compliance costs. Plainly, it is unrealistic to impose greater, or even the same Permit requirements on the Santa Margarita Region, as have been imposed on South Orange County.

In addition to having a lower property tax revenue based on lower property tax base and lower per capita retail sales, the Santa Margarita Region has also been hit harder by the recession, which has further diminished funding resources. It is projected that revenues will continue at a reduced level for an extended period with recovery not expected within the term of the Permit term. Therefore, the available resources to fund public safety, existing state and federal mandates, and expanded water quality permit requirements are much less than San Diego and Orange Counties.

The economy has resulted in reductions of reserves to minimum levels and virtually all local services and programs have been reduced or eliminated. As increases in funding for the water quality mandates contained in the draft Permit can only come from reduced funding for public safety, existing state and federal mandates, the expanded compliance requirements proposed in the draft Permit are economically infeasible.

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**Comment Response**

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The San Diego Water Board recognizes that there are differences in the economic characteristics between the counties in the San Diego Region, but we do not agree that those differences should affect the provisions included in the Tentative Order to protect water quality. If anything, because of the significant growth and development experienced by the Upper Santa Margarita Watershed within the last 10 years, the new and enhanced requirements are more necessary than ever. Significant changes in the Tentative Order's schedules and compliance requirements have been made to accommodate the Copermittees and the watersheds unique status.

The population of the Upper Santa Margarita Watershed has almost doubled in the last 10 years. The significant increase in population has resulted in a significant increase in development in the area. On the 2002 303(d) List, there were 3 water body/pollutant combinations listed for the waters in the Upper Santa Margarita Watershed. On the 2008 303(d) List, there are over 50 water body/pollutant combinations listed for the waters in the Upper Santa Margarita Watershed.

We understand that the current economic situation is challenging for the Copermittees. While the current economic environment is a cause for concern in the short term, it also provides the Copermittees an opportunity to find and implement improvements and efficiencies to their storm water programs before the next period of growth and development. In any case, the Copermittees must improve their storm water programs to be more protective of water quality.

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**Specific Comment**

As the draft MS4 Permit for the Santa Margarita Region of Riverside County was modeled on the MS4 Permit developed for South Orange County, it is important to carefully contrast the economic resources available to the Counties:

The population of the Santa Margarita Region (289,765) is 48% less than the population of South Orange County (553,161).

The 2009 per capita income in Riverside County (\$29,177) is 38% less than the per capita income in Orange County (\$46,898).

The current unemployment rate in Riverside County is 15.3 percent, which is 56% higher than the unemployment rate in Orange County (9.8 percent).

Property and sales tax revenues are the primary sources of funding for local programs and services, including compliance with MS4 Permit requirements. Based on population and average home value, South Orange County generates over four times the property tax revenue generated in the Santa Margarita Region. Based on data presented in the Los Angeles Economic Development Corporation's July 2010 Economic Forecast, South Orange County generates 2.6 times the taxable sales generated in the Santa Margarita Region. As a less affluent area with a relatively small population, the Copermittees in the Santa Margarita Region receive significantly less property and sales tax revenue than municipalities in South Orange County and are less able to fund additional MS4 Permit compliance costs. These issues are discussed in detail in Attachment 2.

The recession also has impacted the economy in the Santa Margarita Region more than in South Orange County and it is projected that tax revenues will continue at a reduced level for an extended period, with recovery not expected within the Permit term. The poor economy has resulted in reductions of reserves to minimum levels and cuts or eliminations in virtually all local services and programs in the Santa Margarita Region. As a result any increases in funding for the water quality mandates contained in the draft MS4 Permit can come only by reducing funding for public safety or other existing state and federal mandates.

Modeling the draft MS4 Permit on the South Orange County permit represented a significant expansion of compliance requirements and compliance costs relative to the existing MS4 Permit issued to the Santa Margarita Region Copermittees. The requirements in the draft MS4 Permit have been expanded to include additional compliance and monitoring requirements beyond the South Orange County permit, further increasing compliance costs. We would submit that such an approach is fundamentally unfair and could be viewed as arbitrary.

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**Comment Response**

Please see the responses to comments 8, 9, 115, 116, 122, 126, 127, 130, 134, and 136. The commenter is not consistent in the scope of statistical comparison of the two regions. For example, the population comparison is only for the Upper Santa Margarita Watershed while the economic indicators are compared for the whole of Riverside County. Factors within Riverside County yet outside of the Upper Santa Margarita Watershed may influence the statistics, e.g. agriculture in the Coachella Valley.

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**Comment #** 138                      **Commentor** 4                      **Comment Subject** Unpaved Roads

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**Specific Comment**

The requirements for unpaved roads are particularly cumbersome, onerous and unreasonable. Our detailed analysis of these requirements is provided in Attachment 5. In summary, the proposed unpaved road requirements may result in substantial and unnecessary additional Copermitttee costs that are not justified by the facts in the Santa Margarita Region. The Copermitttees believe that the existing MS4 Permit requirements for new development, construction, maintenance and IC/ID adequately address regulation of unpaved roads that threaten water quality. If the Regional Board believes that unpaved roads require further regulation, the Copermitttees believe that the appropriate regulatory mechanism is a general permit (Waste Discharge Requirements or NPDES permit) that would apply to all unpaved roads in the San Diego Region, rather than only those that are under the jurisdiction of the Copermitttees

The Copermitttees request that Sections F.1.i, F.3.a.(11) and F.3.c.(5) regulating unpaved roads be deleted from the draft MS4 Permit.

**Comment Response**

The commenter does not provide any substantial data or reasoning to support their assertion that the requirements are "cumbersome, onerous and unreasonable." Despite the Copermitttees' belief that existing MS4 Permit requirements adequately address pollution from unpaved roads, the San Diego Water Board has discovered numerous cases of unpaved roads creating or causing water quality impacts. Examples of unpaved roads causing water quality problems within the past year include Fairway Hills Estates, Rancho Glen Oaks, Santiago Road, and Lake Village Association. The San Diego Water Board reserves the right to issue a general permit to regulate unpaved roads; but until such time the unpaved roads are addressed through the MS4 permit. Please see the responses to comments 103 and 104.

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**Comment #** 139                      **Commentor** 4                      **Comment Subject** Unpaved Roads

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**Specific Comment**

Clarification that these requirements apply to those unpaved roads that the Copermitttees maintain in their road system.

This should be commonly understood, but the clarification is important to include due to complex legal limitations and rights associated with access, ownership, and maintenance of unpaved roads.

**Comment Response**

Comment noted. Appropriate changes addressing the comment have been included in the errata.

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**Comment #** 140                      **Commentor** 4                      **Comment Subject** Unpaved Roads

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**Specific Comment**

Removal of language that specifies specific BMPs that must be implemented.

Specifying the method of compliance is prohibited pursuant to CWC Section 13360, and inappropriately forces the Copermitttees to adopt particular solutions that may not best fit the situation.

**Comment Response**

Comment noted. Clarifying language has been included in the errata.

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**Comment #** 141                    **Commentor**    4                    **Comment Subject** Unpaved Roads

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**Specific Comment**

Removal of requirement for BMPs for private unpaved roads.

The proposed requirements would require the creation of an additional and unnecessary program element addressing privately owned unpaved roads. The Copermittees believe that a focused public outreach program should be implemented to educate property owners and associations about the need to properly maintain unpaved roads. This education program combined with existing IC/ID enforcement capabilities seems a more reasoned and responsible response to addressing this issue.

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**Comment Response**

The San Diego Water Board is sensitive to the Copermittees' concerns. Upon considering various factors, we have removed the requirements for privately owned unpaved roads in the errata. The San Diego Water Board reserves the right to include this provision in future MS4 permits or general permits. The San Diego Water Board still expects the Copermittees to address illicit discharges from privately owned unpaved roads to their MS4 systems through their IC/ID programs.

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**Comment #** 142                    **Commentor**    4                    **Comment Subject** Monitoring

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**Specific Comment**

Since the initial MS4 permit was issued in 1990, the Copermittees have been actively and successfully implementing programs to manage their MS4 discharges. As described in the 2009 report of waste discharge (ROWD) submitted by the Copermittees, there have been no statistically significant increases in pollutant concentrations since issuance of the initial MS4 permit in 1990, despite the fact that the Santa Margarita Region has experienced over 300% population growth over the same time period. Further, although staff points out several recent 303(d) listings as basis for the need to enhance regulations, these listings were based on data that mostly predates our existing management programs implemented under the 2004 NPDES MS4 Permit. Further, the Permittees have submitted additional data for the current round of listings that should result in the removal of some of these additional listings based on more recent data. Additionally, the likely sources of these impairments include natural background concentrations in soils and groundwater (iron and manganese), natural and/or agricultural source loads (nutrients, total dissolved solids, sulfates and bacteria), and/or federally authorized uses of products (pesticides and copper). Although all of these sources can have urban components, it is also clear that these sources are mostly non-point in nature and not solely urban sourced, as implied in the Fact Sheet and Findings.

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**Comment Response**

The San Diego Water Board finds the comment to be confusing and misleading on multiple accounts. First, the ROWD states that not enough data has been collected to date by the current and past MRPs to statistically detect any change or trend in water quality. Thus, if not enough data has been collected, how can any statistically significant increases in pollutant concentrations be detected? Secondly, the recent 303(d) listings referenced in the comment refer to the 2008 303(d) list, which relies on data collected up to that listing, including data collected under the current Order. New listings and re-listings for the 2008 list relied on data collected from 2004-2006. The list is required to be updated every 2 years, so it is unclear how new listings are based primarily on data prior to 2004. Lastly, it should be noted that speculation regarding likely sources of pollutants for 303(d) listed receiving waters should not take the place of active source identification, which been largely absent under the current Order.

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**Specific Comment**

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Monitoring and Reporting Program (Attachment 4)

Prior to the submittal of the ROWD, the Copermittees met with Board staff to propose changes to the Monitoring and Reporting Program (MRP). In these discussions, Board staff identified two areas for needed improvement:

- Relocation of Illicit Connection I Illicit Discharge (IC/ID) monitoring stations to MS4 outfalls, and
- Incorporation of Action Levels

In more recent discussions, Board staff noted that the MRP needed significant modification to reflect the South Orange County MRP, but would be scaled to be appropriate to the smaller Santa Margarita Region.

Unfortunately, the final MRP requirements have been expanded well beyond the South Orange County MRP requirements, resulting in a program that is completely out of proportion with the needs and resources of the Santa Margarita Region. In fact, the proposed MRP requirements will result in a 500% increase in monitoring program costs, costing our residents over two and a half times the per capita costs for South Orange County.

[Per Capita Monitoring Cost Comparison Table]

The Copermittees recognize that monitoring and data collection is necessary. However, the MRP requirements exceed what is necessary to address management questions related to water quality, are beyond requirements dictated in the South Orange County MRP, and are beyond the Copermittees' ability to fund. Not only are the level of requirements inappropriate for the Santa Margarita Region, but they disregard the economic realities faced by the Copermittees. As such, the MRP falls far short of meeting the Executive Officer's stated goals of affordability.

In the interest of finding ways to offer Board staff a comparable program in a more cost effective and appropriate manner, the Copermittees have identified nine adjustments to the MRP that will save approximately seven hundred and eighty thousand dollars (\$780,000) annually and bring per capita monitoring costs more in line with the South Orange County MRP, while maintaining the core components of the MRP. Table I summarizes the key changes and the respective cost savings. It is important to note that any change highlighted in RED reflects bringing the program in line with the South Orange County MRP. Figure I below shows graphically the comparative costs for the draft MRP with and without the requested adjustments. Please note that the 100% baseline in Figure 2 reflects the current cost of the Copermittees' current MRP.

[Table 1 - Cost Savings resulting from proposed MRP changes]

[Figure 1 - graph comparing draft permit costs with Requested Changes]

[Cost comparison table with Proposed Changes]

Although the requested adjustments to the MRP will not eliminate cost increases, and will result in an MRP which is more expensive, on a per capita basis, than the South Orange County MRP, they provide a more manageable program for the Copermittees.

The Copermittees requests that the Board make the adjustments identified in Attachment 4 before Permit adoption.

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**Comment Response**

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See the response to comment 92.

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**Comment #** 144

**Commentor** 4

**Comment Subject** Monitoring

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**Specific Comment**

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[From Attachment 4 to the RCFC&WCD comment letter]

Prior to the release of the first draft of the MRP requirements to the Copermittees, Water Board staff indicated the program would be similar to the South Orange County MS4 Permit (OC Permit) yet scaled appropriately to the Santa Margarita Region. The first draft of the MRP was not released until three weeks prior to the public release draft MRP. To our surprise, instead of being appropriately scaled, the draft MRP actually exceeded the scope and costs of the OC Permit MRP. Due to limited time, Water Board staff recommended the discussions regarding MRP requirements be brought before the Regional Board at the appointed October 13, 2010 Board Hearing. This was particularly frustrating as it was not consistent with our mutual goal to resolve technical issues at the staff level and bring only necessary policy issues to the Regional Board.

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**Comment Response**

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Please see the response to comment 92. For clarification, San Diego Water Board allowed the Copermittees to select and prioritize topics for discussion at these meetings. Dedicated discussions regarding the MRP occurred at multiple meetings, including prior to public release of the Tentative Order. Some modifications and agreements were made regarding the MRP, but many issues came to an impasse at the staff level. Where impasse was met, staff provided a recommendation that the discussions be brought to the Board following review of public comments.

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**Comment #** 145      **Commentor** 4      **Comment Subject** New Development

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**Specific Comment**

Section F.1.f of the draft MS4 Permit includes new requirements for the Copermittees to verify that Post-Construction BMPs are being appropriately maintained. The new requirements appropriately develop a risk-based approach to inspections, defining eight factors that the Copermittees must consider in determining 'high-priority' projects.

However, language in Section F.1.f.(2)(a) removes that discretion by stating:

'At a minimum, high priority projects include those projects that generate pollutants (prior to treatment) within the tributary area of a 303(d) listed waterbody impaired for that pollutant; or those projects generating pollutants within the tributary area for an observed action level exceedance of that pollutant.'

This language is excessively broad, and will require virtually all sites in the watershed to be designated as 'high priority' and, therefore, subject to annual inspections. This language is inconsistent with the goals of a socially responsible and affordable permit and should be modified for several reasons:

Inspections frequencies should be based on risk of discharge. Annual inspections are not needed for all sites that generate a specific pollutant. For example, if a site generates a pollutant associated with 303(d) listing, but the site retains runoff onsite or stores those pollutants indoors, annual inspections would be unnecessary. However, sites that store 303(d) listed pollutants outdoors or otherwise have a high risk of discharge should be inspected more frequently.

The language dilutes Copermittee resources by requiring annual inspections of low-risk sites, preventing the Copermittees from appropriately concentrating resources on problematic sites/sources. This is because when an action level is exceeded then all parties in the watershed are assumed guilty until proven innocent.

While the Copermittees are not opposed to implementing a program to verify that these BMPs are being maintained, it is critically important that they be provided the flexibility to determine which sites warrant annual inspections. Specifically, the Permittees request that the language in F.1.f.(2)(a) be amended as follows prior to adoption of the Permit:

At a minimum, high priority projects include those projects that have been determined to be the source of an observed action level exceedance.

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**Comment Response**

Please see the response to comment 94.

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**Comment #** 146      **Commentor** 4      **Comment Subject** Commercial/Industrial

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**Specific Comment**

Section F.3.b. of the draft Permit includes requirements to inventory and inspect Commercial and Industrial businesses. The draft Permit expands upon existing inventory and inspection requirements in two problematic ways:

It requires significantly more businesses to be inspected, and

It includes new requirements specifying what the Copermittees are required to inspect when they are onsite.

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**Comment Response**

Please see the response to comments 96 and 98.

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**Specific Comment**

Sections F.3.b.(1)(a)(i) and (ii) identify 42 categories of businesses that must be inventoried and inspected based on risk of pollutant discharge. However, Section F.3.b.(1)(a)(iii) adds virtually any business in the Permit area, independent of pollutant discharge risk:

'All other commercial or industrial sites/sources within or directly adjacent to or discharging directly to receiving waters within environmentally sensitive areas (as defined in Attachment C of this Order) or that generate pollutants tributary to an observed exceedance of an action level.' (Bold emphasis added)

In effect, section F.3.b.(1)(a)(iii) adds the following additional businesses:

EVERY business that is adjacent to (or within) an Environmentally Sensitive Area (ESA), regardless of whether the business generates or discharges any pollutants, and

EVERY business that 'generates' pollutants which happens to be upstream of an action level exceedance, regardless of whether the site has ever discharged any pollutants.

This language expands the list of sites far beyond the current requirements, and well beyond those sites that actually pose a threat to water quality. This is clearly unnecessary and should be removed for several reasons:

It inappropriately separates 'risk' from the 'response', by requiring the Copermittees to inspect businesses irrespective of the risk that the business poses to water quality. For example, this language would require the Copermittees to expend resources and time inspecting hair salons, office buildings and other activities that happen to be adjacent to an ESA. This inappropriate broad-brush approach to permitting actually works to discredit the Copermittees' NPDES programs and dilute resources, rather than enhancing protection of water quality.

It will further remove the flexibility that the Copermittees need to be able to re-allocate resources to inspecting and following up with sites/sources that are problematic.

Therefore, the Copermittees request that the language in F.3.b.(1)(a)(iii) be amended as follows prior to adoption of the Permit:

All other commercial or industrial sites/sources that have been determined to be the source of an observed exceedance of an action level.

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**Comment Response**

Please see the response to comment 96.

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**Specific Comment**

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Additional items to review during inspections:

Section F.3.b.(4)(a) specifies what the Copermittees must review when performing an inspection. The new requirements in subsections (i) and (ii) to review BMP implementation plans, and review facility monitoring data, respectively, are an unnecessary new mandate. They should be removed for several reasons:

The requirements burden the Copermittees with reviewing information that is required under General Permits and is the responsibility of the Regional Board to enforce.

The requirements would significantly increase the inspection time for sites with General Permits and endanger an existing collaborative inspection program (Compliance/Assistance Program (CAP)) that leverages the time highly trained Environmental Health Inspectors spend onsite for Certified Unified Program Agencies (CUPA) and Food Services inspections to also conduct NPDES inspections. The CAP program not only utilizes highly trained Environmental Health inspectors, but also regionalizes the inspections and, therefore, provides multiple benefits including uniformity, reduction in total number of inspections and higher-quality inspections. The Environmental Health HazMat inspection program administrators have indicated that they cannot accommodate the additional time required to implement the new requirements, as they would unduly cut into their ability to meet their own state-mandated inspection frequencies.

By virtue of eliminating the CAP program, the requirements would effectively mandate a more fractured and disconnected set of inspections for the businesses, contrary to CAL EPA mandates for consolidated inspections, and in turn diluting the effectiveness of the program.

The Copermittees request that the language in F.3.b.(1)(a)(iii) be amended as follows prior to adoption of the Permit:

(a) Inspection Procedures: Inspections must include but not be limited to:

(iii) Check for coverage under the General Industrial Permit (Notice of Intent (NOI) and/or Waste Discharge Identification Number), if applicable;

(iv) Assessment of compliance with Copermittee ordinances and Copermittee issued permits related to runoff;

(v) Assessment of the implementation, maintenance and effectiveness of the designated minimum and/or enhanced BMPs;

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**Comment Response**

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Please see the response to comment 98.

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**Specific Comment**

Section F.3.d. proposes a program to develop an inventory of existing developments that may be candidates for future water quality retrofits. The requirement goes on to encourage the Copermittees to collaborate with local property owners to promote urban retrofit in an effort to accelerate reductions in pollutant loading from existing urban areas.

Although laudable, this requirement has two significant problems:

1) The program is self-defeating as it contains no "carrots" to lure private property owners into participating in the program. Any property owner that is interested in volunteering in this effort would be required to fully comply with all provisions of the draft MS4 Permit. This includes preparation of compliance documents such as SSMPs, LID and hydromodification studies, subjecting themselves to additional regulatory scrutiny through business and BMP inspection programs required by the MS4 Permit, and otherwise incurring a myriad of costs and requirements. These costs and requirements would provide a strong disincentive to participate in a retrofit program. This program will only work if it is modified to remove these disincentives.

2) Current and projected economic conditions will limit the interest and participation of private property owners. Long-term economic predictions for Riverside County indicate that assessed valuations and property values will likely remain stagnant for the term of this Permit. Similarly, sales tax and unemployment are not expected to significantly improve either.

Without Co-Permittee resources to supplement private retrofit projects, the current economic disincentives for private redevelopment that are built into the program and the current impact of the economy on private property owners, there is no real value to the program.

**PREFERRED POLICY CHOICE:** The Permittees strongly request that this program be deleted for the aforementioned reasons.

Alternatively, and at minimum, the Copermittees request that the schedule for completion of the retrofitting program be revised to provide for development during the term of the Permit and submittal of the proposed program with the next ROWD. This will allow the Copermittees to defer expenditures related to development of the program until later in the Permit term when it is hoped that economic conditions and local revenues will improve. The Copermittees expect few opportunities for retrofit until the economy improves. Due to the Copermittees' limited ability to require retrofit on private property, our best opportunities for retrofit may be associated with approvals of proposed modifications of existing developments.

**ALTERNATE POLICY CHOICE:** If the Retrofit requirements are not removed, the Copermittees request that the Regional Board modify Section F.3.d. as follows:

Each Copermittee must develop and implement a retrofitting program that meets the requirements of this section upon submittal of the ROWD.

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**Comment Response**

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Please see the response to comment 99.

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**Specific Comment**

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[From Attachment 4 to the RCFC&WCD comment letter]

One of the most significant issues with the MRP is that the Copermittees proposed several new special studies in the ROWD. The Copermittees moved forward on these studies in good faith, including a \$3,000,000 LID Demonstration and Testing Facility at the District headquarters in Riverside. The final MRP does not recognize any of these efforts, and instead mandates six new special studies and a habitat monitoring program. Initially, Board staff indicated that these six studies were for discussion and that it was not their intent to include all of the studies, however, later Board staff changed their position and mandated all of the studies. Further, the habitat monitoring program was actually removed from the Orange County MS4 Permit due to the addition of the NAL/SAL monitoring which was expected to effectively address the underlying habitat monitoring questions. These unnecessary additions put the Copermittees in the precarious position of having to abandon special studies that were already deemed by local stakeholders to be of critical value to managing stormwater within our region.

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**Comment Response**

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San Diego Water Board staff did review the proposed special studies within the ROWD. Staff have made changes to the Special Studies to include the SMC Bioassessment study while concurrently removing the requirement for twice-annual bioassessment monitoring, and removed an additional special study on unpaved roads prior to public release of the MRP. In the 2004 SMC report, special studies are recommended when preliminary source identification work identifies a receiving water problem and/or to answer receiving water questions related to MS4 discharges not addressed by core monitoring programs. In addition, many of the special studies are regional issues, and the MRP allows Copermittees to propose participation in regional efforts to supplement and/or replace MRP requirements. San Diego Water Board staff did not include the Copermittees request to include a site-design LID special study in the MRP because it does not qualify as a MRP special study and the proposed study is outside of our jurisdictional region. Given the purpose of including special studies in the MRP, the proposed LID special study has no relation to a receiving water problem, question, or evaluation (including source identification monitoring). While the San Diego Water Board does not want in any way to discount the importance of LID demonstration and BMP testing, the study would only have an indirect relationship to the MRP.

In regards to the High Priority Inland Aquatic Habitat Monitoring (“habitat monitoring program”), this requirement was included as an important core MRP element per recommendations by the 2004 SMC report, of which the Copermittees took part. The High Priority Inland Aquatic Habitat Monitoring requirements were constructed to allow the Copermittees a maximum level of flexibility when proposing their monitoring program. For example, the Copermittees could choose to select some SAL/NAL monitoring outfalls and stream assessment monitoring at a site they deem to be High Priority Inland Aquatic Habitat. Furthermore, unlike Orange and San Diego County, the Copermittees’ monitoring is limited only to inland surface waters. In regards to the removal of the High Priority Inland Aquatic Habitat requirement from Orange County, the removal was made under the Board’s direction to attempt to make Orange County’s MRP as “cost-neutral” as possible while prioritizing focus areas for monitoring. This direction was made due to the performance of the Orange County monitoring program during the previous permit term. The removal of the requirement was not a “trade” for NAL/SAL monitoring. MS4 effluent monitoring was already an existing MRP element prior to inclusion of NALs and SALs.

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**Comment #** 151

**Commentor** 4

**Comment Subject** Monitoring

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**Specific Comment**

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[From Attachment 4 to the RCFC&WCD comment letter]

The proposed draft MRP includes additional stations, constituents, data analysis and multiple special studies that exceed other programs such as South Orange County's or established standards of practice. These elements will not add substantively to the understanding of MS4 water quality impacts within the Santa Margarita Region and vastly exceed the ability of the Copermittees to pay and staff. Table 1 summarizes the Copermittees' requested revisions to the draft MRP and the costs savings from each revision.

These changes are also critical as the draft MRP proposes a program that exceeds available monitoring staffing and equipment resources. The District is currently in the process of recruiting for budgeted positions that were based on the monitoring program contained in our ROWD. However, review of the MRP has determined that our estimations were woefully inadequate. The MRP special studies and other requirements require scientists and other staff with specialized training and backgrounds that are not readily available. The District will likely have to find staff with generalized knowledge in related fields and spend significant resources training them to be knowledgeable in the science of stormwater management. Even if we were to consult out most of the work, we would still need specialized staff to scope, manage and review the consultants' work. It is not feasible to find, recruit and train the necessary staff and also deploy the proposed MRP in the time allotted. The Copermittees' proposed revisions scale requirements to a more financially attainable and manageable level. Detailed justifications for each revision are described below.

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**Comment Response**

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Please see the response to comment 92.

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**Specific Comment**

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[From Attachment 4 to the RCFC&WCD comment letter]

Revision: Request wet weather monitoring to be required twice a year instead of three times a year.

Justification: (1) The Water Board Staff has referenced the SMC guidance and indicated not enough data has been collected to warrant a requirement change from three wet weather samples to two. However this guidance states once three wet weather samples have been collected for three years, sampling for two wet weather events is acceptable. This data has been collected by the Copermittees. The Copermittees successfully collected three wet weather events for three reporting periods; in addition, the Copermittees have over 10 years of data to form the basis of future analyses. Although the methods of collection have changed, our statistical analysis indicates that there is no statistically significant difference between data sets collected during prior terms and the current term. (2) The current OC and SD Permits require only two wet weather samples. (3) The Santa Margarita Region is semi arid with ephemeral flows, sampling for a third storm event has proven, and will continue to prove difficult and may result in non compliance due to climate (lack of storm events). (4) The cost to Copermittees to fund a third wet weather monitoring event during this permit term is significant.

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**Comment Response**

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The referenced SMC guidance recommends 3 storm events for at least 3 years, after which a power analysis should be conducted to determine what, if any, changes should be made. The ROWD provided an analysis that stated not enough data was available statistically detect any trends. Furthermore, two issues remain regarding the mass loading data collected to date:

1) Much of the mass loading monitoring had deficiencies that were documented in the 2008 USEPA audits. For example, the audits found the Copermittees collected grab in lieu of manual composite samples. These deficiencies make answering MRPs core management questions, as well as meeting the goals, very difficult. Composite sampling enables a better calculation of the extent and magnitude of impacts on receiving waters (i.e. loading, first flush, event mean concentrations, etc...)

2) The required list of pollutants have not been monitored at mass loading stations under the current Order.

The current Orange and San Diego County MRPs have a reduced frequency because they have collected a large number of samples from representative storms, have done composite sampling, and have sampled the first storm event of the rainy season. The statement regarding inability to sample storms in the Santa Margarita HU is addressed in the 2008 USEPA Audit Inspection Report.

Lastly, the draft MRP is consistent with the Santa Ana MRP (Order No. R8-2010-0033), which requires mass loading sampling for 3 storm events annually.

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**Specific Comment**

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[From Attachment 4 to the RCFC&WCD comment letter]

Revision: Request dry weather sampling method to be changed from composite sampling to grab samples.

Justification: (1) The Copermittees currently conduct dry weather sampling using an instantaneous grab sample. The MRP proposes 24-hour composite sampling, which represents a significant cost increase due to the need to construct infrastructure at the sampling sites to secure and facilitate portable automatic sampling equipment. (2) Composite samples will mask illicit discharges which is one of the primary reasons for dry weather monitoring. (3) Due to dry weather flows' steady nature, the flows can be accurately characterized using a grab sample. (4) The SMC Regional Bioassessment Program, which effectively defines the standard of practice for receiving waters monitoring, has found that chemistry samples must be collected at the most downstream transect (Transect A) to be representative of the flow through the assessed reach. This program therefore uses Grab samples collected immediately prior to benthomacroinvertebrate (BMI) and periphyton sampling. If composite sampling was required, it similarly must be done at the downstream transect; however, the composites would not be representative as they would pick up sediment, nutrients and other pollutants that had been unnaturally introduced by the BMI and periphyton collection activities. This would create an unrepresentative sample and the sampling equipment would be at risk of failure due to the suspension of sediment.

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**Comment Response**

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The purpose of dry weather mass loading is to determine concentrations and mass loads of pollutants within receiving waters during dry weather conditions. This is critical in order to meet the goals and answer the core management questions of the MRP. A 24-hour composite is required because flows may not have a steady nature during the course of 24 hours. The Copermittees are expected to utilize the concentration and loading information from the composite sampling to identify pollutants of concern that should be closely monitored for in their IC/ID monitoring. It is doubtful that 2 dry weather grab samples per year at a mass loading station will be representative of illicit discharges occurring upstream. It should also be noted that the SMC bioassessment monitoring does not include mass loading monitoring as part of receiving water monitoring. For bioassessment (stream assessment) conducted at mass loading stations, composite sampling is required to coincide with bioassessment monitoring in accordance with water chemistry sampling protocol in the bioassessment SOP. A statement to that effect has been added to the draft MRP.

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**Specific Comment**

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[From Attachment 4 to the RCFC&WCD comment letter]

Revision: Request change in toxicity testing from three organisms to two organisms.

Justification: (1) The MRP specified in the OC Permit requires toxicity testing of two organisms and this permit should not go beyond requirements found within the OC Permit due to limited funding and resources. This is an example of a simple change where cost-savings can be realized. (2) The USEPA only has chronic toxicity protocols for *Pseudokirchneriella subcapitata* (formerly, *Selenastrum capricornutum*). Therefore there are no established protocols for the other two species, and data collection results will be difficult to compare to other regions.

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**Comment Response**

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The toxicity testing required within the Orange County MRP is inappropriate for comparison to the Riverside County draft MRP, as the Orange County MRP includes toxicity testing for inland surface waters (2 organisms) as well as estuarine and marine organisms (1-2 organisms). Thus, Orange County actually includes the same number or additional organisms for toxicity testing at mass loading stations.

Furthermore, the testing of 3 organisms is recommended by USEPA and is discussed in the fact sheet. For clarification purposes, USEPA has published chronic toxicity protocols (see EPA-821-R-02-013) for

- 1) the fathead minnow, *Pimephales promelas*
- 2) the cladoceran, *Ceriodaphnia dubia*
- 3) the alga, *Selenastrum capricornutum*

In this respect, the draft MRP is consistent with the Santa Ana MRP (Order No. R8-2010-0033), which requires toxicity testing for 3 organisms of different phyla at mass loading stations.

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**Specific Comment**

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[From Attachment 4 to the RCFC&WCD comment letter]

Revision: Request that three stream assessment stations be monitored instead of six stations.

Justification: (1) The existing MS4 Permit requires three stream assessment stations annually. These stations are our mass loading stations. It should be noted that this is an ephemeral watershed. The current stations were selected because they were the only stations that had flowing water during the bioassessment sampling periods, not because they were necessary representative of urban runoff (although they are downstream of the entire MS4 system). Specifically, during dry weather, none of the current receiving waters stations receive runoff from the MS4 due to the ephemeral nature of the watershed. Similarly, efforts to find flowing water for the Regional Bioassessment Program have been challenging. For example, in 2009, the first year of the program, 35 random sites were evaluated before one perennial site could be identified. In 2010, 39 random sites were evaluated. The final sites that were selected were actually our CURRENT mass loading stations as they were the first randomly selected sites that had flow. This lack of flow was recognized by SCCWRP in establishing the distribution of Regional Bioassessment Stations in southern California. This is why southwest Riverside County is only assigned one Bioassessment station. (2) As is demonstrated above, the Copermittees are not likely to find three additional flowing stations that are indicative of impacts from MS4 discharges. The Permit requirement therefore puts the Copermittees in unavoidable non-compliance with the Permit. (3) The cost of monitoring the additional three stations is substantial, and given the relative size of the MS4 system and population of RC to OC, the additional stations are not appropriate on an environmental, economic or social justice scale.

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**Comment Response**

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The San Diego Water Board understands that there are areas within the Santa Margarita HU that have largely ephemeral and intermittent flows.

In response to the comment:

1) The existing Order requires three stream assessment stations monitored twice per year, not annually as the commentor states. Thus, 6 sampling events are currently required. Based upon discussions with the Copermittees, the draft MRP has been modified from requiring 6 stations twice per year to 6 stations once per year. Thus, the frequency of monitoring will remain unchanged from the current Order, and the Copermittees are required to sample in the spring following storm flows.

2) For the Regional Bioassessment Monitoring Program, it is important to note the station selection criteria for inclusion in the program. For example, stations selected must be representative of certain land use criteria, as well as have sufficient flows during September. The draft MRP requires the Copermittees to select 3 additional stations for monitoring. The Copermittees already have selected 1 additional station to monitor as part of the Regional Bioassessment Monitoring Program. Thus, 2 additional stations, which are not required to be monitored in the fall, will need to be selected. The San Diego Water Board does not agree that this will put the Copermittees in unavoidable non-compliance.

3) As stated above, the frequency of monitoring will remain the same as in the current Order. In regards to the relative frequency of monitoring when compared to Orange County, the initial Orange County draft had 12 stations monitored twice per year. Following discussions with the Orange County Copermittees, this was reduced to 9 stations annually. Orange County also participates in the Regional Bioassessment Monitoring Program.

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**Specific Comment**

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[From Attachment 4 to the RCFC&WCD comment letter]

Revision: Request frequency be changed from twice per year to once per year for stream assessment monitoring.

Justification: (1) The Water Board Staff and Executive Officer agreed to make this change as a trade for the Copermitees participation in the SMC Regional Bioassment special study. The change was based on findings by the Southern California Coastal Watershed Research Project (SCCWRP) scientiests indicating that there is no seasonally significant difference in bioassessment scores. The Copermitees volunteered to implement th Regional Bioassessment Program ahead of the necessary changes to the NPDES MS4 Permit program to reduce the ioassessment sampling events in a good faith effort. (2) To determine if two sampling events are in fact necessary, the Copermitees evaluated the difference in biological community scores between Spring and Fall for data collected at Lower Murrieta, Lower Temecula and Adobe Creeks during May and October from 2007 through 2009. Utilizing a Two-Way Analysis of Variance of Southern California Index of Biological Integrity (IBI) scores, with season (Spring/Fall) and year (2007 through 2009) as variables, results indicated no statistical difference between years for any of the Permittee's three sites. No seasonal statistical difference in IBI scores ( $p \geq 0.19$ ) was noted within any of the three stations, indicating that the IBI scores were consistent across seasons, regardless of the year. This data confirmed SCCWRP findings that there is not a change in the biological communities between the Spring and Fall seasons. (3) Further, the MRP within the OC Permit states that stations with year-round flow conditions may be monitored in May/June or September/October. Current assessment stations at Murrieta Creek, Temecula Creek, and Adobe Creek are perennial stations. Consistency across programs would denote assessments of these creeks once per year.

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**Comment Response**

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Pursuant to discussions with the Copermitees, the frequency has been changed to 6 sites once per year. The monitoring will be required to be conducted in the spring.

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**Specific Comment**

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[From Attachment 4 to the RCFC&WCD comment letter]

Revision: Request "a representative percentage of the major outfalls within each hydrologic subarea" (II.B.1 ) and "a representative number of major outfalls within each hydrologic subarea" (II.C.1.b.(1)) be changed to "representative major outfalls" as shown in the redlines attached to this comment letter.

Justification: (1) The draft MRP requires sampling of a representative number or representative percentage of major outfalls. This is a problematic compliance target as it focuses the program on a particular and open-ended "number" or "percent" of outfalls. By revising the language to require monitoring of "representative major outfalls", the burden is on the Copermittees to come up with a program that is truly representative, without requirements to meet an arbitrary number or percent of outfalls. The Copermittees are concerned about subareas that have many outfalls, which could require sampling of more sites than are economically feasible. These costs could escalate beyond the initial sampling event because if a NAL or SAL exceedance is recorded, source assessments studies are triggered that require additional staff time and resources. If this requirement is not revised, costs will quickly rise beyond the Copermittees' ability to sustain the MS4 compliance program.

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**Comment Response**

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The language in the draft MRP is consistent with requirements under 40 CFR 122.26 for non-storm water field screening (122.26(d)(1)) and storm water characterization (122.26(d)(2)) requirements. The language "a representative percentage of the major outfalls within each hydrologic subarea" leaves it up to the Copermittees to determine what number would be a representative percentage. The comment speculates that areas with many outfalls would require sampling of more sites than economically feasible. The San Diego Water Board does not expect the Copermittees to propose a program with a frequency that is not economically feasible nor statistically defensible. In regards to rising costs, the SAL/NAL requirements in the Order have specific language which allows for prioritization of source identification if a situation arises where the number of exceedances of action levels exceeds the ability to adequately respond. Additionally, in discussions with the Copermittees, the Copermittees were unable to provide an accurate numerical count of MS4 outfalls within the permit coverage area. Lastly, the Copermittees to date have not characterized their storm and non-storm water MS4 effluent, as monitoring is currently conducted in the receiving waters. Effluent monitoring is a critical component of MS4 programs, and as a permanent MRP element, the San Diego Water Board expects that the Copermittees will be able to collect data over the permit term that provides a representative percentage or number of MS4 outfalls that discharge for differing watershed conditions in each hydrologic subarea. The lack of representative stations was also documented in the 2008 USEPA audits. Thus, no change has been made to the draft MRP.

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**Specific Comment**

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[From Attachment 4 to the RCFC&WCD comment letter]

Revision: Request the following text revisions in footnote:

"A representative determination must consider hydrologic conditions, total drainage area of the site, land use types (commercial, residential and industrial) , costs and other considerations as appropriate."

Justification: (1) The Copermittees originally asked for clarification on what factors would be considered for "representative percentage" and Water Board staff agreed to cost being included. The failure to include cost as a factor results in a program that reduces resources and diminishes funds quickly. The revision of the above allows for cost to be included through "other considerations as appropriate". (2) Deletion of percentage is consistent with previous comments. (3) Hydrologic conditions, population density of the site, traffic density and age of the structures or building in the area are all proposed "A representative percentage determination must consider hydrologic conditions, total drainage area of the site, population density of the site, traffic density, age of the structures or buildings in the area, and land use types (commercial, residential and industrial) , costs and other considerations as appropriate." deletions because each subarea may not be sensitive to these factors and if one of this factors is applicable it will be included under the addition "other considerations as appropriate".

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**Comment Response**

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Please see section VI of the Fact Sheet for a discussion regarding cost considerations in NPDES storm water permits. To clarify, the San Diego Water Board did not agree to include cost as a specific criteria for determining a "representative percentage" of sampling points. The San Diego Water Board agreed to clarify what factors (consistent with 40 CFR 122.26) to consider when evaluating representativeness under the MRP in order to meet the goals and answer the questions of the MRP. The existing language provides sufficient flexibility for the Copermittees to consider their program cost-efficiencies when evaluating factors in the draft MRP for proposing water quality monitoring. It is unclear how the "failure to include cost as a factor results in a program that reduces resources and diminishes funds quickly." It is expected that sufficient water quality monitoring will require resources and funds. No changes were made based on this comment.

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**Specific Comment**

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[From Attachment 4 to the RCFC&WCD comment letter]

Revision: Request samples for Storm Water Action Levels (SALs) to be changed from 24-hour composite to grab.

Justification: (1) Composite sampling would result in significant increased cost due to the cost of purchasing additional automatic sampling equipment and constructing the necessary infrastructure to support its use. (2) Grab samples are likely more conservative. The Copermittees propose that grab samples be collected first and then, if a problem is indicated, the Copermittees would specify needed follow-up monitoring in the Source Assessment Monitoring Plan. (3) Freed resources can be dedicated to other key components of the program, such as follow-up source assessment studies.

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**Comment Response**

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The request to modify SALs to composites is not warranted on multiple accounts:

- 1) The draft MRP has flexibility that allows the Copermittees to select a representative percentage of sites, and frequency of sampling.
  - 2) Grab samples may or may not be more conservative depending upon the time of sampling. Composite samples are what the SALs were calculated from, are what is required under 40CFR 122.21(g)(7), and composites provide additional information crucial to storm water programs (see the responses to comments 152 and 153, for example see 40 CFR 122.26(d)(2)(iii)(B)).
  - 3) If grab samples are not representative of the discharge, it may actually waste resources on unnecessary follow-up source monitoring.
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**Specific Comment**

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The draft MS4 Permit categorically prohibits the discharge of landscape irrigation; irrigation water; lawn watering; (collectively 'irrigation runoff') and non-emergency fire fighting flow runoff to the MS4. The basis for this requirement comes from the current Orange County stormwater permit within the San Diego Region (NPDES No. CAS0108740), which prohibits such discharges.

Although irrigation runoff may have been shown to be a problem in South Orange County, it has not been shown to be causing problems in receiving waters in the Santa Margarita Region. Attachment 6 summarizes the unique conditions and other facts that warrant the restoration of irrigation runoff as a non-prohibited non-stormwater discharge category. It is important to reiterate the three key points made in Attachment 6:

Unlike the watersheds in South Orange County, the Santa Margarita Region is an ephemeral watershed;

Unlike South Orange County, the Copermittees have not identified landscape irrigation, irrigation water or lawn water as an actual source of pollutants or conveyance of pollutants to waters of the U.S.;

The draft MS4 Permit requires Copermittees to eliminate irrigation runoff TO THE MS4, which by definition, requires elimination of discharges to streets, curbs and gutters.

As noted above, the prohibition appears to hold the Copermittees responsible for any amount of irrigation runoff discharged to the curb and gutter, regardless of whether or not the discharge ever reaches receiving waters or causes or contributes to the exceedance of a water quality standard. This fact, combined with the fact that irrigation runoff has not been shown to be causing impairments in the local receiving waters, will make enforcement difficult to justify with residents and will likely result in community outrage over bans on irrigation. Further the Copermittees are not water purveyors, and as such, have little control over residential irrigation runoff outside of sending code enforcement officers out to look for incidents of excessive irrigation runoff. This is a very inefficient use of resources. In any event, the provisions as written will do little for water quality but potentially much for community outrage against water quality programs. The Copermittees do not believe this is the intent of the Board.

It is further worth noting that the Permit already contains an investigation and remediation process via Non-Stormwater Action Levels (NALs) by which the Copermittees will identify the source of problematic non-stormwater discharges. Should the source be found to be a conditionally exempt non-stormwater discharge, the permit requires the Copermittees to address that discharge or the entire category of discharges as appropriate. By allowing the NAL process to determine when and where conditionally exempt discharges need to be prohibited, the Copermittees are better positioned to justify any enforcement actions.

**PREFERRED POLICY CHOICE:** the Copermittees request that the Regional Board restore the conditional exemption for landscape irrigation, irrigation water and lawn watering as outlined in Attachments 6 and 7.

Alternatively, if the Regional Board nevertheless insists on prohibiting Irrigation Runoff, the Copermittees request that the draft MS4 Permit be revised to allow for irrigation runoff to be managed as a JRMP program, rather than as a prohibited discharge to the MS4. This alternative request is consistent with how the Permit currently deals with non-emergency fire fighting discharges, which was also removed from the list of non-prohibited non-storm water discharges. The Executive Officer stated that he would be open to consideration of a program for irrigation runoff that would address discharges from the MS4. This alternative approach allows the Copermittees to develop a program that focuses on irrigation runoff problem areas, as opposed to holding the Copermittees responsible for eliminating any instant case of over-irrigation to a street independent of threat to receiving water quality.

**ALTERNATIVE POLICY CHOICE:** The Copermittees request that the Regional Board clarify that irrigation runoff is only prohibited where it is discharged from an MS4 (into receiving waters) by adding the following language:

B.4. As part of the JRMP, the Copermittees must develop and implement a program to address pollutants from landscape irrigation, irrigation water and lawn watering identified as significant sources of pollutants to waters of the United States.

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**Comment Response**

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Please see the response to comment 100.

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<b>Comment #</b> 161	<b>Commentor</b>	4	<b>Comment Subject</b> Monitoring
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**Specific Comment**

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[From Attachment 4 to the RCFC&WCD comment letter]

Revision: Request removal of the High Priority Inland Aquatic Habitat Monitoring requirements.

Justification: (1) This is an entirely new monitoring program. This monitoring program was initially proposed in the Orange County NPDES MS4 Permit, but later deleted when the NAL/SAL monitoring requirement was added. This trade was made as it was expected that the outfall monitoring data from the NAL and SAL program would effectively answer the underlying management question – "are MS4s impairing beneficial uses in priority aquatic habitat areas?" The underlying logic for removing the requirement in Orange County similarly applies here. Given the current economic conditions and the fact that this was considered and deleted from the OC Permit; the Copermittees respectfully request that this requirement similarly be deleted from the Riverside County MRP.

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**Comment Response**

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Please see the response to comment 150.

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<b>Comment #</b> 162	<b>Commentor</b>	4	<b>Comment Subject</b> Economic
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**Specific Comment**

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It is fundamental that the MS4 Permit be economically, technically, and legally feasible. To be credible, and to pass legal muster, MS4 Permit requirements must demonstrable a nexus to water quality improvements. Instead the current requirements, although well intended but not always well developed, will put the Copermittees in non-compliance since we cannot afford to implement all the requirements and consequently this will not lead to water quality improvement.

The present economic crisis has made daily headlines over the past three years and Riverside County has been identified as the 11th most impacted county in the nation. In the ROWD and throughout the development of the draft MS4 Permit, the Copermittees have provided abundant publicly available information regarding the impact of this crisis on their revenues, staffing, and programs. Virtually every program and service, including public safety services, has been impacted, and others have been eliminated. Contingency reserves have been depleted to the lowest levels allowable to maintain operations. At this point, the Copermittees cannot increase water quality compliance spending without real risks to reducing spending on existing state and federal mandates or other much-needed local programs and services. As proposed, the draft MS4 Permit is economically infeasible.

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**Comment Response**

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Please see the responses to comments 8, 9, 52, 134, and 136. The Tentative Order is economically, technically, and legally feasible as evidenced in the supporting Fact Sheet.

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<b>Comment #</b> 163	<b>Commentor</b>	4	<b>Comment Subject</b> General
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**Specific Comment**

In an effort to promote a viable 4th-term MS4 Permit, the Copermitees proactively engaged Regional Board staff in a collaborative dialogue with the intent of developing an economically feasible MS4 Permit that was protective of receiving water quality in the Santa Margarita Region. However, the following constraints have limited the benefits of the process:

1. The discussions were curtailed because the Board expected the draft MS4 Permit to be heard in October;
2. The Board had adopted the South Orange County MS4 Permit as a "model" permit, and, therefore, would have to approve any major revisions to the provisions of that Permit; and
3. The inclusion of several new provisions of the draft MS4 Permit addressing unpaved roads, inspection programs and monitoring requirements go well beyond the Orange County Permit.

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**Comment Response**

Please see the responses to comments 121 and 131. The commentor presents a paradoxical argument of on the one hand complaining that the San Diego Water Board uses the South Orange County MS4 permit as a model permit and on the other hand complaining about unqiues provisions in the Tentative Order that are not in the South Orange County MS4 permit.

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<b>Comment #</b> 164	<b>Commentor</b>	4	<b>Comment Subject</b> Economic
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**Specific Comment**

As noted in the Executive Summary, the MS4 Permit adopted for South Orange County was ultimately developed for a region with substantial coastal resources and perennial streams, twice the population, significantly higher property tax revenues, and more affluent tax payers.

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**Comment Response**

Please see the responses to comments 8, 9, 115, 116, 122, 126, 127, 130, 134, and 136.

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**Comment #** 165      **Commentor** 4      **Comment Subject** Monitoring

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**Specific Comment**

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[From Attachment 4 to the RCFC&WCD comment letter]

Revision: Request alteration of Special Study Program.

Justification: The Draft Permit requires six special studies to be conducted (TMDL Development and Implementation, Sediment Toxicity, Trash and Litter Investigation, Agricultural, Federal and Tribal Input Study, MS4 and Receiving Water Maintenance Study and Intermittent and Ephemeral Stream Perennial Conversion Study). This is in excess of the four special studies required by the OC MRP. Given the larger MS4 Permit Area, population and resources available to South Orange County, the additional studies proposed on Riverside County are inappropriate from a social, economic and environmental justice standpoint. (1) Water Board staff acknowledged multiple studies were added to the draft MRP with the intention that would be eliminated. (2) The issues addressed by these studies are not all specific to the Santa Margarita Region and would be more appropriate to be evaluated as part of a broader regional study, such as the Sediment Toxicity study. (3) The Agricultural, Federal, and Tribal Input Study is specifically inappropriate as it requires the Copermittees to monitor the discharges of other entities subject to separate NPDES regulations. (4) The Intermittent and Ephemeral Stream Perennial Conversion Study is specifically inappropriate as it incorrectly presumes that such ephemeral streams are actually being converted to perennial systems within the permit area due to MS4 discharges.

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**Comment Response**

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Please see the responses to comments 92 and 150. San Diego Water Board staff included special studies for issues of concern to the San Diego Water Board specific to the Santa Margarita Watershed, based upon our current knowledge of the watershed, including complaints and enforcement within the region, to answer specific questions outside the scope of the core MRP requirements, and as a result of issues raised in the ROWD. Based upon discussion with the Copermittees, one of the Special Studies was removed from the draft MRP prior to public release. For those remaining, San Diego Water Board staff included studies thought to be of importance from a water quality standpoint, and their removal or inclusion is appropriately considered by the Board.

Additionally, Copermittees are correct that some studies have a regional context and are of regional importance. Thus, as in the Orange County MRP, the Copermittees can propose to participate in a regional monitoring approach to supplement and/or replace MRP requirements. This is subject to Executive Officer approval.

Please see the response to comment 167 in regards to the Sediment Toxicity Study.

Please see the response to comment 168 in regards to the Agricultural, Federal, and Tribal Input Study.

Please see the response to comment 172 in regards to the Intermittent and Ephemeral Stream Perennial Conversion Study.

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**Comment #** 166      **Commentor** 4      **Comment Subject** General

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**Specific Comment**

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By contrast, the ephemeral conditions found in the Santa Margarita Region result in stream channels that are dry during dry weather conditions and receive less rain during wet season conditions. The stream flow conditions in the Santa Margarita Region are entirely unlike the significant perennial flow conditions found in South Orange County. The proposed changes contained herein address these realities. The proposed changes also address necessary changes to ensure that the Copermittees can continue to afford implementation of the draft MS4 Permit given the significant economic disadvantages faced by the Santa Margarita Region, disadvantages that have been exacerbated by the impacts of the recession.

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**Comment Response**

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Please see the response to comment 175

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**Comment #** 167      **Commentor** 4      **Comment Subject** Monitoring

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**Specific Comment**

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[From Attachment 4 to the RCFC&WCD comment letter]

Sediment Toxicity – In the waterbodies found in the Santa Margarita watershed (which are intermittent at best and dry most of the time) the idea of investigating sediment toxicity and its impacts on benthic macroinvertebrates seems a reach. Current sediment toxicity monitoring in the State is focused on year round streams and estuaries (e.g. the Delta ). Furthermore the current state of sediment toxicity monitoring is at best in its infancy as is the State's policy regarding Sediment Quality Objectives. It would seem that a more reasonable approach associate with sediment toxicity is to allow the science to catch up with the policy and for the Copermittees to learn from these other statewide efforts.

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**Comment Response**

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As discussed in the Fact Sheet, Pyrethroid pesticides were identified from TIEs conducted in response to toxicity observed during sampling as part of the triad approach at Temecula and Murrieta Creek. This monitoring was water chemistry specific and did not include sediment monitoring for pesticides. Additionally, Temecula Creek, Murrieta Creek and the Santa Margarita River were 303(d) listed for toxicity for the 2008 list. In regards to current sediment toxicity monitoring, southern California specific monitoring has shown sediments to contain pyrethroids, specifically following storm events from residential areas. Thus, irrespective of watershed hydrology (i.e. intermittent streams), pyrethroids can have a large impact on the benthos during periods of flow both during and following storm events, which may be reflected in the observed low IBI scores.

The commentor also includes some discussion regarding the science behind sediment toxicity monitoring and the status of sediment quality objectives policy at a statewide level. It is important to note that the science is well-established as documented in peer-reviewed studies, and the rate of development of state policy does not provide a sufficient basis for removal of the special study. It is unclear how the science needs to “catch up with the policy,” and how this warrants not evaluating the receiving waters for a pollutant already documented to be present in toxic amounts.

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**Comment #** 168      **Commentor** 4      **Comment Subject** Monitoring

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**Specific Comment**

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[From Attachment 4 to the RCFC&WCD comment letter]

Agricultural, Federal, and Tribal Input Study - Ongoing monitoring efforts in the Central Valley and the Los Angeles Regions for the Agriculture Waiver Program are more robust and statistically valid to make any efforts by Riverside County to be pale in comparison and likely insignificant. Likewise, monitoring in watersheds (e.g. Lake Tahoe, and the northwest part of the State) where water bodies are impaired by sediment and where Federal and Tribal land uses have inputs to the impaired water bodies is significant and should take precedent over any efforts in Riverside County. As previously noted, it is inappropriate to require the Copermittees to not only monitor their own discharges, but also expend resources monitoring the discharges of others. The Regional Board has authorities to require these sources to collect their own data and should exercise that authority appropriately if such studies are required.

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**Comment Response**

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This special study was included based upon information provided in the Copermittees' ROWD, as the Copermittees stated their concern regarding the quality of storm water being discharged into their MS4s from Agricultural, Federal and Tribal areas without sufficient supporting data. The Copermittees are responsible for flows into, through and from their MS4s, and they cannot passively accept discharges from third parties (see Finding D.3.d and Discussion in the Fact Sheet). This special study is intended to identify those flows and determine the level of pollutants being discharged into their MS4s.

The information from this study will be useful in determining whether pollutant contributions from agricultural, federal, and tribal areas are actually a significant source of pollutants entering the Copermittees' MS4 systems, as they assert. This study can also be done in conjunction with the monitoring that will be performed by the irrigated agriculture community for Conditional Waiver No. 4.

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**Comment #** 169      **Commentor** 4      **Comment Subject** Monitoring

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**Specific Comment**

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[From Attachment 4 to the RCFC&WCD comment letter]

MS4 and Receiving Water Maintenance Study - It is likely that every flood control district in the State and Caltrans would be impacted by the MS4 and Receiving Water Maintenance Study; therefore it would be imperative to have a well thought out, comprehensive, and regional study to answer the questions being posed in the MRP. Requiring the Copermittees to take on this responsibility is misleading and will not be sufficient to answer the broad questions being posed in the MRP. A more reasonable approach would be to model a regional program similar to the current SCCWRP efforts to assess hydromodification requirements for southern California.

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**Comment Response**

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Although MS4/receiving water maintenance activities are conducted throughout the region, they are not conducted in the same manner and magnitude as is the practice in Riverside County. This special study was included with the intention that the study would serve as a pilot study to assist in the San Diego Water Board's determination if further investigation is warranted. The special study requirements are flexible and require, at a minimum, 2 sites (1 reference and 1 maintained) with pre and post monitoring for 9 pollutants. There is no specific requirement for sampling frequencies, durations or specific locations. However, the Copermittees are encouraged to propose a regional approach or program, which is allowed under the draft MRP, with EO approval.

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**Comment #** 170      **Commentor** 4      **Comment Subject** Economic

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**Specific Comment**

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The requirements in the Permit must protect beneficial uses in a cost effective manner. It is always a balance to protect water quality and avoid unnecessary increases in program compliance costs. Balancing local water quality needs and funding limitations should be paramount in the current economic climate. Proposed program expansions must be carefully weighed against economic realities and be justified by conditions actually found in the Santa Margarita Region. As described, unpaved roads and business inspections have been effectively addressed by existing programs, yet the draft MS4 Permit proposes requirements that can only be met by establishment of new compliance programs and, in the case of the business inspections, elimination of the highly effective CAP.

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**Comment Response**

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Please see the responses to comments 52, 130, and 134. Through meeting with the Copermittees over a dozen times spanning several months, the Tentative Order was modified to address cost effectiveness.

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**Comment #** 171      **Commentor** 4      **Comment Subject** General

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**Specific Comment**

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The legislature created Regional Boards to protect our beneficial uses while carefully considering the technical and economical feasibility of such protection. Even in the best of economic times, state and local government must carefully manage public revenues. A policy-level decision by the Regional Board is necessary to direct staff to work with the Copermittees to address the comments contained herein. The Copermittees request your support in our effort to develop an economically, technically, and legally feasible MS4 Permit that is appropriate to the Santa Margarita Region. As noted in the opening Executive Summary of this comment letter we specifically request that you direct Regional Board provide staff with direction to resolve the issues identified in this letter and attachments.

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**Comment Response**

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Please see the responses to comments 8, 9, 52, 121, 134, 136, 162, and 170.

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**Specific Comment**

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[From Attachment 4 to the RCFC&WCD comment letter]

Intermittent and Ephemeral Stream Perennial Conversion Study – Finally, review of historical water resource data by the Copermittees (as indicated in the ROWD), USGS and state and federal courts have all found that the construction of Vale and Skinner dams has significantly increased the ephemeral nature of local watersheds, resulting in much drier conditions than naturally occurred. This is why Rancho California Water District is required to discharge raw water down the Santa Margarita River at the County Line. Requiring a study to study the impacts of ephemeral conversion demonstrates a clear lack of understanding of historical and current receiving water conditions. Further, similar to our comment above regarding the MS4 and Receiving Water Maintenance Study, this study is better addressed at a regional or statewide level. It is not possible to develop a sufficient local database to statistically validate any impacts from non-stormwater discharges within any reasonable timeframe. Furthermore any minimal monitoring effort that could be provide by the Copermittees would not comprehensively address the questions being proposed in the MRP and would be a waste of resources. Again a regional approach, whether it be SCCWRP or other combination of stormwater Copermittees, would be a more logical and constructive approach to address this issue.

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**Comment Response**

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The San Diego Water Board does not disagree with the impact of impoundments upon downstream hydrology, including historical conditions within the Santa Margarita HU. However, the commentor misunderstands the context of the special study. The purpose of the investigation is to assess if exempted non-storm water discharges from the MS4 are negatively impacting beneficial uses through the conversion of waters that historically were ephemeral or intermittent into perennial systems. For ephemeral systems, any discharge of effluent becomes the receiving water, and as such, can alter beneficial uses due to pollutants, flow, invasives species, etc... which would otherwise not be present. As described, this special study is meant to coincide with non-storm water discharge monitoring and provide a qualitative and quantitative evaluation of beneficial uses for receiving waters subject to the non-storm water discharges. This is expected to aid the Copermittees IC/ID efforts to determine if the discharges are causing a condition of pollution, contamination, or nuisance due to the non-storm water flows. The San Diego Water Board contends this is not a waste of resources.

The special study has been written with a great deal of flexibility and does not require the development of a database for statistical validation of results as the commentor states. Additionally, it is unclear what questions are proposed in the special study that could not be comprehensively addressed.

Again, the Copermittees may propose a regional approach under the draft MRP to supplement and/or replace monitoring requirements. While a regional approach may be warranted, the study's intent is to provide site-specific non-storm water evaluations within the Santa Margarita HU.

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**Specific Comment**

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[From Attachment 4 to the RCFC&WCD comment letter]

The Copermitees have proposed maintaining two of the special studies (TMDL Development and Trash Assessment), while replacing the other four with locally preferred special studies already in place (Regional Bioassessment Program and LID BMP design, maintenance, and effectiveness study). The Copermitees believe the alternate proposal provides information that is directly relevant and beneficial to the Santa Margarita Region. This would result in an annual cost savings of \$314,000 per year. This would maintain parity with the OC Permit, which only has four special studies, three of which are identical to the studies proposed below (TMDL Development, Regional Bioassessment, Trash and Litter investigation). Specific language to incorporate the new studies is included in the redline markup of the MRP.

The Copermitees propose the following studies, the write-up for which can be found in Attachment 9 to the comment letter:

1. TMDL Development and Implementation

2. LID BMP design, maintenance and effectiveness study and demonstration

This study will be valuable in ensuring BMPs that are required are effective and the benefit and integration of LID BMPs into a site is understood. This proposed study would directly affect the Copermitees ability to ensure effective LID BMPs are being implemented.

3. Regional Bioassessment study

All the Southern California counties have committed to participate in this study, with the understanding that it would be written into the MS4 permits as a special study for which they would get credit. The Copermitees have been proactively implementing this study without a MS4 Permit requirement, and want to be able to continue to support these regional studies.

4. Trash and Litter Investigation

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**Comment Response**

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The San Diego Water Board is amenable to the addition of the Regional Bioassessment as a special study, and has modified the Stream Assessment Monitoring Frequency to once annually, in exchange. The draft MRP has been modified accordingly. The San Diego Water Board disagrees with including the LID special study (see the response to comment 150).

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**Comment #** 174                      **Commentor**     4                      **Comment Subject** Unpaved Roads

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**Specific Comment**

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[From Attachment 5 to the RCFC&WCD comment letter]

The Draft Municipal Separate Storm Sewer System Permit (Draft Tentative Order No. R9-2010-0016; NPDES No. CAS0108740) for the Santa Margarita Region of Riverside County (Draft MS4 Permit) includes proposed findings and requirements for development and maintenance of unpaved roads that are redundant to existing regulatory requirements. The proposed requirements for maintenance of unpaved roads may lead to the unintended consequence of discouraging maintenance of the majority of the unpaved roads in the Santa Margarita Region, which may increase the potential for erosion and sediment discharge from such roads. Statements in the Fact Sheet and Findings, monitoring data, and Permittee observations and experience do not support identification of unpaved roads as a significant source of pollutants to receiving waters in the Santa Margarita Region, thereby warranting additional regulation of unpaved roads.

The Copermitees request that the proposed requirements for development and maintenance of unpaved roads be removed from the Draft MS4 Permit. The Copermitees believe that enhancement of existing programs by identifying Best Management Practices (BMPs) specific to maintenance of unpaved roads and providing public education to owners and contractors providing maintenance of privately maintained unpaved roads will be as effective as the program in the draft Permit at substantially less cost. If the San Diego Regional Board determines that unpaved roads within their jurisdiction require further regulation, the Permittees believe that the appropriate regulatory mechanism is a General Permit (Waste Discharge Requirements or NPDES Permit) since the Draft MS4 Permit addresses only a fraction of unpaved roads within the jurisdiction of the San Diego Regional Board.

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**Comment Response**

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San Diego Water Board disagrees with the conclusion that these requirements are redundant to existing regulatory requirements.

Also, the comment fails to explain the reasoning or logic behind their assertion why requiring maintenance of unpaved roads will discourage the maintenance of the majority of unpaved roads. If indeed a reduction in maintenance does occur, to whatever extent that reduction results in water quality impacts, it must be addressed through the requirements proposed.

The San Diego Water Board has identified unpaved roads as a significant source of pollutants; please see the response to comment 138 for recent examples. The requirement to regulate unpaved roads has not been removed from the Tentative Order. Certain changes have been made to the exact language as requested by the Copermitees. The San Diego Water Board strongly encourages the Copermitees to educate the public on proper maintenance of unpaved roads. The San Diego Water Board reserves the right to issue a general permit regulating unpaved roads.

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**Comment #** 175                      **Commentor**     4                      **Comment Subject** General

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**Specific Comment**

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[From Attachment 5 to the RCFC&WCD comment letter]

The stream system in the Santa Margarita Region is ephemeral, with only small isolated segments exhibiting natural perennial flow due to rising groundwater. Such a stream system does not support fish migration. Runoff from the Santa Margarita Region naturally exhibits high sediment loads due to precipitation patterns, limited vegetative cover, soil types and steep topography.

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**Comment Response**

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The San Diego Water Board disagrees with the comment as an over generalization of the stream conditions within the Santa Margarita watershed. The Santa Margarita River has historic fish migration and historic perennial flows. Groundwater harvesting has drawn down the water table and reduced surface flow availability. In addition, urbanization has created localized perennial flows and wetlands in historically ephemeral areas, much like other areas throughout the region.

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**Comment #** 176                      **Commentor**    4                      **Comment Subject** Unpaved Roads

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**Specific Comment**

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[From Attachment 5 to the RCFC&WCD comment letter]

Most existing unpaved roads in the Santa Margarita Region are private roads on private property that have not been engineered and have evolved through use. Such unpaved roads consist of earthen materials that have been compacted by vehicular use and do not include improved drainage, engineered grading or surface improvement. However, proposed unpaved road projects are subject to the development requirements of the MS4 Permit and the Construction General Permit and would be engineered.

In contrast to paved roads, unpaved roads are predominantly lightly traveled and found in rural areas serving economically disadvantaged residents. Many of these roads remain unpaved for economic reasons. Moreover, some residents do not want paved roads as they desire to preserve the rural/rustic nature of their communities.

**Comment Response**

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San Diego Water Board staff disagree that proposed unpaved road projects are already subject to the development requirements of the MS4 Permit and the Construction General Permit (see the response to comment 102)

The status of ownership may increase an unpaved roads' threat to water quality due to a private owner being less likely to be informed on the threat to water quality or have the ability to maintain the unpaved road. The frequency of travel may also correlate to a threat to water quality. Less frequently used roads are also less likely to be maintained, thereby being an increased threat to water quality. If residents choose to have unpaved roads as their preferred access for aesthetic reasons, those roads must have BMPs and be maintained to not cause a water quality impairment.

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**Comment #** 177                      **Commentor**    4                      **Comment Subject** Monitoring

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**Specific Comment**

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[From Attachment 4 to the RCFC&WCD comment letter]

Revision: Request "Carbamates" be removed as a constituent for analytical testing in Table 1.

Justification: The testing of carbamates should be dictated by the completion of toxicity identification evaluations (TIEs). The use of carbaryl in urban areas throughout California dropped approximately 80% between 2004 and 2008. This drop is also matched by an 80% reduction in the number of USEPA registered carbaryl products between 2004 and 2008. A downward trend since 2006 likely reflects a long-term reduction in the availability of carbaryl products due to USEPA regulatory requirements. Further, once the USEPA completes its regulatory process for the full implementation of new carbaryl restrictions<sup>3</sup>, urban carbaryl use is likely to continue to decline.

**Comment Response**

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The Copermitees have not monitored for carbamates, and thus no evidence of their presence in the discharge is available. While the reduction in registration and projected use likely limits the possibility of the presence of carbamates in the future, it does not warrant removal of carbamates from the required monitoring list. Should toxicity be detected, the inclusion of carbamates will assist with conducting TIEs. It is also important to note that other pesticides required to be monitored regularly (chlorpyrifos) and through TIEs (pyrethroids) have been detected. Thus, it is probable carbamates are present. No change has been made to the draft MRP.

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**Comment #** 178

**Commentor** 4

**Comment Subject** Unpaved Roads

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**Specific Comment**

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[From Attachment 5 to the RCFC&WCD comment letter]

Maintenance of unpaved roads in the Santa Margarita Region is generally limited to smoothing washboard depressions that have been created by vehicle use and to improve drainage by properly sloping the surface. The smoothed road surface is compacted by the grading equipment and, subsequently, by regular traffic use. This routine maintenance activity is intended to maintain original lines and grade, and the original purpose of the unpaved road. Repair of landslides and washouts, and replacement of culverts is also performed as needed, in some instances on an emergency basis. Landslide and washout repairs may require the implementation and maintenance of temporary erosion and sediment control BMPs until the disturbed area is stabilized.

The Permittees voluntarily provide limited maintenance of Copermittee maintained, dedicated and accepted unpaved roads for public access. This voluntary maintenance is provided for public safety, including emergency vehicle access, and to maintain utility of the public easement. There is no requirement that the Permittees provide this maintenance.

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**Comment Response**

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Unpaved roads should be maintained to prevent landslide and washouts that subsequently cause a water quality impairment. Regardless of ownership, the Copermittee can, through their storm water ordinances, require private owners of unpaved roads to maintain the road to prevent erosion and sedimentation downstream in receiving waters. The San Diego Water Board, however, is sensitive to the Copermittees' concerns. The unpaved roads requirements have been revised. Please see the responses to comments 101 and 139-141.

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**Comment #** 179

**Commentor** 4

**Comment Subject** Unpaved Roads

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**Specific Comment**

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[From Attachment 5 to the RCFC&WCD comment letter]

Most unpaved roads in the Santa Margarita Region are not maintained by the Permittees, but instead are private roads located on private property. Permittee staff is only allowed to enter private property if a crime or illegal activity is observed. The County of Riverside has not accepted maintenance of unpaved roads since the late 1940s and now only accepts paved roads that have been designed and constructed to County standards. Murrieta and Temecula will only approve new subdivisions with paved roadways constructed to their standards. In some instances, the Permittees maintain unpaved roads under contract to Home Owners' Associations or through Community Service Areas. However, the Permittees are prohibited by law from using Gas Tax funds for maintenance of unpaved roads on private property.

Other entities that are not under the legal authority of the Permittees also own unpaved roads in the Santa Margarita Region. These entities include: Agricultural Operators, Eastern Municipal Water District, Federal Lands, Metropolitan Water District of Southern California, Nature Conservancy, Railroads, Rancho California Water District, Southern California Edison, State of California, Tribal Lands

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**Comment Response**

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The Tentative Order only regulates those unpaved roads within the Copermittee's jurisdiction. Outside of their jurisdiction, other regulatory mechanisms will be required to address pollution from unpaved roads.

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<b>Comment #</b> 180	<b>Commentor</b> 4	<b>Comment Subject</b> Monitoring
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**Specific Comment**

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[From Attachment 4 to the RCFC&WCD comment letter]

Revision: Request "Hexavalent Chromium" be removed as a constituent for analytical testing in Table 1.

Justification: Since 2004, monitoring in the Santa Margarita Region has reflected that out of 62 total samples, there were 60 non-detected levels of Hexavalent chromium. The 2 detected levels of Hexavalent chromium occurred in April 2007 in wet weather samples. It may be notes that 2007 was the driest year on record for the region and analyzed samples reflect an extended period between wet weather events. Table 1 has been modified to reflect this change.

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**Comment Response**

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Based upon data collected to date, the requirement to monitor Hexavalent Chromium has been reduced to the 1st storm event of the season and 1 dry weather event at mass loading stations. Following results collected during the term of the Tentative Order, the inclusion of Hexavalent Chromium will be evaluated for continued monitoring. Table 1 has been modified to include this clarification.

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<b>Comment #</b> 181	<b>Commentor</b> 4	<b>Comment Subject</b> Monitoring
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**Specific Comment**

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[From Attachment 4 to the RCFC&WCD comment letter]

Revision: Request "Biological Oxygen Demand, 5day" and "Chemical Oxygen Demand" be removed as constituents for analytical testing in Table 1.

Justification: The reference in the Fact Sheet supporting the inclusion of these constituents is to the initial Phase 1 application requirements. It should be noted that the initial constituent list is not required of future permits. Further, these constituents are costly to analyze and do not provide new information that is relevant to the management of the NPDES MS4 Program.

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**Comment Response**

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Biological and Chemical Oxygen Demand (BOD/COD) provide an indication of pollution from excess sources of organic waste (biologically available and inert) such as sewage, animal waste, and plant over-production due to nutrient enrichment. The initial NPDES application requires the collection of a minimum number of constituents, including a list of constituents that are used to characterize storm water discharges. The comment does not provide any supporting evidence or documentation that warrants removal of these constituents. No changes were made based on this comment.

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**Specific Comment**

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[From Attachment 5 to the RCFC&WCD comment letter]

The evidence cited in the Finding, water quality monitoring data, and Permittee observations and experience since establishment of the MS4 Permit in 1990 do not identify unpaved roads as a significant source of pollutants resulting in water quality impairments. The Copermittees support the continued application of development and construction requirements and maintenance of temporary erosion and sediment control BMPs as specified in existing permits.

The requirements for development and maintenance of unpaved roads were proposed by Regional Board staff for inclusion in the Draft MS4 Permit just prior to its release for public comment. Prior to that time, and dating from the original establishment of the MS4 Permit requirements in 1990, unpaved roads had not once been mentioned by Regional Board staff as a significant source of water quality impairment requiring additional regulatory.

The discussion of Finding D.1.c. states that the inclusion of unpaved road requirements was based on "investigations and complaints" reviewed by the San Diego Regional Board. However, Regional Board staff identified only one recent case regarding an unpaved road in the Santa Margarita Region as a problem. The Copermittee in question has investigated this case and it is being addressed as an enforcement action. Although the Copermittees have not had the opportunity to review the investigations and complaints cited by Regional Board staff, no feedback from these investigations was reported to the Copermittees at the MS4 Permit discussions prior to the proposal of the unpaved road requirements. This indicates to the Copermittees that unpaved roads do not in fact present a significant water quality concern.

The Copermittees have reviewed the documents cited by Regional Board staff in the discussion of Finding D.1.c. and the conditions in the Santa Margarita Region are vastly different from those in Pennsylvania and Northern California cited in those documents. These areas receive regular precipitation, have significant vegetative cover, and perennial streams, some of which may support migrating fish. Nothing in these documents suggests that unpaved roads are a significant source requiring special attention in the Santa Margarita Region. Further, no data collected during Copermittee monitoring nor their observations support a conclusion that unpaved roads are a significant source of pollutants warranting special regulatory attention.

The lack of evidentiary support for the unpaved roads provisions makes their inclusion in the Draft MS4 Permit arbitrary and capricious. The Copermittees therefore request deletion of Finding D.1.C.

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**Comment Response**

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Contrary to the comment, the San Diego Water Board has identified several unpaved roads potentially causing water quality problems. Therefore, "continued application of development and construction requirements and maintenance of temporary erosion and sediment control BMPs" is clearly insufficient, and, to some extent inappropriate, since unpaved roads are not temporary.

The BMPs cited in USEPA and State of California can be equally effective at addressing sediment and erosion on unpaved roads in the Santa Margarita Watershed. In no way does a BMP manual infer similar geology, climate or habitat. The fact that the watershed has less vegetative cover and flashy flows underscores the need for proper BMPs in the watershed.

Finally, the statement that , " no data collected during Copermittee monitoring nor their observations support a conclusion that unpaved roads are a significant source of pollutants warranting special regulatory attention" is not surprising since no such data was collected. This was the basis for the San Diego Water Board proposing a Special Study on unpaved roads in earlier drafts (prior to public release).

Please see the responses to comments 101, 103, and 138.

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**Comment #** 183                      **Commentor** 4                      **Comment Subject** Monitoring

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**Specific Comment**

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[From Attachment 4 to the RCFC&WCD comment letter]

Revision: Request "Total Organic Carbon" and "Dissolved Organic Carbon" be removed as constituents for analytical testing in Table 1.

Justification: The reference within the Fact Sheet does not require these constituents and there is a significant cost in analyzing the constituents. It is not clear what additional information these constituents provide that would be useful in managing the MS4 program that is not already addressed through the collection of other constituents.

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**Comment Response**

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The reference in the Fact Sheet has been updated to reflect the reference for monitoring of organic carbon. Please also see the response to comment 181.

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**Comment #** 184                      **Commentor** 4                      **Comment Subject** Unpaved Roads

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**Specific Comment**

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[From Attachment 5 to the RCFC&WCD comment letter]

For the reasons set forth above, there is no evidence that unpaved roads require special regulatory attention in the MS4 Permit. Moreover, proposed requirements specific to unpaved roads are redundant to existing requirements in both the existing Permit and the draft MS4 Permit, the state General Construction Permit, and the Copermittees' Stormwater ordinances. To the extent that unpaved roads are of concern to Regional Board staff, those concerns can be effectively addressed by minor adjustments to these existing compliance programs. In a time of tight regulatory budgets, adding these additional requirements, especially where there is no demonstrated need for them, is arbitrary and capricious. The Copermittees request deletion of requirements specific to unpaved roads (see discussion below) as well as these statements in the Fact Sheet.

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**Comment Response**

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Please see the response to comment 138 and 182. The Copermittees' existing permit requirements have failed to adequately address pollution coming from unpaved roads.

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**Comment #** 185                      **Commentor** 4                      **Comment Subject** Unpaved Roads

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**Specific Comment**

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[From Attachment 5 to the RCFC&WCD comment letter]

Virtually all unpaved road development activities would be greater than one acre and/or be part of a priority development project of one acre or more. Such development projects are required to prepare and implement project-specific Standard Urban Stormwater Mitigation Plans (SUSMPs) under Section F of both the existing MS4 Permit and the Draft MS4 Permit. The SUSMPs identify post-construction BMPs that will be implemented for all elements of the project, including the unpaved road elements of the project. Unpaved road projects are also required to comply with the state General Construction Permit, which requires preparation of a SWPPP that identifies construction-phase BMPs and post-construction BMPs. These development and construction phase requirements are applicable to unpaved roads and are imposed by the Copermittees during the development review process, during the issuance of grading permits and during construction inspections. Either the general requirements for development projects in the existing or Draft MS4 Permit and/or the General Construction Permit already require identification and implementation of post-construction BMPs, including erosion and sediment control BMPs, when developing new unpaved roads. Therefore, additional requirements for development of unpaved roads are redundant and the Copermittees request that these redundant requirements be removed from the Draft MS4 Permit.

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**Comment Response**

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The San Diego Water Board disagrees with the comment's over generalization that virtually all unpaved road development activity would be greater than one acre. In particular, small roads crossing ephemeral stream can cause significant impacts through improperly engineered, designed and maintained culvert systems. Please see the response to comment 102.

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**Comment #** 186                      **Commentor** 4                      **Comment Subject** Unpaved Roads

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**Specific Comment**

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[From Attachment 5 to the RCFC&WCD comment letter]

The documents cited in Finding D.1.c discuss shaping of the surface of unpaved roads during smoothing, and maintenance of temporary sediment and erosion control BMPs associated with maintenance activities, such as repair of landslides and wash outs. The temporary erosion and sediment control BMPs identified include straw bales and silt fencing. The documents do not describe conditions in the Santa Margarita Region, but rather in Pennsylvania and Northern California.

The conditions in the Santa Margarita Region are vastly different from the conditions found in Pennsylvania and Northern California. Nevertheless, the Copermittees conduct surface grading and maintain temporary erosion and sediment control BMPs as appropriate following completion of maintenance on unpaved roads. These BMPs associated with the routine maintenance of unpaved roads will be documented and procedures formalized in the Riverside County Drainage Area Management Plan (DAMP).

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**Comment Response**

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Finding D.1.c in the Tentative Order does not include any document citations. The Fact Sheet discussion for Finding D.1.c. does include some examples of existing BMP manuals that the Copermittees may draw upon as a cost -saving resource in designating BMPs for unpaved roads maintenance. The BMP manuals are in no way used to describe the geology, habitat and climate of the Santa Margarita Region. The manuals do include useful information regarding the impacts of unpaved roads regardless of location. See comment 182 response.

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**Comment #** 187      **Commentor** 4      **Comment Subject** Unpaved Roads

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**Specific Comment**

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[From Attachment 5 to the RCFC&WCD comment letter]

As previously described, the vast majority of unpaved roads within the jurisdiction of the Copermittees are not maintained by the Copermittees, but are maintained by others, typically private property owners. As these are public easements over private property, however, the underlying property owner is under no legal obligation to provide maintenance. To provide reasonable access, maintenance of such unpaved roads is voluntarily provided by property owners and, in some cases, home owners' associations. State law prohibits the use of Gas Tax funds by the Copermittees for the maintenance of unpaved roads on private property. Requirements for implementation and maintenance of temporary erosion and sediment control BMPs in areas under the legal jurisdiction of the Copermittees are addressed by the general requirements of the Copermittees' stormwater ordinances and, where grading activities are significant, through the Copermittees' grading ordinances. As maintenance of unpaved roads on private property is voluntary, more aggressive regulation of such private roads may in fact discourage routine maintenance of unpaved roads, likely resulting in an increase in erosion and sediment discharge from such roads.

As an alternative, maintenance of unpaved roads can be effectively addressed by enhancing existing programs. There is no need to create a new compliance program requirement specific to unpaved roads, especially where such programs cannot in any event be implemented by the Copermittees on private property. The Copermittees believe that a better approach is to provide public education to property owners and grading contractors in areas served by unpaved roads, focusing on the proper methods of shaping unpaved road surfaces and the benefits of implementing and maintaining temporary erosion and sediment controls.

The Copermittees request that these proposed provisions be removed from the Draft MS4 Permit.

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**Comment Response**

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Please see the responses to comments 101, 102, 176, and 182.

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**Comment #** 188      **Commentor** 4      **Comment Subject** Unpaved Roads

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**Specific Comment**

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[From Attachment 5 to the RCFC&WCD comment letter]

There is nothing unique about potential discharges from unpaved roads under the legal jurisdiction of the Copermittees such that they would require special regulation. As discussed above, there is significant mileage of unpaved roads in the Santa Margarita Region that are not under the legal jurisdiction of the Copermittees. If there is concern about the impact of unpaved roads on water quality (a concern that, for the reasons already stated, is not supported by the evidence), there is no reason to believe that unpaved roads not under the legal jurisdiction of the Copermittees do not present the same potential to affect receiving water quality.

If it is determined that development and maintenance of unpaved roads requires special additional regulation, then such regulation should apply equally and on the same schedule to all unpaved roads under the jurisdiction of the San Diego Regional Board, not just those under the legal authority of the Copermittees. The Copermittees request that, if staff continues to maintain that unpaved roads require additional regulation, those requirements be addressed through a general permit for unpaved roads, and not in the Draft MS4 Permit.

**Comment Response**

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Because unpaved roads are a significant concern to water quality, the San Diego Water Board will regulate discharges from them under the appropriate mechanism. Please see the responses to comments 101 and 179.

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**Comment #** 189

**Commentor** 4

**Comment Subject** Unpaved Roads

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**Specific Comment**

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[From Attachment 5 to the RCFC&WCD comment letter]

No evidence, whether statements in the Fact Sheet and Findings, monitoring data, or Copermittee observations and experience, supports identification of unpaved roads as a significant source of pollutants to receiving waters in the Santa Margarita Region warranting additional regulation. The proposed unpaved road requirements are redundant to requirements of existing permits, including the state General Construction Permit, as well as existing Copermittee ordinances and programs. To the extent that unpaved roads may be a source of pollutants to the MS4 and thence to receiving waters, the Copermittees believe that enhancement of existing programs by documenting BMPs specific to maintenance of unpaved roads and providing public education to owners and contractors who provide maintenance of privately maintained unpaved roads will be as effective in reducing such pollutants, at a much reduced cost.

If the Regional Board determines that unpaved roads within its jurisdiction require further regulation, the appropriate method for addressing those roads is through a General Permit (Waste Discharge Requirements or NPDES Permit) rather than the Draft MS4 Permit, since a General Permit would address all unpaved roads in the San Diego Region, not just the subset of unpaved roads under the legal jurisdiction of the Copermittees.

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**Comment Response**

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Please see the responses to comments 101 and 138.

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<b>Comment #</b> 190	<b>Commentor</b>	4	<b>Comment Subject</b> General
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**Specific Comment**

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[From Attachment 6 to the RCFC&WCD comment letter]

Unlike the watersheds in South Orange County, the Santa Margarita Region is an ephemeral watershed that includes Murrieta and Temecula Creeks which are perennial interrupted streams, i.e., they include some reaches in which the flow is continuous and others where flow is ephemeral. However, the areas of perennial flow in the Santa Margarita Region are located in mountain area tributaries outside of the urbanized areas serviced by the MS4s. These perennial flows quickly disappear by seepage into the sands and gravels and resurface upstream of the confluence of Murrieta and Temecula Creeks. The creeks in the urbanized areas of the watershed, located primarily in the valley, are ephemeral and flows are only observed during and immediately following significant storm events.

Rising groundwater is currently observed in Murrieta Creek below its confluence with the Santa Gertrudis Channel, an observation consistent with the observations made by the State of California in 1956. Rising groundwater is also observed in Temecula Creek approximately one quarter mile upstream of the Interstate 15 Bridge. In 1956, the State observed more extensive rising groundwater conditions occurring as far upstream as the Highway 79 Bridge. Based on the virtual absence of non-stormwater flows and the rising groundwater conditions observed in lower Murrieta and Temecula Creeks prior to development of the watershed, there is no evidence that the rising groundwater currently observed is due to Urban Runoff nor that Urban Runoff has affected the quality of rising groundwater.

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**Comment Response**

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The San Diego Water Board recognizes that many of the streams should be ephemeral in the Upper Santa Margarita Watershed. The San Diego Water Board disagrees that the perennial flows in the upper parts of the watershed are all natural. This is the reason the Intermittent and Ephemeral Stream Perennial Conversion special study was included in the MRP. The San Diego Water Board recognizes that rising groundwater is likely to contribute to flows that are observed in some reaches. The San Diego Water Board does not contend that rising groundwater is necessarily due to non-storm water discharges. The San Diego Water Board does not agree that non-storm water discharges are not affecting groundwater quality. Much of the available groundwater monitoring data in the region indicate that there are elevated levels of nitrates and other forms of nutrients, as well as other pollutants that can likely be attributed to non-storm water discharges that infiltrate to groundwater.

The commenter misrepresents the State of California's 1956 report on the Santa Margarita Watershed. The report cites that flows in the watershed are highly "seasonal" not "ephemeral". In addition, the report demonstrates the seasonality with flow data in a table that shows diminished flows in the summer, but not an absence of flows, at the river gauge.

Also see the response to comment 175.

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<b>Comment #</b> 191	<b>Commentor</b>	4	<b>Comment Subject</b> Monitoring
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**Specific Comment**

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[From Attachment 4 to the RCFC&WCD comment letter]

Revision: Request "Biological Oxygen Demand, 5day" and "Chemical Oxygen Demand" be removed as constituents for analytical testing in Table 4.

Justification: The reference in the Fact Sheet supporting the inclusion of these constituents is to the initial Phase 1 application requirements. It should be noted that the initial constituent list is not required of future permits. Further, these constituents are costly to analyze and do not provide new information that is relevant to the management of the NPDES MS4 Program.

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**Comment Response**

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Please see the response to comment 181. It is important to note that no data has been collected to date to characterize discharges of storm water effluent from the Copermittees' MS4s. No changes were made based on this comment.

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**Comment #** 192                      **Commentor**      4                      **Comment Subject** Monitoring

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**Specific Comment**

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[From Attachment 4 to the RCFC&WCD comment letter]

Revision: Request "Total Organic Carbon" and "Dissolved Organic Carbon" be removed as constituents for analytical testing in Table 4.

Justification: The reference within the Fact Sheet does not require these constituents and there is a significant cost in analyzing the constituents. It is not clear what additional information these constituents provide that would be useful in managing the MS4 program that is not already addressed through the collection of other constituents.

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**Comment Response**

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Please see the responses to comments 181 and 183. It is important to note that no data has been collected to date to characterize discharges of storm water effluent from the Copermittees' MS4s. No changes were made based on this comment.

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**Comment #** 193                      **Commentor**      4                      **Comment Subject** Monitoring

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**Specific Comment**

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[From Attachment 4 to the RCFC&WCD comment letter]

Revision: Request the following text revisions:

"The Copermittees must collaborate to develop and implement a program to identify sources of pollutants causing the priority water quality problems within each hydrologic subarea. The program must include focused monitoring as necessary to identify source areas, or other methods to identify the societal sources of pollutants, as appropriate. This program must begin no later than the 2012-2013 monitoring year."

Justification: As drafted, the permit requires source identifications to start at the end point of the watershed and move upstream. The requested revisions are intended to provide flexibility to allocate resources appropriately based on field judgements. The second part of the revision is to acknowledge some pollutant contributions to the MS4 are in-fact, non-point source, and cannot be pinpointed through focused source ID Monitoring.

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**Comment Response**

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A key component of receiving water and effluent monitoring is to conduct source identification monitoring to identify specific sources and/or areas for pollutants causing priority water quality problems. This is done in conjunction with source identification as required under the Tentative Order on a watershed basis, moving upstream to identify specific sources and contributing areas. As stated in the fact sheet, all monitoring conducted under Order No. R9-2004-001 focused on receiving water conditions rather than MS4 effluent discharges. Outside of required toxicity identification and reduction evaluations, no source identification effluent monitoring was conducted for observed exceedances of water quality standards in receiving waters. The utilization of "other methods to identify the societal sources of pollutants," is not considered water quality monitoring, and thus does not fall under the MRP but rather the Tentative Order (i.e. construction site locations). See the Fact Sheet for further discussion. No changes were made based on this comment.

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**Comment #** 194                      **Commentor** 4                      **Comment Subject** Monitoring

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**Specific Comment**

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[From Attachment 4 to the RCFC&WCD comment letter]

Revision: Request text additions:

"Sampling of non-storm water discharges may be done utilizing grab samples. If a ponded MS4 discharge is observed at a monitoring station, the Copermittee(s) must record the observation and collect at least one (1) grab sample, however ponded water samples will not be used in determining action level exceedances. If flow is evident, a 1-hour composite sample may be taken. The Copermittee(s) must estimate the flow using techniques such as by measuring the width of water surface, approximate depth of water, and approximate flow velocity."

Justification: The first text addition is to avoid triggering action levels due to increased concentrations caused by evaporation of ponded water. Evaporation of ponded water will result in increased concentrations of any constituents contained in the water. NALs are based on Water Quality Objectives that are based on stable, flowing stream conditions. The second text addition is to allow flexibility in measuring stream flows. In some cases, flow gauges or flow meters may be available to estimate flow.

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**Comment Response**

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In response to the comment regarding ponded MS4 discharge and concerns over higher concentrations, there are multiple factors to consider. Non-storm water discharge sampling requires sampling of the effluent discharged from the MS4 into receiving waters. First, if an MS4 discharge is ponded within the receiving water due to the receiving water's natural hydrology, then an increased concentration due to receiving water conditions (i.e. evaporation) is not a sufficient rationale for causing a condition of pollution, contamination, or nuisance as a result of the discharge. This is also reflected within the action level calculations, specifically in consideration of the appropriateness of granting dilution credits. Second, if an MS4 discharge is ponded within the MS4 prior to the discharge point, then action levels would also still apply, as there is visible evidence of a non-storm water discharge into the MS4 system which may be an illicit discharge. The ponding does not warrant foregoing proper IC/ID investigations.

In regards to the flow estimation language, edits have been made to ensure there is flexibility in measuring the flow of the effluent. For clarification, the commentor requests "flexibility in measuring stream flows", and the referenced flow estimation is for effluent discharge. The draft MRP has been modified to include this clarification.

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**Comment #** 195                      **Commentor** 4                      **Comment Subject** Monitoring

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**Specific Comment**

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[From Attachment 4 to the RCFC&WCD comment letter]

Revision: Request text additions:

Monitoring Annual Report: The Principal Copermittee must submit the Receiving Waters and MS4 Discharge Monitoring Annual Report to the San Diego Water Board on October 1 of each year, beginning on October 1, 2013. Receiving Waters and MS4 Discharge Monitoring Annual Reports must cover the monitoring activities and results from the previous fiscal year, and must meet the following requirements:

Justification: All of the Copermittees' activities are tracked and reported on a Fiscal Year basis. This facilitates clearer data and cost tracking, and results that can be more effectively integrated into the JRMP reports in a clear and understandable manner, since the reporting periods are aligned. This change is important, so as to allow for a simpler transition from the existing monitoring and data tracking methods, to those that will be developed for compliance with the permit.

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**Comment Response**

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The San Diego Water Board finds this to be a reasonable request and has modified the draft MRP language.

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**Comment #** 196      **Commentor** 4      **Comment Subject** Monitoring

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**Specific Comment**

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[From Attachment 4 to the RCFC&WCD comment letter]

Revision: Request the following text revisions:

"The 4th year monitoring report must include identification and analysis of any long-term trends in the Copermittees' MS4 storm water discharges or receiving water quality. Appropriate statistical methods shall be used to evaluate the water quality data."

Justification: The first edit is to require the long term statistical analyses be performed on a time schedule consistent with submission of the ROWD. Requiring long-term statistical trend analyses on an annual basis is unnecessary and inappropriately increases analysis and reporting costs and complexity. The second edit recognizes a multitude of different statistical methods could be used and others may be more appropriate to the dataset than those identified in the draft MRP.

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**Comment Response**

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The first proposed edit to reduce trend analysis to the 4th year monitoring report for submission with the ROWD is not appropriate for multiple reasons. This does not meet the goals of the MRP (I.A). For example, goal number 2 is to "Measure and improve the effectiveness of the Copermittees' runoff management programs." Trend analysis should be utilized as a tool to meet this goal, which arguably should not be done on a permit re-issuance basis. The proposed edit would also not answer the core management questions the MRP is designed to answer (I.B). For example, question 5 asks "are conditions in receiving waters getting better or worse?" Again, this should not be answered only on a permit re-issuance basis.

In regards to the second proposed edit, the commentor misconstrues the MRP language. The MRP language only requires a trend analysis to include a non-parametric approach, and provides some examples ("Trend analysis must use nonparametric approaches, such as"). A non-parametric approach is required to be included because stormwater data in southern California are not normally distributed, and comparison of statistical calculations on transformed data with a non-parametric approach aids in evaluating conducted trend analysis. No changes were made based on this comment.

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**Comment #** 197      **Commentor** 4      **Comment Subject** Monitoring

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**Specific Comment**

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[From Attachment 4 to the RCFC&WCD comment letter]

Revision: Request elimination of requirement for annual monitoring reports to include total pollutant loads (wet weather loads plus dry weather loads) due to MS4 Discharge for each of the hydrologic subareas.

Justification: Many assumptions go into the calculations of total loads, making their use in statistical analyses questionable at best. The Copermittees have continued to provide this data, but do not see that it has any value.

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**Comment Response**

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The San Diego Water Board recognizes that multiple assumptions are integrated into the estimation of total pollutant loading from MS4 discharges. However, this does not warrant the removal of the calculation requirement, as load calculations play an important role in estimating the impact of MS4 discharges on receiving waters. Importantly, estimation of pollutant loading should be utilized by the Copermittees to meet the goals and answers the questions under I.A and I.B. Furthermore, the Copermittees have not conducted MS4 effluent monitoring under previous or the current Order, so it is expected that pollutant loading estimations under the draft MRP, which requires storm and non-storm water effluent monitoring, will be more accurate.

It is also important to note that the collection of MS4 effluent and receiving waters data and subsequent MS4 load estimation will assist in the evaluation of 303(d) listings and TMDL development. No changes were made based on this comment.

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**Comment #** 199                      **Commentor** 4                      **Comment Subject** Overirrigation

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**Specific Comment**

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[From Attachment 6 to the RCFC&WCD comment letter]

The last sentence of this Finding [C.15] does not accurately reflect the facts. Unlike Orange County, and despite Board staff's contentions in the fact sheet the Copermittees have not identified landscape irrigation, irrigation water or lawn water as a source of pollutants or conveyance of pollutants to waters of the U.S. Rather, this statement is based on the efforts in Orange County where that County found that the significant perennial flows throughout the urbanized areas were caused by irrigation runoff. Not only has irrigation runoff not been found to be a source of pollutants to waters of the U.S. in the Santa Margarita Region as a category, no individual discharges of irrigation runoff in the region have been found to be a source of pollutants. As described in the Stream Flow Characteristics section above, during dry weather there is no perennial flow in the waters of the U.S. in the urbanized area until rising groundwater occurs just before the confluence of Murrieta and Temecula Creeks. This is unlike streams in South Orange County, that it was found that the significant perennial flows throughout the urbanized areas were caused by irrigation runoff. In the Santa Margarita Region, any weather runoff that does reach receiving waters quickly seeps into the alluvial soils.

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**Comment Response**

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Please see the responses to comments 27, 83, 175 and 233.

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**Comment #** 200                      **Commentor** 4                      **Comment Subject** Overirrigation

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**Specific Comment**

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[From Attachment 6 to the RCFC&WCD comment letter]

Second, the Discussion of Finding C.15 in the Fact Sheet fails to demonstrate the need for a prohibition of this irrigation runoff as a non-stormwater runoff category. The discussion references conditions outside of and unlike those found in the Santa Margarita Region and misconstrues statements in public education materials that encourage runoff management as justification for the proposed prohibitions. Finally, no justification is provided in this discussion or elsewhere to support the prohibition of the non-emergency fire fighting flows runoff as a category.

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**Comment Response**

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Please see the responses to comments 25, 27, and 83.

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**Specific Comment**

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[From Attachment 6 to the RCFC&WCD comment letter]

A prohibition of irrigation runoff will result in significant costs to the public and the Copermittees as the prohibition is TO THE MS4, which is defined to include streets, curbs and gutters. As the MS4 Permit has eliminated the MEP protections for dry weather non-stormwater discharges (see also legal comments in Attachment 7 to the comment letter), this makes the Copermittees responsible for every incidence of over-irrigation, regardless of whether such discharges ever affect receiving waters. As such, the cost to eliminate these discharges is not commensurate with any measurable environmental benefit. The Copermittees cannot impose fees to recover the costs of enforcing this new requirement and, as described in the Economics White Paper (Attachment 2 to the comment letter), the Copermittees have even fewer resources to carry out the requirements of the current MS4 Permit than in past years, much less carry out the additional requirements set forth in the draft Permit, including the development and implementation of a new program to prohibit irrigation runoff.

As this prohibition would also apply to Copermittees' facilities, retrofit of existing facilities would likely be immediately required to ensure compliance. The City of Murrieta, for example, has estimated that retrofit of their sprinklers to a drip system to avoid irrigation runoff from their facilities alone would cost \$250,000.

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**Comment Response**

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Please see the response to comment 23. The San Diego Water Board disagrees that including the prohibition of irrigation runoff in the Tentative Order will result in significant costs to the public and Copermittees. The prohibition is consistent with the Water Conservation in Landscaping Act (AB1881), which already required cities and counties to adopt landscape water conservation ordinances prohibiting runoff from inefficient landscape irrigation by January 1, 2010. The cities and counties are 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 are already required to enforce these ordinances.

In the event that overirrigation runoff is identified as an illicit discharge to "adjacent property, non-irrigated areas, walks, roadways, parking lots, or structures", which includes the Copermittees' MS4s, the Copermittees are expected to address the illicit discharge through their IC/ID programs. In addition, the San Diego Water Board encourages the Copermittees to identify and implement retrofit projects and education programs that can help to minimize or eliminate the potential for illicit discharges of overirrigation runoff into their MS4s.

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**Specific Comment**

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[From Attachment 6 to the RCFC&WCD comment letter]

Management of irrigation runoff is currently addressed by existing requirements and programs and the additional requirements proposed in the draft Permit are unnecessary. The use of reclaimed water is regulated under Waste Discharge Requirements (WDRs) issued by the Regional Board.

The draft Permit also provides other mechanisms to address irrigation runoff. First, if a discharge of irrigation runoff was determined to be a source of stormwater pollutants, the Copermittees already have the legal authority to take appropriate enforcement action to control the discharge as an illegal discharge, under their existing storm water ordinances. Second, the non-stormwater action level monitoring required by this draft Permit will identify any potentially problematic non-stormwater discharges and identify the source of those discharges. Should the source be determined to be irrigation runoff, it will require the Copermittees to address that discharge. Both mechanisms are better suited (financially and legally) to deal with irrigation runoff than a complete prohibition provision in the absence of local data showing it as a problem.

Finally, local water purveyors are better equipped and able to address irrigation runoff. As an example, Rancho California Water District and Eastern Municipal Water District actively promote water conservation programs, which are supported by the Metropolitan Water District of Southern California. The County and the cities have adopted water conservation ordinances as required by the Water Conservation in Landscaping Act (AB 1881, Laird). Given these facts, there is even less justification for an extensive and expensive program to address an irrigation runoff issue that is not, in fact, a source of pollutants causing or contributing to a violation of water quality standards in the Santa Margarita Region.

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**Comment Response**

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The San Diego Water Board disagrees that the requirements in the Tentative Order are unnecessary. The San Diego Water Board has identified runoff from overirrigation as a significant source and conveyance of pollutants to the MS4 and receiving waters. This justifies the requirements of the Tentative Order. Please see the responses to comments 27 and 83.

In addition, the prohibition is consistent with the Water Conservation in Landscaping Act (AB1881), which already required cities and counties to adopt landscape water conservation ordinances prohibiting runoff from inefficient landscape irrigation by January 1, 2010. The cities and counties are 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 are already required to enforce these ordinances.

The San Diego Water Board agrees that NALs may identify illicit discharges from overirrigation. In the event that an individual irrigation runoff discharge is identified as an illicit discharge to the MS4, whether or not an NAL exceedance has been observed, the Copermittees are expected to address the illicit discharge through their IC/ID programs.

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**Comment #** 203      **Commentor** 4      **Comment Subject** Overirrigation

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**Specific Comment**

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[From Attachment 6 to the RCFC&WCD comment letter]

Specifically, the Permittees request that the language in the Permit be amended as follows prior to adoption of the Permit:

Delete Finding C.15

As the last sentence of this Finding is not supported by fact, the Permittees request that it be deleted as noted in the following text and the entirety of the Discussion of Finding C.15 in the Fact Sheet be deleted.

Non-storm water discharges to the MS4 granted an influent exception [i.e., which are exempt from the effective prohibition requirement set forth in CWA section 402(p)(3)(B)(ii)] under 40 CFR 122.26 are included within this Order. Any exempted discharges identified by Copermittees as a source of pollutants are subsequently required to be addressed (emphasis added) as illicit discharges through prohibition and incorporation into existing IC/ID programs. Furthermore, the USEPA contemplates that permitting agencies such as the San Diego Water Board may also identify exempted discharges as a source of pollutants required to be addressed as illicit discharges (See VOI. 55 Fed. Reg. 48037).

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**Comment Response**

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Please see the responses to comments 27 and 83. No changes were made based on this comment.

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**Specific Comment**

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[From Attachment 6 to the RCFC&WCD comment letter]

The Permittees request that the landscape irrigation; irrigation water; lawn watering; and non-emergency fire fighting flows runoff categories be restored to the list of non-prohibited, non-stormwater discharges identified in B.2 of the draft SMR MS4 Permit as noted below. In the event that an individual irrigation runoff discharge is determined to be a source of pollutants as identified by the non-stormwater dry weather action level (NAL) process, appropriate action can be taken by the Permittees to control that source.

**B.2. Non-Stormwater Discharges**

This item includes a listing of discharges that are not prohibited unless a discharge is determined to be a source of pollutants to waters of the U.S. Landscape irrigation, irrigation water, lawn watering and non-emergency fire fighting flows were deleted from this list as noted:

- a. Diverted stream flows;
  - b. Rising groundwaters;
  - c. Uncontaminated groundwater infiltration [as defined at 40 CFR 35.2005(20)] to MS4s;
  - d. Uncontaminated pumped groundwater<sup>3</sup>;
  - e. Foundation drains<sup>3</sup>;
  - f. Springs;
  - g. Water from crawl space pumps<sup>3</sup>;
  - h. Footing drains<sup>3</sup>;
  - i. Air conditioning condensation;
  - j. Flows from riparian habitats and wetlands;
  - k. Water line flushing<sup>4,5</sup>;
  - l. Landscape irrigation;
  - m. Discharges from potable water sources not subject to NPDES Permit No. CAG679001, other than water main breaks;
  - n. Irrigation water;
  - o. Lawn watering;
  - p. Individual residential car washing;
  - q. Non-emergency fire fighting flows; and
  - r. Dechlorinated swimming pool discharges
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**Comment Response**

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Please see the responses to comments 27 and 83. In the event that an individual irrigation runoff discharge is identified as an illicit discharge to the MS4, which may be after an NAL exceedance has been observed, the Copermitees are expected to address the illicit discharge through their IC/ID programs. No changes were made based on this comment.

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**Specific Comment**

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[From Attachment 6 to the RCFC&WCD comment letter]

It is not practicable for the Copermittees to prevent or eliminate irrigation runoff. The Permittees request that the following requirements be revised as noted to provide achievable compliance requirements:

F.1.c.(1) Approval Process Criteria and Requirements for All Development Projects states:

Performance Criteria: Discharges from each approved development project must be subject to the following management measures:

(1) Source control BMPs that reduce stormwater pollutants of concern in runoff; prevent reduce the potential for illicit discharges into the MS4; prevent reduce the potential for irrigation runoff; storm drain system stenciling or signage; properly design outdoor material storage areas; properly design outdoor work areas; and properly design trash storage areas.

F.1.d.(5) Source Control BMP Requirements states:

Each Copermittee must require each Priority Development Project to implement applicable source control BMPs. The source control BMPs to be required must:

- (a) Prevent illicit discharges into the MS4;
  - (b) Minimize storm water pollutants of concern in runoff;
  - (c) Eliminate Reduce the potential for irrigation runoff;
  - (d) Include storm drain system stenciling or signage;
  - (e) Include properly designed outdoor material storage areas;
  - (f) Include properly designed outdoor work areas;
  - (g) Include properly designed trash storage areas;
  - (h) Include water quality protection requirements applicable to individual priority project categories.
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**Comment Response**

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The San Diego Water Board disagrees with the proposed changes. The San Diego Water Board disagrees that it is not practicable for the Copermittees to prevent or eliminate irrigation runoff from entering their MS4 systems. The Copermittees are required by AB 1811 to prohibit overirrigation runoff. Please see the responses to comments 27, 83, and 201. The Copermittees are expected to implement their jurisdictional programs, especially their IC/ID programs, to prevent or eliminate irrigation runoff from entering their MS4 systems. No changes were made based on this comment.

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**Specific Comment**

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[From Attachment 6 to the RCFC&WCD comment letter]

Regulate irrigation runoff discharges from the MS4, rather than as prohibited discharge to the MS4:

If the Regional Board nevertheless insists on prohibiting irrigation runoff, the Copermittees request that the draft MS4 Permit be revised to allow for irrigation runoff to be managed as a Jurisdiction Runoff Management Plan (JRMP) program, rather than as a prohibited discharge to the MS4. This alternative request is consistent with how the Permit currently deals with non-emergency fire fighting discharges, which was also removed from the list of non-prohibited non-stormwater discharges. The Executive Officer stated that he would be open to consideration of a program for irrigation runoff that would address discharges from the MS4. This alternative approach allows the Copermittees to develop a program that focuses on irrigation runoff problem areas, as opposed to holding the Copermittees responsible for eliminating any instant case of over-irrigation independent of threat to receiving water quality.

As the alternative to restoring the conditional exemption, the Copermittees request the Board to ADD Provision B.4 as follows:

B.4. As part of the JRMP, the Copermittees must develop and implement a program to address pollutants from landscape irrigation, irrigation water and lawn watering identified as significant sources of pollutants to waters of the United States.

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**Comment Response**

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The San Diego Water Board disagrees with the requested change. The Copermittees are expected to implement their jurisdictional programs, especially their IC/ID programs, to prevent or eliminate irrigation runoff from entering their MS4 systems. No changes were made based on this comment. Please see response to comment 201.

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**Specific Comment**

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[From Attachment 7 to the RCFC&WCD comment letter]

Throughout Part F. of the Tentative Order relating to the Jurisdictional Runoff Management Program, the language requires not only that the Copermittees adopt programs intended to achieve control of pollutants but also requires such programs to achieve certain ends. See, for example, Part F.1., where each Copermittee must implement a development planning program which meets the requirements of Section F of the Tentative Order and which requires such a program to (1) reduce development project discharges from the MS4 to the MEP, (2) prevent such discharges "from causing or contributing to a violation of water quality standards", (3) prevents illicit discharges to the MS4, and (4) manages increases in runoff discharge rates. A similar requirement is set forth in other provisions, including Part F.3, relating to existing development, Part F.3.b., relating to commercial/industrial programs, Part F.3.c., relating to residential programs and Part F.6, relating to the education component where, in each case, the Copermittees are required to develop programs and ensure their performance.

This dual requirement, to develop a program and then to ensure that it achieves the intended ends, is unlawful, as it goes beyond the requirements of the MS4 regulations and requires the Copermittees to guarantee the results of activities that will often be in the control of third parties. The MS4 regulations require that the MS4 permittees develop the required programs. See, for example, 40 CFR § 122.26(d)(2)(iv(A))(2), which requires the Copermittees to, among other things, develop and implement a management program including 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". The Copermittees certainly could be liable under the permit if they failed to adequately "develop, implement and enforce controls". However, the MS4 regulations do not require that the Copermittees guarantee, under threat of being found in violation of the permit, that such controls achieve the desired ends of the management programs. It should be also noted that in many other parts of the Order, the Copermittees are directed to develop programs "designed" to achieve water quality goals.

Further, the iterative BMP approach required by the State Water Resources Control Board ("State Board") in precedential State Board Order WQ 99-05 and subsequent rulings would be made meaningless if the Copermittees were strictly liable for ensuring in their programs that discharges did not cause or contribute to a violation of a water quality standard. It is appropriate for the Board to set forth in these sections the "elements needed in the Copermittees' program to fulfill the goals of [the] directive", as set forth in staff's Response to Comment 297 on the Orange County MS4 permit, Order No. R9-2009-0002. However, the Board has no authority to require the Copermittees to guarantee that such goals will be fulfilled, as the current language appears to require.

In addition to the portions of the Order cited, the Copermittees also request changes to similar provisions found at Sections F.1.d, F.1.d.5, F.2, F.3.a, F.4, and G. The attached redline identifies those and any additional parts.

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**Comment Response**

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40 CFR 122.44(d)(1) requires municipal storm water permits to include any requirements necessary to "[a]chieve water quality standards established under section 303 of the CWA, including State narrative criteria for water quality." 40 CFR 122.44(d)(1)(i) requires NPDES permits to include limitations to "control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the Director determines are or may be discharged at a level which will cause, have reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality." Please also see the response to comment 76.

The Tentative Order's requirements are wholly lawful in accordance with the Clean Water Act, the Code of Federal Regulations and the California Water Code. The dual requirements are not in conflict, but work in harmony. The requirements set forth minimum programmatic actions that are expected to result in MS4 discharges meeting water quality standards. Where the Copermittees have implemented the minimum programmatic actions yet their discharges continue to violate water quality standards, the Copermittees must modify their programs and implement additional actions that are not specified within the Tentative Order to achieve water quality standards. The Tentative Order does not require strict compliance with water quality standards. See *Defenders of Wildlife v Browner* (9th Cir. 1999) 191 F.3d 1159, 1167-1168.

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**Specific Comment**

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[From Attachment 7 to the RCFC&WCD comment letter]

A number of requirements in the Tentative Order exceed the requirements of federal law. The Board may have discretion to impose such requirements under state law (*Defenders of Wildlife v. Browner*, 191 F.3d 1159 (9th Cir. 1999)), however, the California Supreme Court has determined that to the extent such state law requirements are included in an NPDES permit, the Board must consider the factors set forth in Water Code § 13263(a) and § 13241, including the water quality that could reasonably be achieved by the requirements and economic considerations. *City of Burbank v. State Water Resources Control Board* (2005) 35 Cal. 4th 613. See also Water Code §13000, setting forth that the activities and factors which may affect the quality of the waters of the state "shall be regulated to attain the highest water quality which is reasonable, considering all demands being made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible".

The Fact Sheet and findings for the Tentative Order do not establish that staff has considered such factors or, to the limited extent the factors were considered, staff used out-of-date and incomplete information. In particular, the economic analysis contained in Section VI of the Fact Sheet uses out-of-date information on the economic viability of the cities in the Santa Margarita Region, ignoring the impact of the national recession, which has hit the Region with particular force and which has caused a major reduction in property tax and sale tax revenues available to fund water quality activities under the Order. For a more complete economic analysis, please see Attachment 2 to the comment letter.

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**Comment Response**

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The federal statute provides that, in adopting MS4 permits, the permit "shall require . . . such other provisions as the Administrator or the State determines appropriate for the control of such pollutants." (See *Defenders of Wildlife v Browner* (9th Cir. 1999) 191 F.3d 1159) U.S. EPA and states have authority under federal law to go beyond the MEP standard and require strict compliance with water quality standards. (*Building Industry Association of San Diego County v. State Water Resources Control Board, et al.* (2004) 124 Cal.App 4th 866. The BIA court was persuaded that USEPA or the states have authority to require strict compliance with water quality standards under the "such other provisions as the Administrator . . . Determines appropriate for the control of such pollutants" language in CWA section 402(p)(3)(B)(iii). (*Building Industry*, 124 Cal.App 4th at 882-884.) In other words, even if the Permit somehow exceeded the federal minimum requirements of MEP, any discretion to exceed MEP originate in federal law, which requires the San Diego Water Board to include such other permit provisions as it deems appropriate.

However, in the Tentative Order, the San Diego Water Board has chosen not to exercise its discretion to go beyond MEP and require strict compliance with water quality standards. Thus, the Tentative Order's provisions clearly fall within the federal mandated requirements. The San Diego Water Board disagrees with the commenter's assertion that requirements in the Tentative Order exceed the requirements of federal law thus needing to consider the cited factors. However, where provided and available, staff has considered economic information in crafting the Tentative Order. Please see the responses to comments 8, 9, 77-79, and 86.

The economic analysis contained in section VI of the Fact Sheet is from up to date information, as reported by the Copermittees' Annual Reports, with information as of January 1, 2009. While we recognize that Riverside County is experiencing a period of economic hardship, the Copermittees do not provide an completely accurate characterization of the economic conditions. Please see the responses to comments 115, 116, 122, and 126-130.

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<b>Comment #</b> 209	<b>Commentor</b>	4	<b>Comment Subject</b> Finding
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**Specific Comment**

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[From Attachment 8 to the RCFC&WCD comment letter]

Need for New Finding B.2: Section B in the findings describes the regulated parties. The District requests a new finding B.2, which provides as follows:

The Riverside County Flood Control and Water Conservation District (District) is not a municipality but rather operates various elements of the MS4 system within the San Diego Region in the form of flood control structures, including channels. Such channels and other flood control structures have been constructed and are operated by the District in accordance with its statutory obligations established by the Legislature in California Water Code App. § 48-9, to "control the flood and storm waters of said district" and to save and conserve in any manner all or any of such waters and protect from damage from such flood or storm waters the watercourses, watersheds, public highways, life and property in said district." Water Code App. § 48-9(8). As a creature of state law, and not a municipal corporation, the District does not exercise jurisdiction over land areas within the San Diego Region and the activities carried out on those land areas outside of its limited rights-of-way. Please see redline.

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**Comment Response**

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The San Diego Water Board disagrees with the requested change. As stated in the comment, the RCFC&WCD constructs and maintains channels and flood control structures, which are considered part of the MS4. The RCFC&WCD has jurisdiction within its right-of-way. The RCFC&WCD is responsible for implementing the requirements of the Tentative Order within its jurisdiction as is any other Copermittee. No changes were made based on this comment.

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<b>Comment #</b> 210	<b>Commentor</b>	4	<b>Comment Subject</b> Legal
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**Specific Comment**

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[From Attachment 7 to the RCFC&WCD comment letter]

Finding A.4: This finding states that responses to comments on the Order would be "incorporated by reference" into the findings supporting the Order.

Comment: Incorporating responses to comments as to which interested parties have no chance to comment prior to the hearing on the Order raises a due process concern.

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**Comment Response**

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Finding A.4 has been modified to remove responses to comments as "incorporated by reference" into the findings of the Tentative Order. Although not part of the findings, the responses to comments remains part of the record and have been considered by the San Diego Water Board in adopting the Tentative Order.

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<b>Comment #</b> 211	<b>Commentor</b>	4	<b>Comment Subject</b> Finding
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**Specific Comment**

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[From Attachment 8 to the RCFC&WCD comment letter]

Findings, Section D.3: This section of the Findings referring to "Construction and Existing Development" is of limited applicability to the District, since the only construction projects that would be overseen by the District are of or within its own facilities. The redline sets forth a change to clarify this limited applicability.

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**Comment Response**

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The San Diego Water Board disagrees that the Findings referring to "Construction and Existing Development" are of limited applicability to the RCFC&WCD. Please see the response to comment 209. No changes were made based on this comment.

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**Comment #** 212                      **Commentor**      4                      **Comment Subject** New Development

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**Specific Comment**

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[From Attachment 8 to the RCFC&WCD comment letter]

Section F.1.a: The District, as a non-municipality, does not prepare a General Plan or equivalent because it does not govern development within a geographical area. Thus, the requirements of this section of the Order are not applicable to it. Please see redline.

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**Comment Response**

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The requested changes are not necessary. The language also says "or equivalent plan". The RCFC&WCD has Master Drainage Plans and Area Drainage Plans that must include watershed protection principles. No changes were made based on this comment.

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**Comment #** 213                      **Commentor**      4                      **Comment Subject** New Development

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**Specific Comment**

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[From Attachment 8 to the RCFC&WCD comment letter]

Section F.1.d.(4)(a)(iii): Since the District, as a non-municipality, does not have land use codes, policies and ordinances, this provision, relating to the removal of "barriers to LID implementation," is not applicable to it. Please see redline.

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**Comment Response**

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The requested changes are not necessary. The RCFC&WCD has standard contract and bid specifications, encroachment permits and internal policies and procedures that all apply to this requirement. No changes were made based on this comment.

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**Comment #** 214                      **Commentor**      4                      **Comment Subject** New Development

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**Specific Comment**

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[From Attachment 8 to the RCFC&WCD comment letter]

Section F.1.d.(9): The only Priority Development Projects (PDP) relevant to the District would be the District's owned non-flood control channel projects, since it has no authority to permit private or non-District facilities and exercises jurisdiction over no private land areas within the watershed, and because the construction of flood control channels is subject to the jurisdiction of the U.S. Army Corps of Engineers through the Clean Water Act Section 404 permit program, not the NPDES permit program under Section 402 of the Clean Water Act. Thus, this directive, which requires the verification of compliance by third parties with Standard Stormwater Mitigation Plan (SSMP) requirements, is not applicable to the District. Please see redline.

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**Comment Response**

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The requested changes are not necessary. The RCFC&WCD is required to verify compliance with SSMP requirements and track post-construction BMPs for its own projects. No changes were made based on this comment.

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**Comment #** 215      **Commentor** 4      **Comment Subject** New Development

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**Specific Comment**

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[From Attachment 8 to the RCFC&WCD comment letter]

Section F.1.e: As noted above, the only PDPs over which the District would have authority are its own projects. Thus, this directive, which requires inspection of BMPs at PDPs constructed by third parties, is not applicable to the District. Please see redline.

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**Comment Response**

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The requested changes are not necessary. The RCFC&WCD is required to verify the construction of BMPs for its own projects. No changes were made based on this comment.

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**Specific Comment**

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[From Attachment 7 to the RCFC&WCD comment letter]

Finding C.14: This finding states, in relevant part, that "[n]on-storm water (dry weather) discharge from the MS4 is not considered a storm water (wet weather) discharge and therefore is not subject to regulation under the Maximum Extent Practicable (MEP) standard . . . .". The finding further asserts that such discharges are to be "effectively prohibited" from discharge into the MS4.

Comment: The rationale for this finding, as set forth in the Fact Sheet, relies on a State Board precedential decision, Order No. WQ 2009-0008. This order has been vacated by order of the Los Angeles County Superior Court in County of Los Angeles v. State Water Resources Control Board, Case No. BS 122724 (July 16, 2010). Thus, the order has no further effect and cannot be cited or relied upon by the Board in support of this finding or any other finding or directive in the Order.

Moreover, the finding incorrectly states that discharges of non-stormwater from the MS4 are not subject to the MEP standard. This parsing of "stormwater" and "non- stormwater" is not found in the Clean Water Act, which states only that the MS4 permit "shall require controls to reduce the discharge of pollutants to the maximum extent practicable . . . .". 33 U.S.C. 1342(p)(3)(B)(iii) (emphasis supplied). The preamble to the MS4 regulations promulgated by U.S. EPA moreover also acknowledges that "MEP control measures" would be implemented to address not only pollutants in "stormwater" but also from "non-stormwater discharges."

As the preamble states:

[Copermittees are required] to develop management programs for four types of pollutant sources which discharge to large and medium municipal storm sewer systems. Discharges from [such systems] are usually expected to be composed primarily of: (1) Runoff from commercial and residential areas; (2) storm water runoff from industrial areas; (3) runoff from construction sites; and (4) non-storm water discharges. Part 2 of the permit application has been designed to allow [permittees] the opportunity to propose MEP control measures for each of these components of the discharge". 55 Fed. Reg. at 48052 (emphasis supplied).

This language sets forth EPA's understanding of the plain language of the Act: "pollutants" must be controlled to the MEP from the MS4 "discharge", not merely stormwater. While State Board Order No. WQ 2009-0008 improperly attempted to ignore this distinction and liken non-stormwater discharges to prohibited "illicit discharges", that order has been vacated and cannot be cited by the Board.

Moreover, the interpretation that the Clean Water Act requires controls of dry weather discharges from the MS4 in the same manner as if such discharges were from an industrial wastewater source ignores the factual complexity of the MS4 discharge. For example, some of that discharge will be composed of exempt discharges, such as car washing runoff, swimming pool drainage, rising groundwater, foundation drains and other such sources. As to these types of discharges, U.S. EPA stated that "it is unlikely Congress intended to require municipalities to effectively prohibit . . . seemingly innocent flows that are characteristic of human existence in urban environments and which discharge to municipal separate storm sewers". 55 Fed. Reg. at 48037 (emphasis added). Other parts of that discharge will be comprised of industrial discharges separately permitted by the Board, such as well development discharges. These discharges cannot be distinguished from possible illicit discharges, yet they must still be treated to the MEP. There is no requirement in the Clean Water Act, or in the implementing regulations, to ensure that these mixed dry weather discharges must be "effectively prohibited" in the same way that an industrial plant would be required to control its discharges.

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**Comment Response**

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Please see the responses to comments 86 and 223.

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**Comment #** 217                      **Commentor** 4                      **Comment Subject** New Development

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**Specific Comment**

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[From Attachment 8 to the RCFC&WCD comment letter]

Section F.1.g: Since the District is not a municipality, and does not permit third parties to build development projects, this provision is not applicable to it. (It should be noted that this directive also has been objected to by the District on behalf of itself and the other Copermittees.)

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**Comment Response**

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The requested changes are not necessary. The RCFC&WCD is required to enforce its storm water requirements and ensure compliance with the requirements of the Tentative Order for its own development projects. No changes were made based on this comment.

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**Comment #** 218                      **Commentor** 4                      **Comment Subject** Construction

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**Specific Comment**

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[From Attachment 8 to the RCFC&WCD comment letter]

Sections F.2, F.2.a and F.2.f.: These directives require each Copermittee to comply with each of the requirements of the section, to review and update its grading and other ordinances, and implement an enforcement process for Construction sites. These requirements are not applicable to the District in the same manner as the other Copermittees, as the District is not a municipality and does not issue grading or other permits for private land use activities. Please see redline.

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**Comment Response**

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The San Diego Water Board disagrees that these requirements are not applicable to the RCFC&WCD in the same manner as the other Copermittees. The RCFC&WCD can review and update its grading and other requirements for construction projects implemented by the RCFC&WCD. The RCFC&WCD must enforce those requirements to ensure they are in compliance with the requirements of the Tentative Order. No changes were made based on this comment.

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**Comment #** 219                      **Commentor** 4                      **Comment Subject** Commercial/Industrial

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**Specific Comment**

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[From Attachment 8 to the RCFC&WCD comment letter]

Sections F.3.b-c: These directives, which require the development of commercial/industrial and residential programs, are applicable to a municipality but not to the District, which does not have land area occupied by either commercial/industrial or residential developments. Such requirements may be applicable to the municipal Copermittees, but not to the District, which only operates MS4 within the Permit area. The District's rights-of-way are limited to that which is necessary to properly operate flood control infrastructure. Please see redline.

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**Comment Response**

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The San Diego Water Board disagrees that the proposed changes are necessary to make a distinction for the RCFC&WCD. If the RCFC&WCD does not have any commercial/industrial and residential land uses within their jurisdiction, they can report it in their Annual Report. The San Diego Water Board would not expect the RCFC&WCD to implement these programs if these land uses are not within their jurisdiction. No changes were made based on this comment.

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<b>Comment #</b> 220	<b>Commentor</b>	4	<b>Comment Subject</b> Retrofit
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**Specific Comment**

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[From Attachment 8 to the RCFC&WCD comment letter]

Section F.3.d: This directive requires development of a retrofitting program for "municipal, industrial, commercial and residential" areas of development. The District only maintains MS4 facilities within the Santa Margarita Region, and does not have jurisdiction over other areas of development. The Order should make clear that any retrofitting requirements (which are the subject of separate comments by the District on behalf of other Copermittees) apply only to development with the jurisdiction of the Copermittee. Clarifying changes are set forth in the redline.

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**Comment Response**

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The San Diego Water Board disagrees with the requested changes. As stated in the comment, the RCFC&WCD maintains MS4 facilities within the Santa Margarita Region. MS4 facilities are considered municipal. There are potential retrofit opportunities for RCFC&WCD maintained MS4 facilities. Where there may be private property owners within other jurisdictions that could impact the RCFC&WCD MS4 facilities, the RCFC&WCD could work with those jurisdictions to identify ways to cooperate and encourage those private property owners to implement retrofit BMPs. No changes were made based on this comment.

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<b>Comment #</b> 221	<b>Commentor</b>	4	<b>Comment Subject</b> General
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**Specific Comment**

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[From Attachment 8 to the RCFC&WCD comment letter]

Section F.6: This directive contains requirements for education of various target communities, including commercial and industrial owners and operators and residential communities, most of which are not within the jurisdiction of the District. The Order should make clear that such educational programs must be consistent with the jurisdiction of the Copermittees. Clarifying changes are set forth in the redline.

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**Comment Response**

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Through meetings with the Copermittees, modifications to the education section were made to accommodate the concern raised by the RCFC&WCD. Section F.6 requires each Copermittee to implement education programs. The Tentative Order is silent on how those education programs are implemented (i.e. for each jurisdiction, or regional). On several occasions, the RCFC&WCD has indicated that the Copermittees have a regional education program. As such, the RCFC&WCD is participating in educating and reaching out to the target communities in all the municipalities. No additional clarification is necessary.

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<b>Comment #</b> 222	<b>Commentor</b>	4	<b>Comment Subject</b> General
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**Specific Comment**

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Attachment 9: Santa Margarita Region MS4 Copermittee Comments on Tentative Order R9-2010-0016 and Attachment E.

This attachment provides an underline strikeout text of Copermittee requested changes to the Tentative Order and Attachment E.

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**Comment Response**

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Where specific comments were provided in the underline-strikeout text, the San Diego Water Board has responded to those comments under a separate comment ID. Where comments were not provided in the text or where the comments were not otherwise addressed in other attachments of their comment letter, the San Diego Water Board has considered the change and either accepted the change as shown in the Errata or did not agree with the proposed change.

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**Comment #** 223                      **Commentor** 4                      **Comment Subject** Legal

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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

This order [WQ-2009-0008] has been vacated and can no longer be referenced

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**Comment Response**

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The San Diego Water Board disagrees with the commenter that discharges of non-storm water from the MS4 are subject only to the MEP standard. Non-storm water discharges into the MS4 are required to be effectively prohibited by the Copermittees. The San Diego Water Board acknowledges that State Water Board Order WQ-2009-0008 is no longer a precedential order by which the San Diego Water Board is bound, the court's opinion in County of Los Angeles v State Water Resources Control Board (Case No. BS 122724 (July 16, 2010)) does not address the substantive analysis and conclusions reached by the State Water Board in Order WQ-2009-0008. Rather, it vacates the permit issued by the Los Angeles Water Board that underlies Order WQ-2009-0008 on procedural grounds. The San Diego Water Board continues to agree with the State Water Board's findings and rationale as expressed in the Order. Findings in the Tentative Order will be revised to reflect that although Order WQ 2009-0008 is no longer a precedential order, the San Diego Water Board independently agrees with its findings and rationale.

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**Comment #** 224                      **Commentor** 4                      **Comment Subject** Legal

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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

This is inappropriate. The information in the fact sheet is/are not 'findings', they are explanations. Further a finding cannot be created through a response to comments.

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**Comment Response**

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Please see the response to comment 210. While the San Diego Water Board has modified the finding stating that responses to comments are incorporated as findings, it is appropriate to incorporate by reference the Fact Sheet into the Tentative Order.

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**Comment #** 225                      **Commentor** 4                      **Comment Subject** Finding

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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

No link has been demonstrated within this watershed. (Partially due to lack of recreation in receiving waters)

The findings should be accurate for reflective of the specific area the permit is regulating.

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**Comment Response**

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The San Diego Water Board contends that the finding is accurate for the specific area the permit is regulating. A landmark study, conducted by the Santa Monica Bay Restoration Project, found that there was an increased occurrence of illness in people that swam in proximity to a flowing storm drain. Although the Upper Santa Margarita Watershed is inland, the watershed drains to the Pacific Ocean, and pollutants generated in the area may impact coastal waters. For example, the Santa Margarita River system provides the main source of beach sand for the beaches in northern San Diego County. In addition, residents from the Upper Santa Margarita Watershed, who recreate at southern California beaches, benefit from clean water. Also, the waters in the Upper Santa Margarita Watershed are designated with water contact recreation (REC-1) beneficial use, and waders may come in direct contact with storm drain discharges. No changes were made based on this comment

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<b>Comment #</b> 226	<b>Commentor</b>	4	<b>Comment Subject</b> Legal
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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

[Copermittees request the word "violations" be replaced with the word "exceedances" in the Finding C.9 that states (in summary) that water quality monitoring data documents persistent violations of Basin Plan water quality objectives.]

It is only a violation if the pollutant has not been reduced to the MEP in accordance with a Permit.

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**Comment Response**

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Section A.2 of the current Riverside County MS4 Permit (Order No. R9-2004-001) prohibits [storm water and non-storm water] discharges from MS4s that cause or contribute to exceedances of water quality objectives for surface water or groundwater. Thus, the San Diego Water Board characterizes exceedances of the water quality objectives in the Basin Plan as violations of water quality objectives, especially if discharges from the MS4 is causing or contributing to those exceedances. This prohibition remains in the Tentative Order (see section A.3), but now also includes response requirements (see sections A.3.a-c).

Section A.3 of Order No. R9-2004-001 prohibits [storm water] discharges from MS4s containing pollutants which have not been reduced to the MEP. MEP only applies to storm water discharges. Please see response to comment 23. If pollutants in storm water discharges are not reduced to the MEP, the discharges would also be in violation of this prohibition. This prohibition remains in the Tentative Order (see section A.2). No changes were made based on this comment.

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<b>Comment #</b> 227	<b>Commentor</b>	4	<b>Comment Subject</b> Finding
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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

See legal comments in Attachment 7 Discharges of pollutants from the MS4, of whatever source, are subject to the MEP standard. The MEP standard applies to municipal discharges, not to only municipal storm water discharges.

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**Comment Response**

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Please see the response to comment 86.

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<b>Comment #</b> 228	<b>Commentor</b>	4	<b>Comment Subject</b> Overirrigation
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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

This is a false statement – the Copermittees have not made this determination (or ‘identification’) See also comments within the letter and attachments thereto.

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**Comment Response**

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Please see the responses to comments 27 and 83.

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**Comment #** 229                      **Commentor** 4                      **Comment Subject** Finding

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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

[Copermittees request the terms "Drainage Area Management Plan" be replaced with "Storm Water Management Plans" and that Storm Water Management Plans together with the DAMP describe the Copermittee's runoff management programs.]

Terminology in this paragraph was not correct for the Santa Margarita Region

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**Comment Response**

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Comment noted, the recommended changes have been made to the Tentative Order and reflected in the errata.

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**Specific Comment**

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[From Attachment 7 to the RCFC&WCD comment letter]

Finding C.15: This finding states, in relevant part, that the Board and the Copermittees have identified "landscape irrigation, irrigation water and lawn water, previously exempted discharges, as a source of pollutants and conveyance of pollutants to waters of the U.S." The finding further asserts that such non-exempt discharges are required to be "addressed" as "illicit discharges" and effectively prohibited from entry into the MS4.

Comment: The rationale for this prohibition lacks both a factual and legal basis. The factual issues are discussed in the District's technical comments on this issue. With regard to legal issues, the justification for removing the preexisting exemption for these discharges (referred to hereafter as "irrigation water") is completely lacking. First, given that the justification is based on State Board Order WQ 2009-0008, which likens dry weather discharges to "illicit discharges" required to be "effectively prohibited" from entry into the MS4, the vacation of this order by the Los Angeles County Superior court eliminates this Order as a justification for the prohibition.

Second, EPA, in the preamble to the federal MS4 regulations, required that a permittee must make a finding that the "irrigation water" discharges must be a "source of pollutants to waters of the United States . . .". 55 Fed. Reg. 48037. Moreover, such discharges must represent a "significant" source of pollutants to waters of the United States "under certain conditions". U.S. EPA Guidance Manual for the Preparation of Part 2 of the NPDES Permit Application for Discharges from Municipal Separate Storm Sewer Systems, November 1992 ("EPA Part 2 Guidance Manual"), at p. 6-33. These conditions require a focus not on an entire category of discharges, but rather a discharger-by-discharger examination.

In the MS4 regulatory preamble, EPA stated that "[i]n general, municipalities will not be held responsible for prohibiting some specific components of discharges or flows listed below through their [MS4], even though such components may be considered non-storm water discharges, unless such discharges are specifically identified on a case-by-case basis as needing to be addressed". 55 Fed. Reg. 47995 (emphasis supplied). In the Guidance Manual, EPA states:

If an applicant knows . . . that landscape irrigation water from a particular site flows through and picks up pesticides or excess nutrients from fertilizer applications, there may be a reasonable potential for a storm water discharge to result in a water quality impact. In such an event, the applicant should contact the NPDES permitting authority to request that the authority order the discharger . . . to obtain a separate NPDES permit (or in this case, the discharge could be controlled through the storm water management program of the MS4).

EPA Part 2 Guidance Manual, p. 6-33 (emphasis added).

Third, the finding asserts that the Board has the authority to "identify exempted discharges as a source of pollutants" and that it has identified the irrigation discharges "as a source of pollutants and conveyance of pollutants to waters of the U.S." Read in the context of the previously cited language, however, the Board has no power greater than a municipality and must identify specific discharges, and not entire categories of discharges. See 55 Fed. Reg. 48037. And, as noted in the white paper on irrigation runoff, the Copermittees have not, in fact, identified irrigation discharges as a source of pollutants or a "conveyance of pollutants" to waters of the United States.

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**Comment Response**

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Please see the responses to comments 27, 83 and 223. The Fact Sheet describes that overirrigation discharges are a significant source of pollutants into and from the MS4 to water of the US.

The San Diego Water Board disagrees with the comment that: "These conditions require a focus not on an entire category of discharges, but rather a discharger-by-discharger examination." The Federal Register (as referenced in the above comment), in discussion of exempted categories of non-storm discharges states: "in general, municipalities will not be held responsible for prohibiting some specific components of discharges or flows listed below through their municipal separate storm sewer system, even though such components may be considered non-storm water discharges, unless such discharges are specifically identified on a case-by-case basis as needing to be addressed." (Vol. 55 Fed Reg 47995). The San Diego Water Board maintains that 40 CFR 122.26(d)(2)(iv)(B)(1) and the discussion in the Federal Register are clear in discussion of "components" and "categories" of non-storm water discharges, and that the exempted components and categories of non-storm water discharges are required to be addressed through prohibition on a category by category basis, not on a discharger by discharger basis, when identified as a source of pollutants.

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The discussion in the Federal Register further clarifies that once a category of exempted non-storm water discharges has been identified and prohibited, "operators of such non-storm water discharges need to obtain NPDES permits for these discharges under the present framework of the CWA..." as "such illicit discharges are not authorized under the CWA" (55 Fed Reg 47995). This is consistent with existing NPDES permits applicable to categories of discharges.

Furthermore, in addition to the regulations under 40 CFR 122.26(d), the discussion in the Federal Register (55 Fed Reg 48037) clearly states that "the Director may include permit conditions that either require municipalities to prohibit or otherwise control any of these types of discharges where appropriate."

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<b>Comment #</b> 231	<b>Commentor</b>	4	<b>Comment Subject</b> Legal
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**Specific Comment**

[From Attachment 9 to the RCFC&WCD comment letter]

Not all non-storm water discharges need to be prohibited.

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**Comment Response**

The Clean Water Act requires all non-storm water discharges to the MS4 be effectively prohibited. Section 402(p)(3)(B)(ii) reads "Municipal Discharge -- Permits for discharges from municipal storm sewers ... shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers;"

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<b>Comment #</b> 232	<b>Commentor</b>	4	<b>Comment Subject</b> Legal
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**Specific Comment**

[From Attachment 9 to the RCFC&WCD comment letter]

The MS4 can never be comprised of natural waterbodies. See definition in federal MS4 regulations and legal comments in Attachment 7.

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**Comment Response**

Please see the response to comment 22.

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<b>Comment #</b> 233	<b>Commentor</b>	4	<b>Comment Subject</b> Finding
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**Specific Comment**

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[From Attachment 7 to the RCFC&WCD comment letter]

Finding D.1.b.: This finding states that "MS4 discharges, however, continue to cause or contribute to violations of water quality standards as evidenced by the Copermittees' monitoring results". (Emphasis added)

Comment: With respect to discharges that "contribute to" violations of water quality standards, it should be noted that for concentration-based water quality standards, an MS4 discharge at concentrations below the water quality standard cannot, as a matter of simple scientific fact, contribute to a violation of such a water quality standard. If the discharge is below the standard in question, that discharge will never exceed the water quality standard, no matter the volume of the discharge.

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**Comment Response**

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The Copermittees' water quality monitoring data submitted to date documents persistent violations of Basin Plan water quality objectives for various runoff-related pollutants (indicator bacteria, dissolved solids, turbidity, metals, pesticides, etc.) at various watershed monitoring stations. Additionally, available monitoring data submitted to the San Diego Water Board have resulted in a significant increase in 303(d) listings for the waters in the Upper Santa Margarita Watershed. On the 2002 303(d) List there were 3 water body/pollutant combinations listed. On the 2008 303(d) List there were over 50 water body/pollutant combinations listed. The 303(d) impaired water body listings are based on violations of water quality standards in the Basin Plan.

The commenter does not consider other ways that discharges to and from the MS4 can contribute to violations of water quality standards. Pollutants in discharges to the MS4 may be deposited within the MS4 and accumulate over time. Those accumulated pollutants could contribute to a violation of water quality standards when the next storm event washes those pollutants from the MS4 to the receiving waters.

Non-storm water discharges from the MS4 during dry weather may discharge at concentrations below the water quality standards, but can still contribute to a violation of water quality standards. Non-storm water discharges to the receiving waters, which may be dry at the time, could pool and concentrate the pollutants within the receiving water body as the water evaporates. The concentrated pollutants in the receiving water body could contribute to violations of water quality standards with the next storm event.

No changes were made based on this comment.

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<b>Comment #</b> 234	<b>Commentor</b>	4	<b>Comment Subject</b> Legal
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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

The MS4 operators are obligated to take storm water under state law, and therefore must "passively" receive such waters, whether or not they contain pollutants. Moreover, a number of separately permitted sources discharge into the MS4 through rights granted under the NPDES program. Control over such permitted sources is the responsibility of the owner of that permitted discharge in question.

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**Comment Response**

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Please see the response to comment 81. The Copermittees are responsible for flows into, through and from their MS4s, and they cannot passively accept discharges from third parties (see Finding D.3.d and Discussion in the Fact Sheet). If the Copermittees identify sources regulated under separate NPDES permits that are discharging pollutants into their MS4 systems and causing exceedances of water quality standards in the receiving waters, the Copermittees should identify those sources, with supporting data and documentation, to the San Diego Water Board so the NPDES requirements for those sources can be enforced and/or revised.

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<b>Comment #</b> 235	<b>Commentor</b>	4	<b>Comment Subject</b> Finding
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**Specific Comment**

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[From Attachment 7 to the RCFC&WCD comment letter]

Finding D.2.g: This finding, which concerns the effects of urbanization on the characteristics of stormwater flow, states in part that "[h]ydromodification measures for discharges to hardened channels are needed for the future restoration of the hardened channels to their natural state . . . ."

Comment: Hardened flood control channels are in place in the Santa Margarita Region due to the need to protect the lives and property of Riverside County residents from floodwaters. Such channels, and other flood control structures, have been established by the District in accordance with its statutory obligations set down by the Legislature in California Water Code App. § 48-9. In particular, we draw the Board's attention to that section of the Water Code setting forth the power of the District to "control the flood and storm waters of said district" and to save and conserve in any manner all or any of such waters and protect from damage from such flood or storm waters the watercourses, watersheds, public highways, life and property in said district." Water Code App. § 48-9(8).

The Board has no statutory jurisdiction under the MS4 program to alter any flood control structures or channels of the District or to some jurisdiction over the construction or location of such structures or channels. Any such alteration or construction must be done with the cooperation and agreement of the District and in accord with the District's statutory mandate to protect the citizens of Riverside County. Please see changes in redline.

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**Comment Response**

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The Tentative Order does not require the alteration of any existing flood control structures or channels. Implementing hydromodification measures for discharges from development projects to hardened channels will allow those hardened channels to be restored to a more natural (i.e. non-hardened) state some day in the future. If those hydromodification measures are not implemented, there is not the possibility that those hardened channels could be restored to a more natural state.

Nor does the RCFC&WCD have a statutory obligation to degrade or destroy water quality and beneficial uses to control flood waters. Rather the opposite; per the federal Clean Water Act Section 101(a), the RCFC&WCD is required to "[r]estore and maintain the chemical, physical, and biological integrity of the Nation's waters." Controlling flood waters while protecting water quality are not mutually exclusive and can be done synergistically to provide economic, environmental and societal benefits. No changes were made based on this comment.

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<b>Comment #</b> 236	<b>Commentor</b>	4	<b>Comment Subject</b> Legal
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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

This finding is inaccurate and inappropriate, as the Commission on State Mandates, and not the Regional Board, has exclusive jurisdiction in determining whether a requirement is an unfunded state mandate. See legal comment white paper.

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**Comment Response**

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Please see the response to comment 77.

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<b>Comment #</b> 237	<b>Commentor</b>	4	<b>Comment Subject</b> Finding
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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

The federal regulations (that do not allow waste assimilation), do not apply to waters of the state.

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**Comment Response**

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The San Diego Water Board disagrees with the proposed change. Waste assimilation is not considered a beneficial use of waters of the U.S. or waters of the state. No changes were made based on this comment.

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<b>Comment #</b> 238	<b>Commentor</b>	4	<b>Comment Subject</b> Finding
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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

[Copermittees requested deletion of ", and Turbidity" from Finding E.9.]

This is not on the 303(d) list.

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**Comment Response**

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The commenter is correct that turbidity is not on the 303(d) list. Finding E.9 has been modified to accurately list the pollutants causing impairments as shown in the 2008 303(d) List.

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<b>Comment #</b> 239	<b>Commentor</b>	4	<b>Comment Subject</b> Legal
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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

See legal comment white paper. The scope of this Order is the discharge from MS4s. Moreover, MS4s are not receiving waters.

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**Comment Response**

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Please see the responses to comments 22, 233, and 290.

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<b>Comment #</b> 240	<b>Commentor</b>	4	<b>Comment Subject</b> Legal
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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

[Copermittees requested adding "Subject to the requirements of section A..3.a" to the opening sentence of section A.3.]

This change clarifies that the iterative process reflected in Part A.3 applies to the entire provision.

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**Comment Response**

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The requested changes are not necessary as it simply references the immediately following subsection. No changes were made based on this comment.

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<b>Comment #</b> 241	<b>Commentor</b>	4	<b>Comment Subject</b> Legal
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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

[Copermittees request adding "but the Copermittees shall not be liable for violation of section A.3 provided that they are in compliance with the requirements of this section" to the end of the sentence for section A.3.c.]

This change reiterates that the iterative process is in effect so long as the Copermittees remain in compliance with the process set forth in section A.3.

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**Comment Response**

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The San Diego Water Board disagrees with the proposed changes. The requested change makes the referenced provision entirely unenforceable and therefore, likely not complied with. The Copermittees must implement the iterative process. The San Diego Water Board reserves the enforcement authority to determine liability for a permit violation. The Tentative Order does not provide any "safe harbor" provisions for violations of water quality standards. No changes were made based on this comment.

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<b>Comment #</b> 242	<b>Commentor</b>	4	<b>Comment Subject</b> Discharge Prohibitions
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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

As noted in the comment letter and Attachment 6, irrigation runoff has not been shown to be an actual source of pollutants to the receiving waters in this watershed.

As such the comment letter requests that THE CONDITIONAL EXEMPTION BE RESTORED as shown in the redlines above.

Should the Board decide to prohibit the discharge anyway, the Copermittees request that at a minimum that the category of discharges be managed through a JRMP program similar to non-emergency fire fighting flows, as shown in these redlines.

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**Comment Response**

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Please see the response to comment 83. Irrigation runoff has been shown to be a source and conveyance of pollutants to receiving waters. The San Diego Water Board disagrees with the proposed changes. The Copermittees are expected to prevent discharges from overirrigation into the MS4 and eliminate those discharges through their IC/ID programs. No changes were made based on this comment.

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**Comment #** 243      **Commentor** 4      **Comment Subject** Legal

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**Specific Comment**

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[From Attachment 7 to the RCFC&WCD comment letter]

Finding D.3.c: This finding states in part that "urban streams", whether natural, anthropogenic or partially modified, are considered part of the "MS4" if they are used as a conveyance for runoff.

Comment: The definition of "MS4" does not include any natural watercourse. This is evident both from the definition of "MS4" in the federal Clean Water Act regulations and from EPA's comments in the preamble to those regulations. First, the definition of "MS4", in relevant part, states that it consists of "a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, manmade channels or storm drains" "owned or operated by" a municipality "having jurisdiction over disposal of . . . storm water" that is "designed or used for collecting or conveying storm water". 40 CFR § 122.26(b)(8). Nothing in that definition even suggests that natural watercourses are part of the MS4, only improved watercourses.

Second, U.S. EPA, in the preamble to the original MS4 regulations, stated unequivocally that "[t]he Agency also wants to clarify that streams, wetlands and other water bodies that are waters of the United States are not storm sewers for the purpose of this rule". 53 Fed Reg. 49442 (December 7, 1988).<sup>1</sup>

Moreover, none of the Copermitees "own" or "operate" a natural stream. Such streams are waters of the State and are "owned" by the people of California.

The authority cited in the Fact Sheet for this finding, a response filed with the State Board in opposition to a petition challenging an MS4 permit issued by the Board to San Diego County, contradicts the federal definition and, under the Supremacy Clause, cannot be employed. Please see changes in redline.

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**Comment Response**

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Please see the response to comment 22.

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**Comment #** 244      **Commentor** 4      **Comment Subject** Action Levels

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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

'lack of compliance' is in contradiction with the second sentence. The proposed language is more appropriate.

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**Comment Response**

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The San Diego Water Board disagrees that the two sentences are in contradiction. The second sentence has the clarifying phrase "does not alone" constitute a violation. In addition, the third sentence does not state that an NAL exceedance is unequivocally a lack of compliance; but only that an NAL exceedance "may indicate" a lack of compliance. The requested change has not been made.

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**Comment #** 245      **Commentor** 4      **Comment Subject** Legal

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**Specific Comment**

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[From Attachment 7 to the RCFC&WCD comment letter]

Finding E.1: This finding states that the RWL language in the Tentative Order "requires compliance with water quality standards, which for stormwater discharges compliance is to be achieved through an iterative approach requiring the implementation of improved and better-tailored BMPs over time".

Comment: The District has two comments regarding this finding, one relating to the language of the finding and one relating to the Fact Sheet discussion of the finding. First, the language of State Board Order WQ 99-05, which establishes the RWL language required to be placed in MS4 permits statewide, is not limited to "stormwater" discharges, but rather to all discharges into receiving waters. See State Board Order WQ 99-05. This is consistent also with the requirement that "discharges" from the MS4, not merely stormwater discharges, must be controlled to the MEP and are not required to meet numeric effluent limitations. 33 U.S.C. § 1342(p)(3)(B)(iii). Second, while the language of the finding correctly states that compliance with water quality standards "is to be achieved through an iterative approach", language in the Fact Sheet improperly contradicts this finding by asserting that compliance with the iterative BMP process "does not shield the discharger from enforcement actions for continued non-compliance with water quality standards". Fact Sheet, page 91.

Such an interpretation contradicts the plain language of Order WQ 99-05 and appears to represent an "end-run" around the entire iterative process and the concept of MEP, which is a flexible concept, intended to allow the development of site-specific permit conditions based on the judgment of the permit writer. See, e.g., 55 Fed. Reg. 48038. The interpretation is, therefore, not consonant with the requirements of the State Board precedential order and the MS4 regulations and should be deleted from the Fact Sheet.

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**Comment Response**

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Please see the responses to comments 23, 207 and 290. The Tentative Order and Fact Sheet are consistent with Order WQ 99-05 as well as Order WQ-2001-015 (In the Matter of the Petitions of Building Industry Association of San Diego County and Western States Petroleum Association).

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**Comment #** 246      **Commentor** 4      **Comment Subject** Action Levels

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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

The previous sentence requires outfalls to be selected consistent with Attachment E. This sentence is not needed and is duplicative of Attachment E.

At a minimum, this language will need to be modified to be consistent with changes being requested in the Attachment 4 to the Comment Letter, including any footnotes.

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**Comment Response**

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The sentence simply reiterates the San Diego Water Board's requirement that a representative percentage of major outfalls are sampled. The requested change has not been made.

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<b>Comment #</b> 247	<b>Commentor</b>	4	<b>Comment Subject</b> Action Levels
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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

This value was incorrectly referencing the criteria for beach areas and needs to be updated to reflect the shown values for infrequently used areas.

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**Comment Response**

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The value is correct. For the application of Enterococcus REC-1 water quality objectives, unless otherwise specified in the Basin Plan, all waterbodies in the San Diego Region designated with REC-1 beneficial use are assumed to have a “designated beach” usage frequency. Until a lower usage frequency is designated in the Basin Plan for one or more water bodies in the Upper Santa Margarita Watershed, the water quality objective based on the “designated beach” usage frequency is the appropriate and correct value to be included in the action levels.

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<b>Comment #</b> 248	<b>Commentor</b>	4	<b>Comment Subject</b> Action Levels
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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

Conflicts with attachment E, which states to select ‘representative’ outfalls.

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**Comment Response**

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Comment noted. The requested change has been made in the errata.

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<b>Comment #</b> 249	<b>Commentor</b>	4	<b>Comment Subject</b> Action Levels
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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

[The Copermittees request addition of language that end-of-pipe assessment points for SAL compliance are major outfalls as also defined by Attachment E of the Tentative Order.]

Consistent with NALs section

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**Comment Response**

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Comment noted. This is a reasonable request and the change has been made in the errata document.

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**Specific Comment**

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[From Attachment 7 to the RCFC&WCD comment letter]

Finding E.6: This finding purports to determine that the Tentative Order "does not constitute an unfunded local government mandate subject to subvention under Article XIII B, Section(6) of the California Constitution".

Comment: This finding has no place in the Tentative Order. The exclusive jurisdiction over a determination as to whether a mandate constitutes an unfunded state mandate lies with the Commission on State Mandates. The Commission has exclusive authority to determine, in the first instance, whether a requirement constitutes an unfunded state mandate. Government Code §§ 17751 and 17552; Lucia Mar Unified School District v. Honig (1988) 44 Cal.3d 830, 837; Hayes v. Commission on State Mandates (1992) 11 Cal.App.4th 1546, 1596-97. The findings of an agency that has no jurisdiction to make those findings are entitled to no weight.

Second, the finding is erroneous on several grounds. It is erroneous in its assertion that the Tentative Order "implements federally mandated requirements under CWA §402". While true, the Order also contains separate state-mandated requirements. As the California Supreme Court has held, NPDES permits (like the Tentative Order) can contain both federal and state requirements. See *City of Burbank*, supra, 35 Cal. 4th at 618, 628. Where those non-federal requirements constitute a new program or higher level of service ordered by the state or exceed federal requirements, those requirements can qualify as a state mandate requiring a subvention of funds. See *Long Beach Unified School District v State of California* (1990) 225 Cal.App.3d 155, 172-73. Even if the requirement derives from federal law, the requirement can still constitute an unfunded state mandate if the state agency has a choice as to whether to impose the requirement on the permittees, e.g., *Hayes*, 11 Cal.App.4th at 1593-94.

Recently, the Commission on State Mandates held that both the Los Angeles County MS4 Permit and the San Diego County MS4 Permit contained requirements that constituted an unfunded state mandate, not required by federal law. In re Test Claim on Los Angeles Regional Quality Control Board Order No. 01-182, July 31, 2009; In re Test Claim on San Diego Regional Water Quality Control Board Order No. R9-2007-0001, March 26, 2010.

The finding further asserts that the obligations to be imposed on the Copermittees are "similar to, and in many respects less stringent than" obligations on non-governmental discharges. A similar argument was considered and rejected by the Commission in the Los Angeles and San Diego MS4 Permit Test Claims. The District disagrees with this assertion, as there are numerous requirements in the Tentative Order that are uniquely applicable to governmental entities. This is, however, a question that would be addressed by the Commission on State Mandates were a test claim to be filed, the only procedure for the determination of this issue.

The finding further asserts that Copermittees "have the authority to levy service charges, fees, or assessments to pay for compliance with this Order". This finding is both erroneous on the facts and without any basis in the record. The question of how a state mandate is to be funded is beyond the scope of the Board's expertise and, again, is exclusively within the jurisdiction of the Commission on State Mandates. The finding also asserts that the "Copermittees requested permit coverage in lieu of compliance with the complete prohibition against the discharge of pollutants contained in CWA §301, subdivision (a)". A similar argument was made and rejected in the Los Angeles and San Diego MS4 Permit Test Claims. The finding further asserts that prohibitions against conditions of pollution or nuisance predate the enactment of Article XIII B Section 6 of the California Constitution. The requirements of the Tentative Order far exceed such requirements. And, in any event, whether such requirements predate Article XIII B Section 6 is an issue for the Commission on State Mandates.

The finding is not supported by evidence in the record and is in fact contradicted by controlling legal precedent. Even were it to be included in the Tentative Order, it is entitled to no weight since the Board lacks jurisdiction to make such a finding. For these reasons, the finding and any associated discussion in the Fact Sheet should be deleted. Please see changes in redline.

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**Comment Response**

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This comment contradicts comments made by other commenters that insist that the San Diego Water Board must recognize that certain Tentative Order provisions constitute unfunded state mandates and may not properly be adopted unless the State first provides funding to the Copermittees to carry out those provisions. The San Diego Water Board agrees that the Commission on State Mandates ultimately has jurisdiction to determine that a provision in an executive order constitutes an unfunded state mandate requiring state subvention. Finding E.6 is nonetheless appropriate and necessary to express the San

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Diego Water Board's opinion that the Tentative Order is the result of a federal and not a state mandate. Please also see the responses to comments 8 and 77-81.

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**Comment #** 251                      **Commentor**      4                      **Comment Subject** Action Levels

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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

The previous sentence requires outfalls to be selected consistent with Attachment E. This sentence is not needed and is duplicative of Attachment E.

At a minimum, this language will need to be modified to be consistent with changes being requested in the Attachment 4 to this comment letter, including any footnotes.

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**Comment Response**

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Please see the response to comment 246.

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**Comment #** 252                      **Commentor**      4                      **Comment Subject** Legal

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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

See legal comments in Attachment 7. The Copermitees' responsibility under the Clean Water Act is to reduce the discharge of pollutants from the MS4 to the MEP. Therefore, the purpose of the BMP is to reduce pollutants in such discharges

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**Comment Response**

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Please see the response to comment 23. No changes were made based on this comment.

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**Comment #** 253                      **Commentor**      4                      **Comment Subject** Legal

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**Specific Comment**

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[From Attachment 7 to the RCFC&WCD comment letter]

Section A.1: This directive mandates, among other things, that discharges "into" MS4s that would cause or threaten to cause a condition of "pollution, contamination, or nuisance" in receiving waters of the state are prohibited.

Comment: While the Board in this Order has jurisdiction to prohibit discharges "from" the MS4, it cannot regulate conditions within the MS4, since these are not in fact "receiving waters of the state". In any event, the language is superfluous, since regulation of a discharge from the MS4, which is subject matter of the Tentative Order, accomplishes the same end. Please see the accompanying redline.

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**Comment Response**

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Please see the responses to comments 23, 72, 233 and 290. No changes were made based on this comment.

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<b>Comment #</b> 254	<b>Commentor</b>	4	<b>Comment Subject</b> Legal
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**Specific Comment**

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[From Attachment 7 to the RCFC&WCD comment letter]

Section A.3: This directive both recites the prohibition against discharges that cause or contribute to the violation of water quality standards and introduces the iterative process required by the State Board for MS4 permittees.

Comment: To clarify that the iterative process specifically applies to the Copermitees' compliance requirements in Section A.3, language has been added in the redline.

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**Comment Response**

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The proposed change is not necessary. Please see response to comment 23, 207 and 290. No changes were made based on this comment.

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<b>Comment #</b> 255	<b>Commentor</b>	4	<b>Comment Subject</b> Legal
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**Specific Comment**

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[From Attachment 7 to the RCFC&WCD comment letter]

Section A.3.b: This directive relates to the requirement that the Copermitees repeat the iterative process to comply with receiving water limitations for continuing or recurring exceedances of the limitations.

Comment: Clarifying language changes are requested in the redline.

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**Comment Response**

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The proposed change is not necessary. Please see response to comment 23, 207 and 290. No changes were made based on this comment.

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<b>Comment #</b> 256	<b>Commentor</b>	4	<b>Comment Subject</b> Legal
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**Specific Comment**

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[From Attachment 7 to the RCFC&WCD comment letter]

Section A.3.c: This directive indicates that nothing prevents the Board from enforcing any provision of the Order while the Copermitees are preparing and implementing the receiving water limitation report.

Comment: Clarifying language changes are included in the redline to make clear that so long as the Copermitees are in compliance with the requirements of Section A.3, they are not in violation of the section.

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**Comment Response**

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The San Diego Water Board disagrees with the proposed change. Please see response to comment 241. No changes were made based on this comment.

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**Comment #** 257      **Commentor** 4      **Comment Subject** Legal

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**Specific Comment**

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[From Attachment 7 to the RCFC&WCD comment letter]

Section B.2: This section categorizes the types of non-stormwater discharges that are not prohibited from discharge into the MS4, and thus not subject to the "effectively prohibit" requirement in Section B.1. However, this section improperly omits several categories of non-stormwater discharges, landscape irrigation, irrigation water, lawn watering and non-emergency fire fighting flows. In addition, this section states that the Water Board may require controls for "non-anthropogenic sources".

Comment: As discussed above in the District's comment concerning Findings C.14 and C.15, the Board lacks authority to delete an entire category of discharge from the non-stormwater designation. Such authority must be exercised primarily by the Copermittees, based on their evaluation of source-specific facts. And, the ability of the RWQCB to liken such flows to "illicit discharges", apparently authorized by State Board Order No. WQ 2009-0008, is no longer in effect, as that Order has been vacated. Moreover, there is no requirement in the MS4 regulations for controls on "non-anthropogenic sources". Such natural sources are not within the control of the MS4 Copermittees. Moreover, controlling such natural sources as rising groundwater or springs by sealing the MS4 could raise concerns about interference with water rights. Given the natural source of such springs, the incidental presence of pollutants in the waters would have occurred whether an MS4 was in existence or not. Please see the accompanying redline as well as the District's technical comments on this directive.

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**Comment Response**

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Please see the responses to comments 27 and 83 in regards to the removal of landscape irrigation, irrigation water, lawn watering from the list of discharge categories that do not have to be prohibited from entering the MS4. The requirement to implement appropriate control measures for non-anthropogenic sources identified as sources of pollutants discharging into or from the MS4 is consistent with the federal regulations. To date, neither the Copermittees nor the San Diego Water Board has identified non-anthropogenic sources as significant sources of pollutants discharging into or from the MS4. No changes were based on this comment. Please also see the response to comment 223 concerning Order No. WQ-2009-0008.

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**Comment #** 258      **Commentor** 4      **Comment Subject** Legal

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**Specific Comment**

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[From Attachment 7 to the RCFC&WCD comment letter]

Section C: This section establishes "non-stormwater dry weather action levels" ("NAL") monitoring and the requirements to be followed when NALs exceedances are identified.

Comment: In addition to the District's technical comments on this part, the District has the following concerns regarding legal aspects of this directive. The District wishes to incorporate its comments on Findings C.14 and C.15, which discuss the requirements applicable to any discharge from an MS4, which is that the Copermittees control pollutants in such discharges to the MEP. Such a requirement applies not only to discharges of stormwater, but also dry weather discharges, which may (as discussed above) include not only non-exempted non-stormwater discharges but also discharges from exempted non-stormwater sources (those identified in Section B.2 of the Order) as well as discharges from sources holding separate NPDES permits. We note that Section C.2.d. requires prompt notice to the RWQCB of a source that may require a separate NPDES permit. The Board must be prepared to address such sources and not require further investigation by the Copermittees. As also noted above, in the preamble to the MS4 regulations, U.S. EPA indicated that the MEP control requirement would apply to all discharges from MS4s, including "non-stormwater discharges". 55 Fed. Reg. 48052.

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**Comment Response**

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Please see the response to comment 23, 86 and 290.

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**Comment #** 259                      **Commentor**      4                      **Comment Subject** General

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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

[The Copermittees requested adding "to the extent of their legal authority established under the California Constitution and any enabling acts" to first sentence of section E.1.]

To address limitations of the District

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**Comment Response**

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The proposed change is not necessary. The Code of Federal Regulations requires the Copermittees including RCFC&WCD to have adequate legal authority to comply with the Tentative Order. No changes were made based on this comment.

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**Comment #** 260                      **Commentor**      4                      **Comment Subject** Legal

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**Specific Comment**

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[From Attachment 7 to the RCFC&WCD comment letter]

Section E.1.a: This directive requires the Copermittees to have legal authority to, among other things, "control the quality of runoff from industrial and construction sites", including sites that have coverage under the general industrial and construction stormwater permits.

Comment: As separate NPDES permits, the general construction and general industrial stormwater permits allow discharge into the MS4 so long as those permits are being complied with. Copermittees do not have authority to contradict the requirements of the general permits. This requirement is vague and ambiguous, and goes beyond the requirements of the MS4 regulations, which require that Copermittees demonstrate that they have legal authority to control discharges into their MS4 systems.

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**Comment Response**

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The Copermittees must enforce their ordinances to prevent or eliminate discharges to their MS4s that can cause or contribute to a condition of pollution in receiving waters. Please see the response to comment 76. If construction or industrial sites are discharging pollutants that are causing a condition of pollution in receiving waters, they are likely in violation of their NPDES requirements. The Copermittees have the authority to enforce their ordinances. The Copermittees can report these violations to the San Diego Water Board, and the San Diego Water Board can also enforce the the NPDES requirements.

40 CFR 122.26 (d)(2)(i)(A) specifically requires the Copermittees 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;" Construction activity is a subset of industrial activity. The USEPA in the Code of Federal Regulations purposefully required a dual permitting system, MS4 and individual, for industrial activities due to their heightened threat to water quality. The Copermittees' ordinances and requirements do not contradict the general industrial stormwater permits; rather the Copermittees can apply more stringent controls than those that are required under general permits.

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**Comment #** 261                      **Commentor** 4                      **Comment Subject** LID

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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

[The Copermittees requested deletion of "of storm water pollutants from the MS4 will be reduced to the MEP, will not cause or contribute to a violation of water quality standards, and" from first sentence of section F.1.c.]

This is duplicative of section A and is not needed. Further, the end of this sentence specifically requires compliance with this order.

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**Comment Response**

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The San Diego Water Board disagrees with the proposed change. The text was included to reiterate the requirements of section A and no changes were made in response to this comment.

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**Comment #** 262                      **Commentor** 4                      **Comment Subject** Legal

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**Specific Comment**

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[From Attachment 7 to the RCFC&WCD comment letter]

Sections E.1.j and k: These directives require the Copermittees to have legal authority to require the use of BMPs to prevent or reduce the discharge of pollutants into MS4s from stormwater to the MEP and to require documentation on such BMPs.

Comment: The Copermittees are required under the Clean Water Act to control discharge of pollutants from their MS4 to the MEP standard. 33 U.S.C. § 1342(p)(3). There is no requirement that discharges into the MS4 meet this standard, though the Copermittees are free to impose such a standard voluntarily. These provisions are not required and should either be removed or made optional for the Copermittees. The requirements of these directives are also duplicative of Section E.1.i., which already requires the Copermittees to have the legal authority to require reports from dischargers to the MS4.

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**Comment Response**

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Please see the responses to comments 22, 23, 233, and 290.

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**Comment #** 263                      **Commentor** 4                      **Comment Subject** New Development

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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

Important not to penalize proactive efforts to retrofit existing development.

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**Comment Response**

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The San Diego Water Board disagrees with the proposed change. Please see the response to comment 353. No changes were made based on this comment.

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**Comment #** 264                      **Commentor** 4                      **Comment Subject** New Development

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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

[The Copermittees requested deletion of section F.1.d.(1)(c), which defines new Development Projects that disturb one or more acres of land as a Priority Development Project.]

Request deletion as disturbance threshold inappropriately captures non-development related activity (maintenance, agricultural, etc.) Further, the one acre threshold is not appropriately supported in the Fact Sheet.

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**Comment Response**

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The San Diego Water Board disagrees with the proposed change. Please see the response to comment 331. No changes were made based on this comment.

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**Comment #** 265                      **Commentor** 4                      **Comment Subject** Legal

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**Specific Comment**

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[From Attachment 7 to the RCFC&WCD comment letter]

Section F.1.h(h): This directive requires that where Priority Development Projects are adjacent to or will modify stream channels, the use of hardscape and other materials is forbidden.

Comment: As noted above, the District has a statutory mandate to protect the lives and property of the citizens of Riverside County from floodwaters. If, in the professional judgment of the District's engineers, hardscape or other engineering improvements are required in a stream channel affected by this directive due to flood control concerns, the District must be allowed to make that judgment. The Board does not have the hydrologic/hydraulic expertise, nor is it authorized by the Legislature to make flood control judgments and presumably would not wish to be a defendant in a lawsuit brought by flood victims whose lives or property was affected by the inability of the District to make necessary flood control decisions.

In making this comment, the District wants to be clear that it is not unwilling to accommodate potential future channel rehabilitation efforts where flood control will not be affected. Please see the accompanying redline for suggested language to address these concerns.

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**Comment Response**

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Section F.1.h(h) requires to Copermittees, as part of the HMP, to identify areas within the Santa Margarita Hydrologic Unit for potential opportunities to restore or rehabilitate stream channels with historic hydromodification of receiving waters that are tributary to documented low or very low IBI scores.

The hydromodification requirements do not allow the use of non-naturally occurring hardscape materials for stream restoration if the purpose of the stream restoration is to mitigate erosion impacts expected from potential hydromodification caused by the Priority Development Project. The hydromodification requirements do not necessarily apply if the stream restoration project is not part of a Priority Development Project.

The requirements within the Tentative Order do not limit the RCFC&WCD's authority to provide flood control to protect public safety. The RCFC&WCD's mandate for flood control does not allow the degradation and destruction of water quality or beneficial uses to fulfill that mandate. As public stewards, the RCFC&WCD must protect water quality and beneficial uses while providing flood control to protect the lives and property of the citizens of Riverside County. Existing projects and studies have demonstrated the hydraulic, economic and societal benefits to providing increased flood control through natural systems that also protect water quality. No changes were made based on this comment. Please also see the response to comment 233.

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**Comment #** 266                      **Commentor** 4                      **Comment Subject** New Development

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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

This requirement is clearly specifying the method of compliance in contradiction with state law (CWC 13360).

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**Comment Response**

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The San Diego Water Board has made appropriate changes in the errata to address the commentor's concern.

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**Comment #** 267                      **Commentor** 4                      **Comment Subject** LID

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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

This had been agreed to in discussions with RB staff, but was omitted from the draft.

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**Comment Response**

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The San Diego Water Board did not agree to make this change during the discussions with the Copermittees. Please see the response to comment 105. No changes were made in response to this comment.

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**Comment #** 268                      **Commentor** 4                      **Comment Subject** New Development

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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

Logistical issue for populating a database with BMPs that have as of- yet not been individually tracked, and potential legal issues for verifications of those BMPs that were built without requirements for such verifications.

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**Comment Response**

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The San Diego Water Board is concerned that apparently the Copermittees are unaware of whether or not post-construction BMPs were implemented as designed during the current permit term. This comment only reinforces the San Diego Water Board's position that the post-construction BMP verification and maintenance tracking requirements are necessary. This also reinforces the need for the Copermittees to review their records, identify these projects and BMPs, and verify and track the maintenance of those BMPs. The San Diego Water Board disagrees with the proposed change. No changes were made based on this comment.

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**Comment #** 269                      **Commentor** 4                      **Comment Subject** Hydromod

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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

It is not appropriate to require a single property owner to mitigate the effects caused by previous owners of that land. The current property owners can only be held responsible for their own actions.

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**Comment Response**

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The San Diego Water Board disagrees with the proposed change and the basis for the proposed change. If a project is a Priority Development Project (PDP) subject to the HMP requirements, then it is entirely appropriate for the owner, whether new or current, to be responsible for restoring the runoff from the site to a pre-development, more natural condition. If PDPs in undeveloped areas are expected to implement HMP requirements, there is no reason there should be a disparity for the application of the HMP requirements for PDPs in already developed areas. In fact, implementing the HMP requirements is even more necessary in already developed areas because of the ongoing hydromodification and water quality impacts caused by those existing developments. This is also consistent with, and can work in conjunction with, the retrofitting requirements in section F.3.d.

The San Diego Water Board recognizes that there may be some conditions in already developed areas that could limit the full implementation of the HMP requirements on site. Therefore, as recommended by the Riverside County Copermittees, we have included a provision in the Tentative Order that allows the Copermittees to develop a waiver program for re-development PDPs (see section F.1.h.(3)). No changes were made based on this comment.

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**Comment #** 270                      **Commentor** 4                      **Comment Subject** Hydromod

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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

This is not a necessary component of the HMP and unnecessarily increases costs.

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**Comment Response**

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The San Diego Water Board disagrees with the commenter that this is not a necessary component. Without having this knowledge, the Copermittees will not be able to plan and prepare for implementing the HMP requirements in the Upper Santa Margarita Watershed in a way that can coherently and efficiently restore or rehabilitate stream channels with historic hydromodification of receiving waters when those opportunities present themselves. No changes were made based on this comment.

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**Comment #** 271                      **Commentor**      4                      **Comment Subject** Hydromod

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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

Per discussions with Board staff on 8/18

Additionally, “wherever feasible” is an appropriate addition to this language for three reasons:

- 1) Based on the prioritization already identified in this section, instream controls will be a ‘last resort’
  - 2) If a project were to need to mitigate in-stream, preventing any man made materials would unnecessarily eliminate potentially viable solutions, even to the extent of eliminating options that would rehabilitate stream functions and uses.
  - 3) The Water Board will still have oversight of the final in-stream plans through the 401 certifications, which will allow the Board to additionally ensure that such instream controls to not adversely affect the stream.
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**Comment Response**

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The San Diego Water Board disagrees with the proposed changes. The San Diego Water Board did not agree to make the proposed changes during the meeting with the Copermittees on August 18, 2010, as implied by the commenter. Please see the response to comment 265. No changes were made based on this comment.

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**Comment #** 272                      **Commentor**      4                      **Comment Subject** Hydromod

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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

This is not needed and makes the language confusing. The HMP must be approved by the board anyway. See legal comment white paper.

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**Comment Response**

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The San Diego Water Board disagrees that the language is confusing. The language is to clarify that it is not fully at the discretion of the Copermittees to identify these types of areas. No changes were made based on this comment.

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**Comment #** 273                      **Commentor**      4                      **Comment Subject** Hydromod

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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

As seen in the San Diego HMP process, things can change after submitting it to the Board for approval. This requirement will create problems where a project implements the early measures, and such early measures may conflict with the final requirements, thereby forcing the project to redesign.

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**Comment Response**

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The San Diego Water Board disagrees with the proposed change. Presumably, the HMP that is developed by the Riverside County Copermittees will include requirements that are more stringent than the interim hydromodification criteria. Many of those requirements are likely to be agreed upon prior to the acceptance of the final HMP. Where there is relative certainty that the HMP requirements will be accepted by the San Diego Water Board, the Copermittees should encourage the implementation of those expected requirements as early as possible. No changes were made based on this comment.

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**Comment #** 274                      **Commentor**      4                      **Comment Subject** Hydromod

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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

All the way to the ocean is unreasonable and unnecessary. In the interim, very few projects are expected within the watershed, and the cumulative effects of such few projects is negligible.

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**Comment Response**

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Please see the response to comment 119. The inclusion of "ocean, bay, lagoon" is simply to list all potential types of water bodies that could be included as part of the exemption. In the interim, any projects that do not qualify for the exemptions provided in Section F.1.h.(6)(a)-(c) must meet the interim hydromodification criteria. We expect there to be very few projects that will be able to qualify for the exemptions.

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**Comment #** 275                      **Commentor**      4                      **Comment Subject** Legal

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**Specific Comment**

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[From Attachment 7 to the RCFC&WCD comment letter]

Section F.2.a: This directive requires the Copermittees to update their grading and other ordinances as necessary to comply with the Order and including requirements for implementing all designated BMPs and other measures.

Comment: The drafting and enforcement of ordinances by a municipality is a municipal function that cannot be directed by the Regional Board. Article XI, section 7 of the Constitution guarantees municipalities the right to "make and enforce within [their] limits all local police, sanitary and other ordinances and regulations not in conflict with general laws". Thus, specific requirements as to the content of ordinances cannot be directed by the Board. The redline requests deletion of this directive.

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**Comment Response**

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Please see the response to comment 76.

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**Comment #** 276                      **Commentor**      4                      **Comment Subject** Unpaved Roads

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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

Pursuant to the comment letter:

THE COPERMITTEES REQUEST THIS SECTION BE DELETED IN ITS ENTIRETY.

See the comment letter, attachment 5, for further discussion of the issues and justification for this request.

Should the board decide to include such requirements despite the request and justifications provided in the comment letter, the edits shown below are the minimum changes that should be made.

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**Comment Response**

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The San Diego Water Board disagrees with the request to delete the section in its entirety. The San Diego Water Board has made appropriate changes in the errata to address the commentor's concern.

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**Comment #** 277                      **Commentor**    4                      **Comment Subject** Legal

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**Specific Comment**

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[From Attachment 7 to the RCFC&WCD comment letter]

Section F.3.b.(5): This directive requires that the Copermittee stormwater ordinances must contain certain enforcement components.

Comment: The drafting and enforcement of ordinances by a municipality is a municipal function that cannot be directed by the Regional Board. Article XI, section 7 of the Constitution guarantees municipalities the right to "make and enforce within [their] limits all local police, sanitary and other ordinances and regulations not in conflict with general laws". Thus, specific requirements as to the content of ordinances cannot be directed by the Board. The redline requests deletion of this requirement.

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**Comment Response**

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Please see the response to comment 76.

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**Comment #** 278                      **Commentor**    4                      **Comment Subject** Unpaved Roads

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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

[The Copermittees requested deletion of sections F.1.i.(2) and F.1.i.(3) as required BMPs for unpaved roads development.]

These are specifying the method of compliance.

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**Comment Response**

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Comment noted. Clarifying language has been included in the errata.

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**Comment #** 279                      **Commentor**    4                      **Comment Subject** Construction

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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

[Copermittees request deletion of requirement that Copermittes must review a project proponent's runoff management plan to verify compliance.]

Specifying method of compliance.

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**Comment Response**

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The San Diego Water Board disagrees that the requirement for a project proponent's runoff management plan to be "reviewed to verify compliance" with local grading ordinance is specifying method of compliance. The requirement directs the Copermittees to do the review, but does not specify how the review is to be performed. The requirement includes a performance standard, that the plan complies with "local grading ordinance". No changes were made based on this comment.

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**Comment #** 280                      **Commentor**      4                      **Comment Subject** Legal

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**Specific Comment**

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[From Attachment 7 to the RCFC&WCD comment letter]

Section F.3.c.(4): This directive requires that each Copermittee "must ensure that effective measures exist and are implement or required to be implemented to ensure that runoff within and from common interest developments, including areas managed by associations and mobile home parks, and meets the objectives of this section and Order".

Comment: The Fact Sheet inappropriately states that the Tentative Order "interprets common interest areas as property subject to the codes and ordinance and enforcement mechanisms of the city or county in which it resides and, therefore, holds the local government responsible for the discharge of wastes from storm water conveyance systems located within these areas".

The Tentative Order regulates discharges from the MS4. Drainage systems and the runoff handled within a private development or common interest area generally are not part of the Copermittees' MS4, as the Copermittees (unless they actually maintain their MS4 within such areas) have no right to maintain or regulate such internal systems, beyond the enforcement of local ordinances regulating discharges into the Copermittees' MS4 or through the requirement to install and maintain BMPs. Discharges from such systems are thus no different than discharges from any other private property within the Copermittees' jurisdiction. The first full paragraph in this section should be deleted because it is merely prefatory language to the specific requirements set forth in the remainder of the section.

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**Comment Response**

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The comment fails to address the San Diego Water Board's contention that common interest areas are subject to the codes and ordinance and enforcement mechanisms of the city or county. The comment has not provided any data or documentation to the contrary. Municipalities consistently enforce their ordinances and regulations within common interest areas. In fact, nothing within the law limits the municipality from taking enforcement within a common interest area. As such, the San Diego Water Board disagrees with the commenter's claim that the Copermittees have no rights to regulate common interest areas including their MS4s. On the contrary, the Copermittees have a public duty to do such to protect public and environmental health and safety.

The Copermittees are responsible for flows into, through and from their MS4s, and they cannot passively accept discharges from third parties (see Finding D.3.d and Discussion in the Fact Sheet), including from common interest areas.

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**Comment #** 281                      **Commentor**      4                      **Comment Subject** Construction

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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

[The Copermittees requested deletion of "Development and" from beginning of section F.2.d.(1)(a)(ii).]

Conflicts with the 'off-the-shelf' approach that may be appropriate for some sites. This issue was discussed with staff.

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**Comment Response**

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The San Diego Water Board disagrees with the proposed change. The "development" of a runoff management plan as a management measure for construction sites does not conflict with an "off-the-shelf" approach that may be appropriate for some sites. A runoff management plan may be developed for an "off-the-shelf" approach. No changes were made based on this comment.

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**Comment #** 282                      **Commentor**      4                      **Comment Subject** Legal

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**Specific Comment**

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[From Attachment 7 to the RCFC&WCD comment letter]

Section F.3.c.(5): This directive requires the Copermittees to enforce their ordinances with respect to grading activities on privately owned unpaved roads "so as to prevent impacts to water quality".

Comment: In addition to the general objection to the requirement to regulate unpaved roads, found in a separate white paper and in the general comment letter, this specific directive violates the constitutional requirement that the drafting and enforcement of ordinances by a municipality is a municipal function that cannot be directed by the Regional Board. Article XI, section 7 of the Constitution guarantees municipalities the right to "make and enforce within [their] limits all local police, sanitary and other ordinances and regulations not in conflict with general laws". Thus, specific requirements as to the content of ordinances cannot be directed by the Board. Moreover, the scope of the Order is to address discharges from the MS4, not discharges from non-point or non-MS4 sources that may affect "water quality". The redline requests deletion of this requirement.

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**Comment Response**

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The commenter is incorrect in their interpretation of the cited section of the constitution. The Code of Federal Regulations that governs the issuance of municipal storm water NPDES permits specifically requires at section 40 CFR 122.26 (d)(2)(i) that the Copermittees have adequate legal authority established by statute, ordinance or series of contracts." Please see the Fact Sheet discussion on the broad and specific legal authority to require section E. LEGAL AUTHORITY. Also, please see the response to comment 76.

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**Comment #** 283                      **Commentor**      4                      **Comment Subject** Construction

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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

[The Copermittees requested deletion of section F.2.d.(3), to remove the Active/Passive Sediment Treatment requirements in their entirety.]

Specifying method of compliance, in violation of CWC 13360.

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**Comment Response**

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Please see the response to comment 47. The San Diego Water Board disagrees that section F.2.d.(3) specifies method of compliance. Section F.2.d.(3) directs the Copermittees to require implementation of Active/Passive Sediment Treatment (AST) at construction site if the Copermittee determines it to be an "exceptional" threat to water quality. The Tentative Order does not specify what AST technologies are required to be implemented. Furthermore, the Tentative Order provides flexibility for the Copermittees to determine which construction sites are "exceptional" threats to water quality. No changes were made based on this comment.

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**Comment #** 284                      **Commentor**     4                      **Comment Subject** Construction

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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

This section is setting the minimum frequencies, and as such should provide flexibility to inspect more frequently those sites that warrant additional focus / followup. The changes shown to F.2.e.(1) and (2) are to provide such flexibility. Additionally these frequencies are consistent with Riverside County's Santa Ana MS4 permit – which promotes consistency within the areas serviced by the County.

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**Comment Response**

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The San Diego Water Board disagrees with the proposed changes. The inspection frequencies in the Tentative Order are consistent with the inspection frequencies for San Diego and Orange Counties. These inspection frequencies are necessary because the San Diego Water Board has found that these types of construction sites can pose a significant threat to water quality and require more scrutiny during the wet season. No changes were made based on this comment.

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**Comment #** 285                      **Commentor**     4                      **Comment Subject** Legal

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**Specific Comment**

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[From Attachment 7 to the RCFC&WCD comment letter]

Section F.6: This directive includes a description of the purposes of the education program with respect to stormwater and non-stormwater discharges.

Comment: The redline includes revisions that correctly state the requirements of the Clean Water Act.

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**Comment Response**

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The proposed change is not necessary. Please see responses to comments 22, 23, and 290. No changes were made based on this comment.

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**Comment #** 286                      **Commentor**     4                      **Comment Subject** Construction

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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

This is a new and inappropriate requirement. Monitoring data is only required under the Statewide General Construction Permit, which is the Regional Board's responsibility to inspect and review. Copermittee review of data which falls under the regional board's responsibility should be optional.

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**Comment Response**

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The San Diego Water Board disagrees with the proposed change. If monitoring data are available, the inspector should review the data. Monitoring data can provide valuable information to an inspector and may help to identify any potential issues that may be on a construction site. No changes were made based on this comment.

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**Comment #** 287                      **Commentor** 4                      **Comment Subject** Legal

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**Specific Comment**

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[From Attachment 7 to the RCFC&WCD comment letter]

Section H.1: This directive requires that each "Copermittees must exercise its full authority to secure the resources necessary to meet all requirements of this Order".

Comment: There is no statutory or regulatory authority for this requirement. The MS4 regulations require only that the Copermittees submit a "fiscal analysis" of the resources required to accomplish permit program activities, including a description of the sources of funds. 40 CFR § 122.26(d)(2)(vi). Moreover, this requirement is inherently vague and ambiguous and is, therefore, especially troublesome given the economic conditions now faced by the County and the Cities within the Santa Margarita region. This directive should be deleted, or at minimum, revised as shown in the redlines.

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**Comment Response**

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Please see the responses to comments 8, 9, 88, and 321. Without securing the resources necessary to meet all requirements of the Order, the Copermittee would be unable to meet the intended outcome of 40 CFR § 122.26(d)(2)(i) (i.e. carry out all inspection, surveillance and monitoring procedures necessary to determine compliance and noncompliance with permit conditions).

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**Comment #** 288                      **Commentor** 4                      **Comment Subject** Municipal

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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

Sites that do not have the potential to discharge pollutants, cannot affect discharges from the MS4.

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**Comment Response**

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The San Diego Water Board disagrees with the proposed change. Sites that do not have the potential to discharge pollutants are only through the implementation and maintenance of BMPs. Through inventorying their sites and conducting appropriate inspection and enforcement, the Copermittees can ensure that the sites continue to not have the potential to discharge pollutants. No changes were made based on this comment.

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**Comment #** 289                      **Commentor** 4                      **Comment Subject** Legal

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**Specific Comment**

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[From Attachment 7 to the RCFC&WCD comment letter]

In the Standard Provisions, it is stated that the Order "may be modified, revoked and reissued, or terminated for cause", citing 40 CFR § 122.41(f). However, the Standard Provisions do not cite 40 CFR § 122.62 or provide that any such modification, revocation or reissuance may only be carried out upon prior notice and hearing. See Water Code § 13263 (regional board, "after any necessary hearing", may prescribe requirements for waste discharges). The Standard Provisions should make clear that any modification, revocation or reissuance of the Order can only be accomplished at a noticed public hearing, with opportunity for comment.

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**Comment Response**

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The requested change is unnecessary. In any matter, the San Diego Water Board is obligated to comply with existing federal and state regulations regarding revocation, reissuance or termination of the Tentative Order. No change made based on this comment.

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<b>Comment #</b> 290	<b>Commentor</b>	4	<b>Comment Subject</b> Legal
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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

The Copermittees are required to reduce pollutants in discharges from the MS4. See legal comments in Attachment 7

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**Comment Response**

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Please see response to comments 22, 23, 72, and 233. The Order's approach to regulating discharges into and from the MS4 is in accordance with State Water Board Order WQ 2001-15. In that order, the State Water Board reviewed the San Diego County MS4 Permit (Order No. 2001-01) requirements and made one change to one prohibition. The Order upheld all other requirements of the current permit. Order No. R9-2010-0016 incorporates the one change made by the State Water Board, and continues the approach of Order No. 2001-01 (the basis for the current permit), as it was upheld by the State Water Board in Order WQ 2001-15. State Water Board Order WQ 2001-15 supports such requirements, stating: "It is important to emphasize that dischargers into MS4s continue to be required to implement a full range of BMPs, including source control."

Oftentimes, the MS4 does not include structural BMPs at the outfalls to reduce pollutants of concern to the MEP from the MS4. Therefore, the municipalities must require and/or implement a full range of best management practices including source controls on discharges into the MS4 to comply with the MEP standard for discharges from the MS4. The requirements addressing "into and from" do not preclude the use of BMPs, structural or non-structural either within the MS4 or at the outfall, that reduce the discharge of pollutants from the MS4 to the MEP.

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<b>Comment #</b> 291	<b>Commentor</b>	4	<b>Comment Subject</b> Municipal
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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

There are cases where pesticides may be necessary due to health concerns (rodent infestations, etc) The concept of IPM does not preclude the use of chemical solutions where such solutions are needed or appropriate.

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**Comment Response**

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The Tentative Order does not preclude the use of chemical solutions for the management of pesticides, herbicides, and fertilizers where absolutely necessary. Non-chemical solutions are preferred and should be utilized first. In any case, the use of chemical solutions must comply with the requirements of the Tentative Order.

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<b>Comment #</b> 292	<b>Commentor</b>	4	<b>Comment Subject</b> Municipal
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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

[The Copermittees requested deletion of section F.3.a.(3)(c), requiring the use of native vegetation as a BMP.]

This is clearly overly specifying method of compliance, and is illegal pursuant to CWC 13360.

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**Comment Response**

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The San Diego Water Board disagrees that section F.3.a.(3)(c) is specifying method of compliance. The requirement provides a limitation as to which types of plants may be used, but does not specify which plants must be used; nor specifically where such plants should be used. The designation of the BMPs is up to the Copermittees to determine the circumstances when the use of such BMP is appropriate. No changes were made based on this comment.

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**Comment #** 293                      **Commentor** 4                      **Comment Subject** Municipal

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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

[The Copermittees highlighted section F.3.a.(4)(c), requiring the Copermittees to evaluate its existing flood control structures as part of ongoing routine maintenance.]

This is not required by the federal regulations as an ongoing permit requirement.

Accordingly, the Copermittees, request deletion of the section.

Should the board decide not to remove the section, at a minimum, the language should be restored to not require anything more than the O.C. Permit.

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**Comment Response**

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This change was made at the Copermittees request during several months of meetings. According to the Copermittees, they preferred to evaluate their existing flood control structures as part of ongoing routine maintenance. No changes were made based on this comment.

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**Comment #** 294                      **Commentor** 4                      **Comment Subject** Municipal

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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

[The Copermittees requested deletion of section F.3.a.(5), rwhich includes requirements for sweeping of municipal areas.]

These are new requirements that are not necessary, and were not included in the draft OC Permit.

Further it is overly specific in forcing the Copermittees to identify high/moderate/ and low (trash) volume streets. Such specificity is not necessary.

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**Comment Response**

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The commenter is incorrect. Similar requirements were included in the Orange County MS4 Permit (Order No. R9-2009-0002). The Orange County Copermittees have shown they are proactively implementing street sweeping, thus less specificity was included in their requirements. The Riverside County Copermittees have not demonstrated that they are proactively implementing their programs, thus more specificity was included. These requirements are the same as in the San Diego County MS4 Permit (Order No. R9-2007-0001). No changes were made based on this comment.

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**Comment #** 295                      **Commentor** 4                      **Comment Subject** Municipal

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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

The term 'facilities' is confusing and unnecessary.

Request use of the language from the 2004 MS4 permit as shown in these redlines (though (b)(ii) ). This is much clearer and simple to comply with.

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**Comment Response**

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The proposed change is not necessary. The San Diego Water Board prefers the term 'facilities' as more encompassing of devices needing cleaning. No changes were made based on this comment.

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**Comment #** 296                      **Commentor**      4                      **Comment Subject** Municipal

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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

Although the shown redlines will be much clearer, should board staff reject such changes, at a minimum the word ‘detention basins’ should be removed as it would otherwise conflict with subpart (iii)below.

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**Comment Response**

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The proposed change is not necessary. Section F.3.a.(6)(b)(iv) only addresses the cleaning of anthropogenic litter and does not address other sediment or debris cleaning activities that the Copermittees should do. Therefore, no conflict exists. No changes were made based on this comment.

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**Comment #** 297                      **Commentor**      4                      **Comment Subject** Municipal

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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

The MS4 Copermittees that do not own nor operate a sewer system cannot prevent seepage by maintaining their MS4.

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**Comment Response**

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The San Diego Water Board disagrees that the Copermittees cannot prevent sewage seeping into their MS4s by maintaining their MS4s. Through routine maintenance of their MS4, the Copermittees may identify sanitary sewer seepage and then take appropriate actions to temporarily divert the sewage, contact the responsible party for the sewage seepage to stop the seepage, or jacket the storm drain to prevent the sewage seepage. No changes were made based on this comment.

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**Comment #** 298                      **Commentor**      4                      **Comment Subject** Municipal

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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

See footnote explaining this change. The idea is that if a project has LID or Treatment Control BMPs in place – it should no longer be a mandatory high-priority site for municipal inspection purposes. It would then be subject to the requirements of Section F.1.f.

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**Comment Response**

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The San Diego Water Board disagrees with the proposed change. See the response to comment 288. No changes were made based on this comment.

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**Comment #** 299                    **Commentor**    4                    **Comment Subject** Unpaved Roads

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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

Pursuant to the comment letter:

THE COPERMITTEES REQUEST THIS SECTION BE DELETED IN ITS ENTIRETY.

See the comment letter, attachment 5, for further discussion of the issues and justification for this request.

Should the board decide to include such requirements despite the request and justifications provided in the comment letter, the edits shown below are the minimum changes that should be made.

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**Comment Response**

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Please see the response to comment 276.

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**Comment #** 300                    **Commentor**    4                    **Comment Subject** Unpaved Roads

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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

Regular maintenance of unpaved roads may have unintended negative effects by virtue of further loosening soil to maintain the roads. This requirement should be removed, or revised to only be required where necessary to resolve significant problems impacting streams and riparian habitat.

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**Comment Response**

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The requirement has been edited to require maintenance of unpaved roads "as necessary" to protect water quality.

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**Comment #** 301                    **Commentor**    4                    **Comment Subject** Unpaved Roads

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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

[The Copermittees requested deletion of section F.3.a.(11)(d), regarding re-grading of Copermittee maintained unpaved roads.]

Specifying method of compliance.

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**Comment Response**

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Comment noted. Clarifying language has been included in the errata.

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**Comment #** 302                    **Commentor**    4                    **Comment Subject** Commercial/Industrial

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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

[Copermittees request deletion of "marinas" from the list of commercial sites/sources required to be included in their inventory.]

Clearly not applicable within this permit area.

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**Comment Response**

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The requested change raises serious concerns that apparently the Copermittees are unaware that marinas are currently or have historically been in business at Lake Skinner, Vail Lake, and Diamond Valley Lake. As such, the Copermittees may be in violation of existing permit requirements under Order No. R9-2004-001. If it is not currently applicable, the Copermittees' inventory should not include such facilities. If, however, such a facility exists or does become established in the future, the Copermittees must include it in their inventory. No changes were made based on this comment.

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**Comment #** 303                    **Commentor**    4                    **Comment Subject** Legal

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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

This change reflects the purpose of the Order, which is to reduce pollutants discharged from the MS4.

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**Comment Response**

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The San Diego Water Board disagrees with the proposed change. Please see the responses to comments 22, 23, and 290. No changes were made based on this comment.

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**Comment #** 304                    **Commentor**    4                    **Comment Subject** Commercial/Industrial

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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

[Copermittees request language changed in the Mobile Business Program to read: Each Copermittee must keep as part of its commercial source inventory a listing of mobile business know to [delete: "operate" and replace with: "have bases of operation"] within titts jurisdiction that conduct services etc.]

This is an appropriate change, as it sets clear responsibility among the Copermittees.

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**Comment Response**

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The San Diego Water Board disagrees with the proposed change. The proposed change is already required under section F.3.b.(1)(a) and would make section F3.b.(3) unnecessary. No changes were made based on this comment.

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**Comment #** 305      **Commentor** 4      **Comment Subject** General

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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

[The Copermittees requested changes to section F.3.c.(1)(e), regarding the criterion to prioritize residential areas tributary to 303(d) listed water bodies as high priority.]

These requirements should be focused on discharges of pollutants

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**Comment Response**

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The San Diego Water Board disagrees with the proposed change. This requirement is focused on areas that can generate pollutants which may contribute to a 303(d) listed impairment. No changes were made based on this comment.

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**Comment #** 306      **Commentor** 4      **Comment Subject** General

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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

[The Copermittees requested deletion of section F.3.c.(1)(f), regarding the criterion to prioritize residential areas within or directly adjacent to or discharging directly to an ESA as high priority.]

This inappropriately separates the risk (pollutant discharge potential) from the action (regulation, minimum BMPs, etc), and should not be a mandated component of this permit.

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**Comment Response**

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The San Diego Water Board disagrees with the proposed change. This requirement is focused on areas that can generate pollutants which may impact an environmentally sensitive area. No changes were made based on this comment.

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**Comment #** 307      **Commentor** 4      **Comment Subject** Unpaved Roads

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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

Pursuant to the comment letter:

THE COPERMITTEES REQUEST THIS SECTION BE DELETED IN ITS ENTIRETY.

See further discussion on this issue in Attachment 5 to this comment letter

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**Comment Response**

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Please see the response to comment 276.

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<b>Comment #</b> 308	<b>Commentor</b>	4	<b>Comment Subject</b> Retrofit
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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

[The Copermittees requested adding "Environmental Constraints (such as regulatory permits)" as a criterion for evaluating areas of existing development for retrofitting.]

There may be external constraints by other regulatory agencies that may affect the ranking of a particular candidate.

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**Comment Response**

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The San Diego Water Board disagrees with the requested change. Section F.3.d.(2) states that the evaluation criteria "is not limited to" the criteria included in the Tentative Order. The Copermittees may identify other criteria during their evaluation. The requested change is not necessary. No changes were made based on this comment.

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<b>Comment #</b> 309	<b>Commentor</b>	4	<b>Comment Subject</b> Retrofit
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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

A particular retrofit opportunity may have both positive and/or negative effects on public health and safety, and both should be considered.

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**Comment Response**

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Please see response to comment 308.

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**Comment #** 310

**Commentor** 4

**Comment Subject** General

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**Specific Comment**

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[From Attachment 10 to the RCFC&WCD comment letter]

Fact Sheet Text, Page 7:

"The First and Second Term Permits, Order Nos. 90-46 and 98-02, provided maximum flexibility. San Diego Water Board Order No. 90-46 contained the "essentials" of the 1990 regulations, but the requirements were written in very broad, generic terms. This was done in order to provide the maximum amount of flexibility to the Copermittees in implementing the new requirements (flexibility was, in fact, the stated reason for issuing the permit in advance of the final regulations). From staff's perspective however, "flexibility" in the form of lack of specificity, combined with the Copermittees' lack of funding and political will, also provided the Copermittees with ample reasons to take few substantive steps towards achieving water quality standards. The situation was exacerbated by the San Diego Water Board's own lack of storm water resources for oversight."

Problem with Text:

The statement regarding a 'lack of funding and political will' is unsupported and inflammatory, and provides no benefit in a public document.

Suggestion:

Delete this statement.

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**Comment Response**

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The San Diego Water Board disagrees with the assertion that the statement is unsupported and inflammatory. During a time of increased economic activity, the Copermittees chose to do the minimum that is required in the current Order No. R9-2004-001 instead of identifying ways to improve upon those requirements and secure funding sources. The Copermittees chose to rely on funding sources that are not sustainable. The Copermittees chose not to actively pursue dedicated resources to support their storm water and non-storm water management programs. Now, with the current economic environment, the Copermittees use the reduction in the sources for their general funds as an excuse for not being able to support and expand their programs. Please see the responses to comments 8 and 9. No changes were made based on this comment.

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**Specific Comment**

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[From Attachment 10 to the RCFC&WCD comment letter]

Fact Sheet Text, Page 12 and 13:

"It is very difficult to ascertain the true cost of implementation of the Copermittees' management programs because of inconsistencies in reporting by the Copermittees. Reported costs of compliance for the same program element can vary widely from city to city, often by a very wide margin that is not easily explained. Despite these problems, efforts have been made to identify management program costs, which can be helpful in understanding the costs of program implementation....

A study on Phase I MS4 program cost was also conducted by the California Regional Water Quality Control Board, Los Angeles Region (Los Angeles Water Board), where program costs reported in the municipalities' annual reports were assessed. The Los Angeles Water Board estimated that average per household cost to implement the MS4 program in Los Angeles County was \$12.50.<sup>8</sup> Since the Los Angeles County permit is very similar to Order No. R9-2004-001, this estimate is also useful in assessing general program costs in Riverside County.

The State Water Board also commissioned a study by the California State University, Sacramento to assess costs of the Phase I MS4 program. This study includes an assessment of costs incurred by Phase I MS4s throughout the State to implement their programs. Annual cost per household in the study ranged from \$18-46, with the Fresno-Clovis Metropolitan Area (FCMA) representing the lower end of the range, and the City of Encinitas (in San Diego County) representing the upper end of the range.<sup>9</sup> Included in the study is the City of Corona, which is in Riverside County under the jurisdiction of the California Regional Water Quality Control Board, Santa Ana Region (Santa Ana Water Board).

The annual cost per household for the City of Corona's program was estimated to be \$32, which should be similar to the costs to implement the MS4 programs in the Riverside County portion of the San Diego Region. In contrast, the cost of the City of Encinitas' program, with an annual cost per household estimated to be \$46, may represent the upper range of Riverside County MS4 programs. However, the City of Encinitas's program cost can be considered as the high end of the spectrum for management program costs because the City has a consent decree with environmental groups regarding its program, and City of Encinitas has received recognition for implementing a superior program.

The annual costs for the City of Corona and City of Encinitas were estimated from data collected in 2003-2004. Between 2003 and 2008, the number of households in both cities has increased by approximately 3 percent and 7 percent, respectively.<sup>10</sup> In contrast, between 2003 and 2008 the number of households in the City of Temecula has increased from 23,199 to 31,135 (34 percent) and the City of Murrieta has increased from 22,020 to 32,664 (48 percent). This significant increase in number of households indicates a significant increase in the tax base (sales and property tax) available to fund the implementation of the MS4 programs for the City of Temecula and City of Murrieta, as well as for the County of Riverside and recently incorporated cities."

Problem with Text:

The text notes that it is difficult to compare costs between Cities for stormwater program implementation since the cost accounting varies widely, and the specific issues also vary widely. Despite this fact, the fact sheet goes on to make just such comparisons and further implies that the Santa Margarita Region Cities are underfunding their programs by comparison. For example, the City of Encinitas is cited as an example of a city that is spending on the upper end for a stormwater program. The City of Encinitas varies significantly from the cities in the Santa Margarita area in that it must address a major outfall (Cottonwood Creek) at its primary beach (Moonlight Beach). Cottonwood Creek has perennial dry weather flow from urban sources and exceeds REC-1 and REC-2 water quality standards. Since Cottonwood Creek discharges at Moonlight Beach, frequent sanitary standard exceedences were noted on a year-round basis. The City of Encinitas constructed a dry weather flow treatment plant near Moonlight Beach to treat Cottonwood Creek to correct this problem. No such compliance problems exist for the Copermittees. The comparisons in this part of the fact sheet are not valid.

In addition, the Fact Sheet leaves the inaccurate impression that the Copermittees have ample financial resources to fund MS4 programs by completely ignoring the effects of the current national recession. (See Attachment 2). As pointed out in Attachment 2 (Economic Assessment), declines in home values and tax receipts have crippled the ability of the Copermittees to finance such programs. The Fact Sheet selectively examines the period 2003-2008, when there was significant growth, but ignores the period 2008-2010, when that growth ended and the economy declined precipitously, affecting property and sale tax receipts as well as other sources of revenue.

Suggestion: Delete the text on Page 13 and 14 of the Fact Sheet.

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**Comment Response**

Please see the responses to comments 9, 115, 116, 122, 126-130, and 208.

In addition to the City of Encinitas, the comparison in the Fact Sheet also includes the City of Corona, which is in Riverside County. The City of Encinitas was included in the comparison to provide a contrast in the varying amounts expended by different municipalities. The City of Corona was included in the comparison to provide a more region specific cost comparison. The comparison showed that the Cities of Murrieta and Temecula expended significantly less for their storm water management program, on a per household basis, compared to to the City of Corona, all of which are in the same county. According to the information provided in their FY 2008-2009 Annual Reports, the City of Corona reportedly spent approximately 50-60 percent more per household than the Cities of Murrieta and Temecula. The information was provided by the Cities. The comparison is accurate and valid. No changes were made based on this comment.

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<b>Comment #</b> 312	<b>Commentor</b>	4	<b>Comment Subject</b> Legal
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**Specific Comment**

[From Attachment 9 to the RCFC&WCD comment letter]

[The Copermittees requested deletion of section F.4.a.(1), requiring each Copermittee to retain legal authority to prevent and eliminate illicit discharges and connections to the MS4.]

This measure is already covered in Part E of the Order.

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**Comment Response**

This level of specificity provides clarity to the Copermittee's to ensure their compliance with the Tentative Order's provisions. The proposed change is not necessary. No changes were made based on this comment.

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<b>Comment #</b> 313	<b>Commentor</b>	4	<b>Comment Subject</b> IDDE
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**Specific Comment**

[From Attachment 9 to the RCFC&WCD comment letter]

[The Copermittees requested deletion of "all known locations of access points (i.e. manholes) to the Copermittee's MS4, all known locations of connections with other MS4s (e.g. Caltrans)" from section F.4.b.]

These are not required under the federal regulations, and are not necessary for the Copermittees' programs.

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**Comment Response**

Section F.4.b of the Tentative Order and the corresponding text in the Fact Sheet have been modified to remove the requirement to include access points (i.e. manholes) in the MS4 Map.

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**Comment #** 314                    **Commentor**    4                    **Comment Subject** IDDE

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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

[The Copermittees requested deletion of section F.4.g, requiring each Copermittee to implement and enforce its ordinances, orders, or other legal authority.]

This requirement is already covered in Part E.1 of the Order.

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**Comment Response**

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This level of specificity provides clarity to the Copermittee's to ensure their compliance with the Tentative Order's provisions. The proposed change is not necessary. No changes were made based on this comment.

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**Comment #** 315                    **Commentor**    4                    **Comment Subject** IDDE

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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

The Copermittees do not own nor operate such systems, and as such cannot 'prevent' such spills from occurring.

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**Comment Response**

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Section F.4.g does not require the prevention of the spills from occurring, but the prevention of the spills from entering the MS4. Please see the response to comment 82. No changes were made based on this comment.

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**Comment #** 316                    **Commentor**    4                    **Comment Subject** General

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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

These entities are subject to individual NPDES regulations, and the Copermittees should not be required to educate them on the general requirements below.

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**Comment Response**

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Section F.6 has been modified as recommended.

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**Comment #** 317                    **Commentor**    4                    **Comment Subject** General

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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

The language should be clear that the minimum topics should be tailored as appropriate to the target audience.

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**Comment Response**

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Section F.6.a.(1) has been modified to clarify that the Copermittees' education programs must educate as appropriate to the target community's potential storm water and non-storm water discharges.

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**Comment #** 318                    **Commentor**    4                    **Comment Subject** General

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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

[The Copermittees requested deletion of "and review of monitoring data" from section F.6.b.(1)(a)(vii).]

As discussed in the comment letter, this is a requirement for other NPDES permits, and it is inappropriate to mandate upon the Copermittees.

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**Comment Response**

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The San Diego Water Board disagrees with the proposed change. Copermittee personnel (e.g., inspectors) should be educated on how to review monitoring data, especially if monitoring data are available for review at a site that is being inspected. Monitoring data provide valuable information to an inspector. No changes have been made based on this comment.

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**Comment #** 319                    **Commentor**    4                    **Comment Subject** General

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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

The requirement to educate the residential and general public communities will necessarily include these underserved audiences.

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**Comment Response**

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The San Diego Water Board agrees that the requirement will necessarily include these underserved audiences. Removing the text as proposed is not necessary. No changes were made based on this comment.

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**Comment #** 320                    **Commentor**    4                    **Comment Subject** General

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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

Goal is to pursue these agreements where we determine it is needed. Otherwise this requirement is diverting our time and resources from other more important efforts.

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**Comment Response**

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The Tentative Order describes that interagency agreements are necessary to control the contribution of pollutants from one portion of the shared MS4 to another portion of the shared MS4. If the agencies do not share portions of the MS4, then such agreements are not necessary.

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**Comment #** 321                      **Commentor**      4                      **Comment Subject** Economic

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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

This clarifies that the Copermittees have the option to request modification of the order for reasons such as inability to obtain the requisite funding for the programs.

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**Comment Response**

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The San Diego Water Board does not agree with the proposed change. The Copermittees are responsible for securing the resources necessary to meet the requirements of the Order. Please see the responses to comments 8 and 9. The Copermittees are free to request modification to the Order at any time. Until those modification are made, the Copermittees' storm water and non-storm water programs must be able to be protective of water quality and meet the requirements of the Order. In addition, the "Need to halt or reduce activity is not a defense" per the standard provisions in Attachment B.1(b) and 40 CFR 122.41(c). No changes were made based on this comment.

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**Comment #** 322                      **Commentor**      4                      **Comment Subject** General

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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

Although the Copermittees prefer to not be required to develop another compliance document, the edits below are intended to focus such a document on information that is relevant to the Copermittees' response.

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**Comment Response**

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The requested information is vital to formulating and implementing an appropriate workplan that addresses water quality. The level of detail is specific to provide the Copermittees more certainty on the status of their compliance. The suggested language is vague and open to multiple interpretations that would create confusion and uncertainty on the status of compliance.

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**Comment #** 323                      **Commentor**      4                      **Comment Subject** Reporting

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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

As drafted (without the changes shown) the requirements will be a significant and lengthy reporting exercise.

Request keeping this as a 'summary' report on compliance with the inspection frequencies, and identifying any follow-up actions (as shown via the markup)

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**Comment Response**

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The San Diego Water Board disagrees with the requested changes and feels the reporting requirements are similar in breadth as current reporting requirements. No changes were made based on this comment.

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**Comment #** 324      **Commentor** 4      **Comment Subject** Reporting

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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

As drafted (without the changes shown) the requirements will be a significant and lengthy reporting exercise.

Request keeping this as a 'summary' report on compliance with the inspection frequencies, and identifying the high-level enforcement actions (as shown via the markup).

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**Comment Response**

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The San Diego Water Board disagrees with the requested changes and feels the reporting requirements are similar in breadth as current reporting requirements. No changes were made based on this comment.

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**Specific Comment**

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[From Attachment 10 to the RCFC&WCD comment letter]

Fact Sheet Text Page 15:

"The vast majority of costs that will be incurred as a result of implementing Order No. R9-2010-0016 is not new. Storm water management programs have been in place in Riverside County for over 15 years. As shown in the discussion above, the amount spent for MS4 Permit compliance per household in the municipalities in the Riverside County portion of the San Diego Region is already low compared to other regions. Any increase in cost to the Copermittees, however, is still expected to be incremental in nature. Since Order No. R9-2010-0016 "fine tunes" the requirements of Order No. R9-2004-001, these cost increases are expected to be modest.

Where there may be additional elements that will incur new costs, the Riverside County Copermittees are given the time to develop the budgets and funding mechanisms to phase those elements into their programs. Additionally, development of these additional elements by the Riverside County Copermittees will have the benefit of the experiences and work already done by the San Diego County and Orange County Copermittees."

Problem with Text:

The Fact Sheet states that the vast majority of costs for implementing the Tentative Order are 'not new'. This is not correct. Almost every program in the Tentative Order has been amended and require new resources. Specific programs include, but are not limited to, the monitoring program (over fivefold increase in costs), hydromodification management programs, new development programs, inspection programs, irrigation runoff prohibitions, retrofit studies and MS4 maintenance programs. The very prescriptive and detailed requirements of the Tentative Order impose new requirements on the Copermittees at a time when funding sources are drying up. The Copermittees estimate that implementation of the regional components of the new Order (as written) will cost approximately \$11,500,000 (e.g. the costs to write the new compliance documents, develop the retrofit, hydromodification programs and develop and implement the new monitoring program). These costs are on top of the current expenditures to implement the existing regional monitoring program (approximately \$5,000,000 for the five-year permit term). These costs are further amplified by the direct cost of implementation that will be incurred by the individual Permittees (e.g. the cost to implement the new compliance documents and hydromodification programs). The text further indicates that the Tentative Order provides time for the Permittees to 'develop...funding mechanisms'. This statement assumes that the Copermittees have the ability to collect additional funds from taxpayers to support the stormwater program implementation. This is false, since any such funds, outside of inspection or plan review fees, would be required to be submitted to a vote of the people pursuant to Propostion 218. In the current economic and political climate, a successful vote to increase taxes is extremely remote. The Copermittees further note that in the City of Encinitas in Orange County, cited by the staff as an example of proactive MS4 regulation, a minimal stormwater proposition recently was voted down.

Suggestion: Delete the text noted above in the Fact Sheet and add a discussion on the difficulties of funding expansions to the Copermittees' stormwater programs due to Proposition 218.

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**Comment Response**

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Please see the responses to comments 8 and 9. No changes were made based on this comment.

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**Specific Comment**

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[From Attachment 10 to the RCFC&WCD comment letter]

Fact Sheet Text Page 16:

"For example, household willingness to pay for improvements in fresh water quality for fishing and boating has been estimated by USEPA to be \$158-210. This estimate can be considered conservative, since it does not include important considerations such as marine waters benefits, wildlife benefits, or flood control benefits. The California State University, Sacramento study reports that the annual household willingness to pay for statewide clean water is approximately \$180. When viewed in comparison to household costs for existing management programs, household willingness to pay estimates exhibit that per household costs incurred by the Riverside County Copermittees to implement their management programs are very low."

Problem with Text:

The discussion in the referenced text is not represented correctly. The figure cited in the California State University, Sacramento study includes the cost of wastewater treatment. The author of the study notes:

'The survey question was for restoring water quality for all waters throughout the state from all impairment, not just within a city or region and not just for impairment from stormwater pollution.' The current cost for sewer fees exceed \$200 per year, Thus, the vast majority of the "household willingness" figure relates to sanitary sewer costs, and not to the costs of addressing stormwater.

Suggestion: Delete this text in the fact sheet and note that the cost consumers are currently paying for clean water in the Permit area exceeds that which studies cited have found they are willing to pay.

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**Comment Response**

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The commenter is correct that the figure cited in the California State University, Sacramento study is for "for restoring water quality for all waters throughout the state from all impairment, not just within a city or region and not just for impairment from stormwater pollution." The survey was about restoring water quality for all waters throughout the state, and does not state, as the commenter asserts, that the cited figure includes the cost of wastewater treatment. Thus, the figure indicates that the household willingness to pay for statewide clean water is higher than what the households in the Upper Santa Margarita Watershed are paying toward the Copermittees' storm water programs. No changes were made based on this comment.

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**Specific Comment**

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[From Attachment 10 to the RCFC&WCD comment letter]

Fact Sheet Text Page 17:

"University of California, Los Angeles assessed the costs and benefits of implementing various approaches for achieving compliance with the MS4 permits in the Los Angeles Region. The study found that non-structural systems would cost \$2.8 billion but provide \$5.6 billion in benefit. If structural systems were determined to be needed, the study found that total costs would be \$5.7 to \$7.4 billion, while benefits could reach \$18 billion. Costs are anticipated to be borne over many years – probably ten years at least. As can be seen, the benefits of the programs are expected to considerably exceed their costs. Such findings are corroborated by USEPA, which found that the benefits of implementation of its Phase II storm water rule would also outweigh the costs."

Problem with Text:

It is a basic principle that public spending should have a positive cost-benefit. The Fact Sheet implies that since spending on stormwater has a positive cost-benefit, such spending should be increased. The reality is that there are also other public spending priorities such as police, fire, ambulance, and public utilities competing for the same funding, all of which have positive cost-benefit ratios. Moreover, the UCLA study specifically focused on the benefit of improving beach water quality, which is a very significant economic factor in terms of tourism in coastal Los Angeles County. No beaches exist in the Santa Margarita Region, and given the ephemeral nature of many of the Region's waterways, attempting to extrapolate the UCLA study is not appropriate. In the absence of a similar cost-benefit study being undertaken in the Santa Margarita Region, the studies cited by staff do not provide any basis for the conclusions reached in the Fact Sheet.

Suggestion:

As the fundamental basis for this comment is flawed, in the absence of any local data for inland waterbodies in semi-arid climates, the text should be deleted.

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**Comment Response**

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The San Diego Water Board disagrees with the commenter's assertion that the basis for the text in the Fact Sheet is flawed. The waters in the Upper Santa Margarita Watershed are designated with water contact recreation (REC-1) and rare, threatened, and endangered species (RARE) beneficial uses. The Upper Santa Margarita Watershed also has valuable resources that are worth protecting and provide value and benefits to the community. In general, the study shows that the costs of implementing programs to restore and protect water quality would provide benefits that exceed and outweigh the costs of implementing those programs. No changes were made based on this comment.

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**Specific Comment**

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[From Attachment 10 to the RCFC&WCD comment letter]

Fact Sheet Text Page 35:

"Trash, as litter in both solid and liquid form, is consistently found on and adjacent to roadways. A California Department of Transportation Litter Management Pilot Study found that of roadway trash, plastics and Styrofoam accounted for 33 percent of trash by weight, and 43 percent by volume. Further, the study found that approximately 80 percent of the litter associated with roadways was floatable, indicating that, without capture, this litter would enter Waters of the State after a storm event, resulting in the impairment of Beneficial Uses. The study, however, relied upon a mesh capture size of 0.25 inches (6.35 millimeters). This size is too large to effectively capture plastic pre-production pellets (a.k.a. "nurdles"), which are roughly 3 mm in size, and likely underestimated the total contribution of plastics. Furthermore, pre-production plastic pellets, which are small enough to be easily digested, have been found to carry persistent organic pollutants, including PCBs and DDT."

Problem with Text:

While the Fact Sheet suggests that there is a compelling argument to address trash along Caltrans highways, such a problem is not found on municipal streets. The Caltrans studies found that a substantial portion of the litter load comes from uncovered loads on commercial and private vehicles. The low speed roadways operated by the Copermitees do not create similar conditions or handle similar traffic. Further, the text discusses pre-production plastics (nurdles), yet fails to acknowledge that there are no industries within the Copermitees' jurisdiction that manufacture or use this material. The Fact Sheet's citation of studies that have no bearing on actual conditions within the Santa Margarita Region cannot be used to justify programs in the Tentative Order addressing such non-existent conditions. The ROWD has a more informed discussion of trash issues based on actual conditions in the Santa Margarita Region.

Suggestion:

Revise the fact sheet text to discuss the current findings relative to trash in the Permit region based on the ROWD.

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**Comment Response**

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The San Diego Water Board disagrees that the Fact Sheet requires revisions regarding trash. The discussion in the Fact Sheet includes information specific to high density urban areas in Southern California as well. The Caltrans study referenced in the Fact Sheet was provided as additional information about the amount and types of trash that can be found along Caltrans maintained roadways which can be discharged from the Caltrans MS4 system to the Copermitees' MS4 systems. No changes were made based on this comment.

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**Specific Comment**

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[From Attachment 10 to the RCFC&WCD comment letter]

Fact Sheet Text Page 50 and 51

Pg. 50 - "To date the San Diego Water Board and the Copermittees have identified overspray and drainage from potable and reclaimed water landscape irrigation as a substantial source and conveyance mechanism for pollutants into waters of the United States."

Pg. 51 - "The San Diego Water Board and the Copermittees have identified irrigation water as a source of pollutants and conveyance of pollutants to waters of the United States, when applied improperly in excess and thereafter entering the MS4, in the following documents:"

Problem with Text:

The documents cited in the Fact Sheet do not support the conclusion that irrigation water is a source of pollutants or conveyance of pollutants in the Santa Margarita Region. First, the comments in the public education document cited in the Fact Sheet were borrowed from an Orange County publication, and do not represent any official conclusion by the Copermittees that irrigation water represents a water quality threat. Plainly over-irrigation is to be discouraged, as even if the water is clean, it adds to the Copermittees' costs of addressing such waters. Second, this public education document is the only document from a Santa Margarita Region source. The other documents cited by staff are studies conducted in other areas, with different hydrology and climate. For a more comprehensive assessment of the irrigation runoff issues, please see Attachment 6 (Prohibition of Irrigation Runoff).

Suggestion:

Delete the referenced text and the quotes referencing Permittee education materials. Also remove the improperly supported irrigation runoff prohibition.

Revise the text to accurately reflect the lack of any connection between irrigation runoff and impairments of receiving waters in the Santa Margarita Region.

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**Comment Response**

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Please see the reponse to comment 83. Also, there are two public education documents used by the Riverside County Copermittees cited, one of which is a survey developed by the Copermittees. These documents exhibit an explicit concern with pollutants contained in and conveyed by irrigation runoff. These documents may have been "borrowed", but the fact that they are being distributed by the Copermittees as part of their public participation program does make them an "official" publication. No changes were made based on this comment.

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**Comment #** 330

**Commentor** 4

**Comment Subject** Unpaved Roads

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**Specific Comment**

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[From Attachment 10 to the RCFC&WCD comment letter]

Fact Sheet Text Page 58:

"Enforcement and inspection activities conducted by the San Diego Water Board during the previous permit term have found a lack of source control for many unpaved roads within the jurisdiction of the Copermittees."

Problem with Text:

The Copermittees submit that there is no evidence reflecting any substantial water quality problem relating to MS4 discharges affected by unpaved roads. Moreover, the mileage of unpaved roads in the jurisdiction of the Copermittees is a small percentage of the total mileage of unpaved roads in the Santa Margarita Region, given that many of these roads are operated by such jurisdictions as the U.S. Forest Service. Please see Attachment 5 (Unpaved Roads). Further, the Fact Sheet notes on page 27 that Permits "will cover municipal systems discharges in unincorporated portions of the county, it is the intent of EPA that management plans and other components of the program focus on the urbanized and developing area of the County". Dedicating resources to unpaved roads diverts already limited resources from the urbanized areas intended to be addressed by USEPA regulations.

Suggestion:

The references and associated program requirements should be removed from the Permit and addressed through a separate general permit for unpaved roads, if in fact unpaved roads are a significant source of pollutants.

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**Comment Response**

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Please see the responses to comments 101, 138, and 179. Although the USEPA intends the regulations to "focus" on urban areas, the regulations are not limited to urban areas. As necessary in the rural areas, the Copermittees must enforce their ordinances to maintain compliance with the Tentative Order thereby protecting water quality.

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**Specific Comment**

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[From Attachment 10 to the RCFC&WCD comment letter]

Fact Sheet Text Page 69:

"The order also found that the SSMP requirements are appropriately applied to the majority of the Priority Development Project categories that are also contained in section F.1 of this Order. The State Water Board also gave California Regional Water Quality Control Boards (Regional Water Boards) the needed discretion to include additional categories and locations, such as retail gasoline outlets(RGOs), in SSMPs "

"The provisions of the SSMP section of the Order are also consistent with those previously issued by the San Diego Water Board for Riverside County (Order No. R9-2004-001), Southern Orange County (Order Nos. R9-2002-0001 and R9-2009-0002) and San Diego County."

Problem with Text:

Several PDP categories or thresholds are not supported by Order WQ 2000-11 such as the 10,000 square feet requirement for residential areas nor the 1-acre threshold for all development projects. Further the Order ignores other applicable portions of Order WQ 2000-11. Specifically, the memo from State Board Chief Counsel Craig S. Wilson transmitted WQ Order 2000-11 to the Regional Board executive officers states that with regard to discretion that:

"3. The Order allows broader discretion by the Regional Water Boards to decide whether to include additional types of development in future SUSMPs. These areas for potential future inclusion in SUSMPs include retail gasoline outlets, ministerial projects (only discretionary projects are included in the approved SUSMPs), and projects in environmentally sensitive areas. If Boards include these types of developments in future permits, the Order explains the types of evidence and findings that are necessary."

Order 2000-11 requires that revisions to regulatory thresholds be justified economically. The Copermitees have expressed their concern with requirement F.1.d.(2)(a) regulating residential developments of 10,000 sq. ft. or more and requirement F.1.d.(1)(c) regulating any project 1-acre or more. These thresholds, and their relative impact on project proponents, have not been adequately justified. The Permittees have noted that these regulations will negatively impact the construction of custom homes (individual lot developments). The relative economic impact of meeting the SSMP requirements for individual homeowners has not been justified in the fact sheet.

Suggestion:

As shown in the redline markup (Attachment 9); The 1-acre SSMP threshold (F.1.d.(1)(c) ) should be deleted and the 10,000 square feet threshold for residential areas (F.1.d.(2)(a) ) should be made the same as the requirement contained in the Riverside County Santa Ana NPDES MS4 Permit.

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**Comment Response**

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The 10,000 square feet threshold is appropriate, since it is consistent with requirements in other Phase I NPDES storm water regulations throughout California. The 10,000 square feet threshold is also included in the Santa Ana Water Board Riverside County MS4 Permit (Order No. R8-2010-0033), but section F.1.d.(2)(a) of the Tentative Order does not differentiate residential new development projects.

This one-acre threshold is appropriate, since it was selected to be consistent with the State Water Board's Phase II NPDES requirements for small municipalities (Order No. 2003-0005-DWQ). The one-acre threshold is consistent with the San Diego County MS4 Permit (Order No. R9-2007-0001) and Orange County MS4 Permit (Order No. R9-2009-0002). The one-acre threshold is also included to be consistent with the State Water Board's Construction General Permit (Order No. 2009-0009-WQO), to ensure all Development Projects subject to the post-construction BMP requirements of the Construction General Permit will implement SSMP post-construction BMP requirements.

No changes were made based on this comment.

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**Comment #** 332                      **Commentor** 4                      **Comment Subject** Hydromod

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**Specific Comment**

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[From Attachment 10 to the RCFC&WCD comment letter]

Fact Sheet Text Page 76:

"The success of future stream restoration and stabilization is, however, dependent on preventing and reducing physical impacts from activities upstream. Therefore, hydromodification management measures are necessary upstream of modified (e.g. concrete, rip rap, etc.) channels in addition to non-modified channels."

Problem with Text:

In some areas, hardened channels may be needed for flood control and public safety. In those areas, channel restoration may not be feasible and onsite controls are not warranted. The protection of public safety from flooding is a statutorily required duty of the District. See Water Code App. Section 48-9. Any provisions of the Tentative Order that would presume to challenge this duty must be deleted. The District assumes that the Regional Board and staff are not placing themselves in the position of making flood control judgments, as the agency is neither charged by the Legislature with such obligation nor is the agency equipped to do so.

Suggestion:

Revise the text to add "except where hardened channels are required for the protection of public safety"

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**Comment Response**

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Please see the responses to comments 235 and 265. No changes were made based on this comment.

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**Comment #** 333                      **Commentor** 4                      **Comment Subject** Commercial/Industrial

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**Specific Comment**

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[From Attachment 10 to the RCFC&WCD comment letter]

Fact Sheet Text Page 77:

"Since municipalities are the lead permitting authority for industrial land use and construction activities, they are also the lead for enforcement regarding runoff discharges from these sites."

Problem with Text:

This is a leap of logic we should probably not let pass. The Copermittees can greatly influence the design and construction, but the Industrial Permit is focused on the operation of the facility, and that is where the authority of the Board lies - and is arguably the most important aspect of runoff quality from the site.

Suggestion:

Delete the sentence.

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**Comment Response**

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The San Diego Water Board maintains that it is logical for the municipalities to be the lead for enforcement regarding runoff discharges from these sites into their MS4. The Copermittees are responsible for enforcing their ordinances within their jurisdiction regarding discharges to their MS4 systems. The Copermittees have land use permitting authority for industrial land use and construction activities and can require implementation of BMPs to reduce or eliminate runoff discharges into their MS4 systems. No changes were made based on this comment.

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**Comment #** 334      **Commentor** 4      **Comment Subject** Legal

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**Specific Comment**

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[From Attachment 10 to the RCFC&WCD comment letter]

Fact Sheet Text Page 79:

"To clarify, an unaltered natural drainage, which receives runoff from a point source (channeled by a Copermittee to drain an area within their jurisdiction), which then conveys the runoff to an altered natural drainage or a man-made MS4, is both an MS4 and a receiving water."

Problem with Text:

As noted in Attachment 7 (General Legal Comments) regarding Finding D.3.c., a natural drainage, whether or not it conveys point source runoff to a man-made MS4, is not itself part of the MS4.

Suggestion:

Delete text.

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**Comment Response**

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Please see the response to comment 22.

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**Specific Comment**

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[From Attachment 10 to the RCFC&WCD comment letter]

Fact Sheet Text Page 79:

"As operators of the MS4s, the Copermittees cannot passively receive and discharge pollutants from third parties. By providing free and open access to an MS4 that conveys discharges to waters of the U.S., the operator essentially accepts responsibility for discharges into the MS4 that it does not prohibit or otherwise control. These discharges may cause or contribute to a condition of contamination or a violation of water quality standards."

Problem with Text:

First, the Copermittees, as operators of the MS4, are required to address storm drainage. During storm conditions in particular, the District is required to handle flood waters so as to protect the lives and property of residents of Riverside County. The failure to do so is a violation of state law. See Water Code App. Section 48-9. Thus, the Copermittees must "passively receive and discharge" waters from third parties, which waters may contain pollutants. Moreover, the operator of the MS4 is NOT accepting responsibility for discharges from other MS4 systems. There is no provision for joint liability under the federal Clean Water Act or the California Water Code. The former directs its prohibitions against a "discharger," and no others. 33 U.S.C. §§ 1319 and 1342. A party is responsible only for its own discharges or those over which it has control. *Jones v. E.R. Snell Contractor, Inc.*, 333 F.Supp.2d 1344, 1348 (N.D. Ga. 2004); *United States v. Sargent County Water Dist.*, 876 F.Supp. 1081, 1088 (D.N.D. 1992).

The Clean Water Act MS4 regulations, moreover, specifically provide that Copermittees under an MS4 Permit are required to "comply with permit conditions relating to discharges from the municipal separate storm sewers for which they are operators." 40 C.F.R. § 122.26(a)(3)(vi) (emphasis supplied). Moreover, the Regional Board, as the permitting agency for stormwater and Industrial Permits, and the State Board as the overall agency responsible for compliance with the Clean Water Act in California, are responsible for ensuring that the discharges from such permitted facilities, whether or not they enter the MS4, are in compliance with the requirements of those permits. Finally, many sources of pollutants are beyond the control of the MS4 operators but are within the control of other agencies, if those agencies elect to exercise their authority. A major example is the discharge of metals from motor vehicle brake pads, which contributes to exceedances of copper, zinc and potentially other metals in stormwater. The MS4 operators cannot control the composition of brake pads, nor can the MS4 operators control air emissions from domestic and foreign sources that discharge pollutants onto the surface area of the region, which can then wash into the MS4 systems.

Suggestion:

Delete cited text.

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**Comment Response**

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The text cited from the Fact Sheet is a Finding that is included as part of the Findings of the Tentative Order. The San Diego Water Board disagrees with the recommendation to delete the finding from the Fact Sheet or the Tentative Order. Please see the responses to comments 81, 233-235, 260, and 265.

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**Comment #** 336      **Commentor** 4      **Comment Subject** Legal

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**Specific Comment**

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[From Attachment 10 to the RCFC&WCD comment letter]

Fact Sheet Text Page 81:

"Since treatment generally does not occur within the MS4, in such cases reduction of storm water pollutants to the MEP must occur prior to discharges entering the MS4."

Problem with Text:

Nothing in the MS4 regulations prohibits use of the MS4 for treatment. Frankly, some of the most effective treatment facilities for pollutants may be located in the MS4 as part of regional treatment systems. An example are catch basins, which collect trash and other debris and detention and retention basins that can be used to capture, treat and infiltrate runoff.

Suggestion:

Delete cited text.

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**Comment Response**

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The San Diego Water Board agrees that nothing in the MS4 regulations prohibits use of treatment devices within the MS4 to treat pollutants prior to discharge into receiving waters, subject to appropriate NPDES requirements. Although more often than not, structural treatment controls within the MS4 are costly and maintenance intensive, and therefore not implemented by the Copermittees. The text clarifies the most common case; that treatment controls for priority pollutants do not exist within the MS4 and the most cost efficient and effective controls are at the source of the pollutants prior to entering the MS4. Please see the response to comment 290. No changes were made based on this comment.

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**Comment #** 337      **Commentor** 4      **Comment Subject** Retrofit

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**Specific Comment**

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[From Attachment 10 to the RCFC&WCD comment letter]

Fact Sheet Text Page 84:

"When appropriately applied as in this Order, retrofitting existing development meets MEP."

Problem with Text:

Only retrofits that are applied with the requirements of the Order meet MEP, which is not the case.

Suggestion:

Delete the text.

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**Comment Response**

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If retrofits are applied appropriately, in compliance with the requirements of the Tentative Order, the San Diego Water Board considers that as controlling pollutants in storm water discharges from existing development to the MEP. No changes were made based on this comment.

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**Comment #** 338                    **Commentor** 4                    **Comment Subject** Monitoring

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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

[Copermittees requested deletion of "Where such monitoring is not practical, such as for large watersheds with significant groundwater recharge flows, composites must be" from Attachment E, section II.A.1.d.]

As discussed in our meeting, this is a large watershed with significant GW recharge flows.

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**Comment Response**

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This requirement is referring to the watershed area for the specific monitoring stations and not for the Santa Margarita Watershed as a whole. The practicality of collecting a sample for the duration of the event is based on the availability of flows during that storm event which may be impacted by the condition of the watershed depending on the size of the storm event, i.e. small storm events in a large watershed with significant groundwater recharge may not have flows during the duration of the entire runoff event.

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**Comment #** 339                    **Commentor** 4                    **Comment Subject** Monitoring

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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

Language from MLS section. This is to allow for changes in MLS locations, and then allow the stream assessment stations to follow.

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**Comment Response**

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The San Diego Water Board agrees with this request with the caveat that the bioassessment stations location remains with the mass loading station. The following language has been added "Copermittees may propose, for San Diego Water Board review and approval, changing the location of stream assessment monitoring stations where the mass loading stations location has changed pursuant to section II.A.1.a."

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**Comment #** 340                    **Commentor** 4                    **Comment Subject** Monitoring

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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

Only the Bioassessment component of stream assessment monitoring must be conducted according to the SOP.

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**Comment Response**

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Section II.A.2.c.(3) requires that the monitoring at the stream assessment stations be conducted according to the most current applicable SOPs developed by SWAMP, and includes a footnote with current SOPs. These SOPs are also applicable to the following water chemistry constituents: Temperature, pH, Dissolved Oxygen, Specific Conductance, and Alkalinity. The Tentative Order has been revised to clarify this.

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**Comment #** 341      **Commentor** 4      **Comment Subject** Legal

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**Specific Comment**

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[From Attachment 10 to the RCFC&WCD comment letter]

Fact Sheet Text Page 88:

"The RWL language in the Order requires storm water compliance with water quality standards through an iterative approach for implementing improved and better-tailored BMPs over time. The iterative BMP process requires the implementation of increasingly stringent BMPs until receiving water quality standards are achieved. This is necessary because implementation of BMPs alone cannot ensure attainment of receiving water quality standards."

Problem with Text:

61 Federal Register 57425 (1996), Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits states "expanded or better-tailored BMPs in subsequent permits, where necessary, to provide for the attainment of water quality standards."

Suggestion:

The second sentence should be revised to reflect the actual text from federal regulations (specifically "in subsequent permits"). Further the last sentence does not make sense and is contrary to the proceeding text and should be deleted.

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**Comment Response**

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The cited guidance is for NPDES storm water permit writing and not for storm water program management. The implementation of improved and better-tailored BMPs does not have to wait for subsequent permit iterations. A proactive storm water program will continuously review and improve their BMPs for the attainment of water quality standards. The last sentence has not been changed because it refers to the iterative process and not BMPs alone. No changes were made based on this comment.

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**Comment #** 342      **Commentor** 4      **Comment Subject** Monitoring

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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

This section is referring to the Bioassessment component of stream assessment monitoring.

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**Comment Response**

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This section is referring to the stream assessment monitoring. See response to comment No. 340.

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**Comment #** 343                      **Commentor** 4                      **Comment Subject** Overirrigation

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**Specific Comment**

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[From Attachment 10 to the RCFC&WCD comment letter]

Fact Sheet Text Page 112:

"The San Diego Water Board has responded to complaints about and observed runoff from over-irrigation entering the MS4s in the Riverside County portion of the San Diego Region."

Problem with Text:

There is no evidence in the fact sheet supporting this statement.

Suggestion:

Provide evidence or delete statement.

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**Comment Response**

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This finding states the fact that the San Diego Water Board has received and responded to complaints about and observed runoff from overirrigation entering the MS4s in the Riverside County portion of the San Diego Region. The documentation is available in the records available to the public at the San Diego Water Board. No changes were made based on this comment.

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**Comment #** 344                      **Commentor** 4                      **Comment Subject** Monitoring

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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

This presumes we are starting at the 'bottom of the watershed'. We may approach this differently, but would come up with something to help identify source areas.

**Comment Response**

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Please see the response to comment 193.

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**Comment #** 345                      **Commentor** 4                      **Comment Subject** Monitoring

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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

This is necessary because some pollutants have broad societal sources that cannot be pinpointed through focused source ID 'Monitoring'.

**Comment Response**

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Please see the response to comment 193.

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**Comment #** 346                      **Commentor** 4                      **Comment Subject** Monitoring

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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

Table 4 is more appropriate – consistency for all MS4 outfall stations.

**Comment Response**

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The San Diego Water Board does not agree with the proposed change. Table 1 is appropriate. No changes were made based on this comment.

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<b>Comment #</b> 347	<b>Commentor</b> 4	<b>Comment Subject</b> LID
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**Specific Comment**

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[From Attachment 10 to the RCFC&WCD comment letter]

Fact Sheet Text Page 130:

"This section requires the use of native and/or low water use plants for landscaping."

Problem with Text:

There was an agreement that this would be suggested but not a requirement. This requirement also mandates the means of compliance, in violation of Water Code section 13360.

Suggestion:

Change the text:

"Section suggests the use of native and/or low water use plants for landscaping,"

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**Comment Response**

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No change is needed in response to the comment. The full text of the the fact sheet accurately reflects the language in the Tentative Order which requires the use of native and/or low water use plants for landscaping where feasible.

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<b>Comment #</b> 348	<b>Commentor</b> 4	<b>Comment Subject</b> Monitoring
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**Specific Comment**

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[From Attachment 9 to the RCFC&WCD comment letter]

The existing monitoring program is reported on a fiscal year basis. Need to align the monitoring report with the fiscal year and the JRMP annual report. Also consistent with the change requested in III.A.2.

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**Comment Response**

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Please see the response to comment 195.

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**Comment #** 349      **Commentor** 4      **Comment Subject** New Development

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**Specific Comment**

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[From Attachment 10 to the RCFC&WCD comment letter]

Fact Sheet Text Page 136:

"This requirement is needed because to date, the Copermitees have generally approved low removal efficiency treatment control BMPs without justification or evidence that use of higher efficiency treatment BMPs was considered and found to be infeasible."

Problem with Text:

The Copermitees challenge the accuracy of this Statement. Riverside County has been requiring landscaped based low impact development BMPs since 2005. The District has also spent a substantial sum of money and time developing BMP manuals with specific criteria to ensure the effectiveness of BMPs.

Suggestion:

Delete the unsupported and offensive statement.

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**Comment Response**

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The statement is accurate. The Fact Sheet references a Program Evaluation Report from 2008, in which an audit of the Copermitees' SSMP programs found that many SSMP reports do not describe the selection of treatment control BMPs. Where treatment control BMPs were implemented for a SSMP project, no justification or evidence was provided for the selection of those treatment control BMPs. The pollutant removal efficiency of those treatment control BMPs was not known or evaluated in the SSMP report. The requirement is necessary to ensure that the Copermitees ensure the use of treatment control BMPs with the highest feasible pollutant removal efficiency. No changes were made based on this comment.

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**Comment #** 350      **Commentor** 4      **Comment Subject** Hydromod

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**Specific Comment**

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[From Attachment 10 to the RCFC&WCD comment letter]

Fact Sheet Text Page 142:

"Where streams are hardened and/or buried to convey storm water, they cannot provide adequate water quality."

Problem with Text:

Unsupported and incorrect. Hardened channels can be designed to provide both flood protection and natural stream function. For example, hardened levees can be designed to be set back and backfilled with native material, effectively providing a natural substrate for stream function. Similarly, porous channel materials such as gabions can provide both flood protection and substrate for native habitat. Finally, even underground systems can be connected to regional treatment systems that provide requisite water quality benefits where appropriate.

Suggestion:

Delete.

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**Comment Response**

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The San Diego Water Board disagrees with the commenter. We fail to see how a channel that is lined with hardscape materials or an underground pipe would be able to support habitat necessary to support rare, threatened, or endangered species (i.e. RARE beneficial use). The Finding in the Fact Sheet is correct to state that hardened stream channels (i.e. lined with hardcape materials) and underground systems (i.e. pipes) cannot provide water quality and other necessary conditions to support beneficial uses. No changes were made based on this comment.

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**Comment #** 351      **Commentor** 4      **Comment Subject** Hydromod

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**Specific Comment**

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[From Attachment 10 to the RCFC&WCD comment letter]

Fact Sheet Text Page 145:

"Redevelopment projects, however, must be able to achieve post-project runoff flow rates and durations that are less than or equal to pre-project and down to pre-development runoff flow rates and durations to be eligible to receive a waiver under the program."

Problem with Text:

This requirement is self-defeating. By placing regulatory obligations on redevelopments that make the cost of redevelopment greater than the cost of developing on virgin land, the Permit effectively promotes inner-city blight as existing structures are abandoned and suburban development is promoted due to economic factors. The Permit should include accommodations for redevelopment to ensure that existing developed areas are economically preferable for new development and to prevent the onset of unnecessary additional impervious area.

Suggestion:

The Permit and fact sheet should be revised to offer exemptions for hydromodification requirements for redevelopments where such improvements are infeasible.

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**Comment Response**

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The San Diego Water Board disagrees that the requirement is self-defeating. Language has been added to the fact sheet clarifying the difference between pre-project and pre-development. The waiver provides the appropriate level of accommodations to redevelopment projects while protecting water quality. In addition, the San Diego Water Board believes the commentor over estimates the extent to which development may be preferred on pristine land over redevelopment with the current landuse zoning and dedicated open space requirements. Please see the response to comment 269. No changes were made based on this comment.

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**Specific Comment**

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[From Attachment 10 to the RCFC&WCD comment letter]

Fact Sheet Text Page 160:

"Retrofitting existing development is practicable for a municipality through a systematic evaluation, prioritization and implementation plan focused on impaired water bodies, pollutants of concern, areas of downstream [hydromodification, feasibility and effective communication and cooperation with private property owners]."

Problem with Text:

Although the current requirement simply calls for a study, it is expected that future permits will require implementation of said study. This study exceeds the requirements for Copermittees to evaluate opportunities for retrofit of the MS4 contained in the federal regulations and federal Clean Water Act. There are no revenues to promote such a program.

Suggestion:

The Board should recognize in the fact sheet that without funding provided by the state, there is no revenue for such a program.

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**Comment Response**

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The San Diego Water Board disagrees that funding must be provided by the State for the Copermittees to implement a retrofitting program. Retrofitting is anticipated to be most feasible and implementable at publicly owned properties and areas. Retrofit opportunities at publicly owned properties and areas can be implemented whenever maintenance or upgrades are necessary, which should already be included in the Copermittee's budget. If private owners choose to retrofit their properties, the cost may be borne by the property owner and may not require additional resources from the Copermittees. Also, retrofit opportunities may be funded by the CWA Section 401 certification project proponents, Supplemental Environmental Project (SEP) proponents, and grant programs.

The requirement to implement retrofits is fully supported by the federal regulations to reduce storm water pollutants to the MEP. 40 CFR 122.26 (d)(2)(iv) provides that the Copermittees storm water program shall include control techniques and engineering methods. Retrofitting BMPs are such control techniques and engineering methods for discharges from existing developments. 40 CFR 122.26(d)(2)(iv)(A) specifies that the Copermittee's program must include "a description of structural and source control measures to reduce pollutants from runoff from commercial and residential areas". Retrofitting BMPs are both structural and source control measures to reduce pollutants. 40 CFR 122.44(d)(1) requires municipal storm water permits to include any requirements necessary to "[a]chieve water quality standards established under section 303 of the CWA, including State narrative criteria for water quality." To date, the receiving waters with the Copermittees' jurisdiction are not meeting water quality standards as evidenced by the San Diego Region Clean Water Act Section 303(d) List of Water Quality Limited Segments. Experience has shown that retrofitting existing development is necessary to meet water quality standards.

Retrofits do not have to be expensive. Retrofits could be as simple as redirecting downspouts from roofs to pervious or landscaped areas instead of to hardscaped areas discharging directly to the MS4. The San Diego Water Board encourages the Copermittees to identify simple, low-cost retrofit opportunities that can be easily implemented, in addition to other more expensive retrofit opportunities, as part of their retrofitting program.

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**Specific Comment**

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[From Attachment 10 to the RCFC&WCD comment letter]

Fact Sheet Text Page 161:

"Section F.3.d.(4) requires each Copermittee to cooperate with private property owners to encourage the implementation of site specific retrofitting projects. Because the Copermittees have limited authority to directly require retrofitting projects on private property, the Copermittees must encourage private property owners to implement retrofitting projects through indirect programs and incentives."

Problem with Text:

If the Board wishes to promote urban retrofit, then they also need to incentivize the program. Currently, property owners wishing to volunteer for urban retrofit projects are required to comply with the SSMP, including hydromodification and LID requirements, opt into BMP inspection programs and subject themselves to ongoing scrutiny through business inspection programs required by the Permit. The permit places an ECONOMIC DISINCENTIVE in the way of promoting a general good for the watershed. The purpose of this requirement is to promote acceleration of water quality benefits from existing urban areas. The requirements, as written, promote a program that is doomed to failure.

Suggestion:

The Board should clearly exempt urban retrofit projects from the new development requirements of the Permit if they wish to accelerate water quality improvements from existing urban areas.

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**Comment Response**

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The San Diego Water board disagrees that urban retrofit project should be exempt from the new development requirements. The San Diego Water Board disagrees with the commenter than all retrofit projects on privately owned properties will be or must be subject to SSMP requirements (See response to Comment #99).

Many retrofit projects could easily be less than 1 acre in size. For example, as described in the response to comment 352, a retrofit project could be as simple as redirecting downspouts from roofs to pervious or landscaped areas instead of hardscaped areas discharging directly to the MS4. To take such a project one step further, the owner of the property may wish add a planter box that can receive roof runoff, which can retain, filter, and evapotranspire the runoff, as well as provide aesthetic value. Or, the property owner could direct the roof runoff to a series of rain barrels that allow the overflow to discharge to a landscaped area or pervious surface. These types of retrofits are unlikely be subject to SSMP requirements.

On the other hand, if a private owner is planning to implement a project that is subject to SSMP requirements, that would essentially mean the project is a redevelopment Priority Development Project (PDP). Such projects would be adding, creating, or replacing at least 5,000 square feet of impervious surface. It is necessary for these redevelopment PDPs to implement the LID and HMP requirements to protect water quality from the runoff that is generated from the impervious surface. If, however, the project were to redevelop the site and replace at least 5,000 square feet of impervious surface with pervious surface, and not add or create at least 5,000 square feet of impervious surface, that project may no longer meet the definition of a PDP. Section F.3.d.(4) provides several practices to encourage retrofit projects to be implemented by private property owners. The San Diego Water Board encourage the Copermittees to implement these practices and identify other practices that may be effective in incentivizing retrofit projects for private property owners. In the unlikely event that a retrofit project triggers the redevelopment PDP criteria, then that project would most likely be self mitigating.

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<b>Comment #</b> 354	<b>Commentor</b> 4	<b>Comment Subject</b> Retrofit
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**Specific Comment**

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[From Attachment 10 to the RCFC&WCD comment letter]

Fact Sheet Text Page 162:

"Periodic inspections may be performed to ensure the site owner has not removed the retrofit BMPs."

Problem with Text:

Similar to the prior comment, this creates a disincentive to retrofit BMPs.

Suggestion:

Delete.

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**Comment Response**

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The San Diego Water Board disagrees that this creates a disincentive to retrofit BMPs. The Tentative Order only requires retrofit BMPs implemented by private property owners to be inspected as needed. An inspection does not have to be intrusive. The inspection could be as simple as driving by and verifying that the retrofit BMP is still there.

The water quality benefit of a retrofit BMP is only realized through continued proper operation of that BMP. Knowing where there are retrofit BMPs and that those BMPs are being maintained properly is important information for the Copermittees to reduce storm water pollutants to the MEP. Knowing if the retrofit BMP has been removed is also important information for the Copermittees. No changes were made based on this comment.

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<b>Comment #</b> 355	<b>Commentor</b> 4	<b>Comment Subject</b> IDDE
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**Specific Comment**

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[From Attachment 10 to the RCFC&WCD comment letter]

Fact Sheet Text Page 163:

"Section F.4.b ...access points (i.e. manholes), connections..."

Problem with Text:

The text from the Phase I rule implementing the NPDES regulations and the requirement of the storm drain system map is:

(from Federal Register, Vol 55, No 222, Friday Nov 18, 1990):

"[submit] a USGS 7.5 minute topographic map...[showing] The location of known municipal storm sewer system outfalls discharging to waters of the United States...the location of major structural controls for storm water discharge (retention basins etc) and the identification of publicly owned parks, recreation areas and other open lands."

The proposed requirements exceed the federal regulatory requirements for MS4 mapping. Further, the mapping of manholes is a significant economic burden that would have no benefit for our staff. Manholes are typically placed at regular intervals (300 – 500 feet) on underground storm drain systems. Once a map providing the location of the MS4 system is available, manholes are quickly located through visual inspection in the field. Further, storm drain plans that are available to Permittee staff can be used to locate specific manholes where absolutely necessary. The economic costs of mapping potentially thousands of manholes is not offset by any known benefit.

Suggestion:

Delete requirement to map manholes.

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**Comment Response**

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Please see response to comment 313.

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**Comment #** 356      **Commentor** 4      **Comment Subject** Monitoring

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**Specific Comment**

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[From Attachment 10 to the RCFC&WCD comment letter]

Fact Sheet Text Page 198:

"Section II.D (High Priority Inland Aquatic Habitat) of the MRP describes required monitoring to be done in order to assess if MS4 storm water and/or non-storm water discharges are affecting high priority aquatic and/or riparian species."

Problem with Text:

This requirement was deleted from the Orange County NPDES MS4 Permit when the provision to assess outfalls using NALs and SALs was added. It is not clear why such an accommodation would not also be provided to the Riverside County NPDES MS4 Program. This region has significantly less economic resources than south Orange County or San Diego County to implement monitoring programs. The Permittees specifically request this be deleted as impacts to aquatic habitat will be detected through the NAL/SAL program.

Suggestion:

This requirement should be deleted.

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**Comment Response**

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Please see the response to comment 150.

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