> 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.

Under this definition, the most that the Regional Board can say with respect to natural drainages used to convey urban runoff is that, to the extent they are relatively permanent, standing or continuously flowing bodies of water forming geographic features that would be described as streams or rivers, they might be considered to be waters of the U.S.. To the extent a drainage has only intermittent or ephemeral flows or only periodically provides drainage for rainfall, the finding that the drainage is a waters of the U.S. would be inconsistent with the current U.S. Supreme Court interpretation of the term. Moreover, to make a Finding that any particular drainage used to convey urban runoff is a waters of the U.S. would require a factual analysis on a case by case basis.[2] The Regional Board's blanket Finding D.3.c. is merely a broad declaration unsupported in fact or current law and should be deleted from the Tentative Order.

C. To The Extent A Natural Drainage Is A Waters Of The U.S. It Cannot Also Be An MS4; By Definition An MS4 Discharges To Waters Of The U.S.

As noted above, the Tentative Order and federal CWA regulations define an MS4 as a conveyance that discharges ***to*** waters of the United States. The notion that a drainage can be both part of an MS4 and a receiving water is inconsistent with this definition. Thus, to the extent a natural drainage is a waters of the U.S., it cannot also be an MS4 and vise versa. The Regional Board should revise the Tentative Order to make clear that if a conveyance is deemed part of an MS4 in accordance with the CWA definition, then it cannot also be deemed a waters of the United States.

II. The Proposed Prohibition Of Treatment Control BMPs In Receiving Waters Is Unsupported By Federal Law And Inconsistent With State Law

The Tentative Order Finding E.7 (page 14) states that "[u]rban runoff treatment and/or mitigation must occur prior to the discharge of urban runoff into a receiving water." Given Finding D.3.c., which states that all natural drainages that carry urban runoff are "both an MS4 and a receiving water," Finding E.7 presents significant practical issues for the placement of treatment control BMPs and creates a legal conundrum. Moreover, the Finding is based on a misinterpretation of CWA regulations and misconstrues USEPA guidance on storm water treatment BMPs.

Finding E.7 apparently is intended to support Tentative Order revisions to the Standard Urban Storm Water Mitigation Plan (SUSMP) requirements for Priority Developments. Tentative Order Section D.1.d.(6)(c) (page 28) is a new provision that provides, "All treatment control BMPs must be located so as to infiltrate, filter, or treat runoff prior to its discharge to any waters of the U.S.," except where multiple projects use shared treatment. Section D.1.d.(6)(f) (page 28) provides that treatment control BMPs for all Priority Development Projects must be

[2] Even under Justice Kennedy's concurring opinion, the determination of a "significant nexus" must be made on a case-by-case basis. *See* 126 S. Ct. at 2250-51.

"implemented close to pollutant sources (where shared BMPs are not proposed), *and* prior to discharging into waters of the U.S." (emphasis added). The corresponding provision in the third term permit, provides that such BMPs be "implemented close to pollutant sources, when feasible, and prior to discharging into *receiving waters supporting beneficial uses*" (emphasis added). Finally, and most directly, Section D.1.d.(6)(g) (page 29) provides that treatment control BMPs must "[n]ot be constructed within a waters of the U.S. or *waters of the State*" (emphasis added). The addition of "waters of the state" to this provision further exacerbates the problem. "Waters of the state" includes "any surface water, groundwater, including saline waters, within the boundaries of the state." Including this expansive term in Section D.1.d(6)(g) would impose extreme limitations on the location of treatment BMPs and greatly interfere with Copermittees' ability to achieve needed water quality improvements.

The revised language of the Tentative Order severely limits the potential locations for installation of treatment control BMPs. See Attachment B (pages 6-7). Given the lack of any proper legal or factual basis for these limitations, the Regional Board should strike Finding E.7 and the corresponding SUSMP revisions from the Tentative Order.

A. Neither The USEPA Regulation Nor The USEPA Guidance Cited In The Finding Provide Legal Support For The Finding or the Revised SUSMP Provisions

1. 40 CFR 131.10(A) Addresses Only Designated Beneficial Uses; It Does Not Prohibit The Use Of A Water Body For Incidental Waste Assimilation Or Conveyance

Tentative Order Finding E.7 and the corresponding discussion in the Fact Sheet cite to regulations in 40 CFR Part 131, which govern the development of water quality standards. Section 131.10(a) provides:

> Each State must specify appropriate water uses to be achieved and protected. The classification of the waters of the State must take into consideration the use and value of water for public water supplies, protection and propagation of fish, shellfish and wildlife, recreation in and on the water, agricultural, industrial, and other purposes including navigation. *In no case shall a State adopt waste transport or waste assimilation as a designated use for any waters of the United States.* (Emphasis added.)

On its face, this provision clearly does not prohibit or support the prohibition of construction of treatment control BMPs in waters of the U.S.. It merely prohibits a state from adopting "waste transport" or "waste assimilation" as a *designated use for purposes of developing water quality standards*. It says nothing about, and has nothing to do with, the incidental use of a water body for those purposes.

The "legislative history" of 40 CFR 131.10(a) does not indicate that the "In no case" language was meant to prohibit the construction of treatment control BMPs in receiving waters. USEPA adopted Part 131 in 1983. It revised and consolidated in the new Part 131 existing regulations previously found in 40 CFR Parts 120 and 35, which governed the development, review, revision and approval of water quality standards. In 1982, Section 35.1550(b)(2) provided that the water quality standards of each state should:

> Specify appropriate water uses to be achieved and protected, taking into consideration the use and value of water for public water supplies, propagation of fish, shellfish, and wildlife, recreation purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.

In USEPA's proposed rule to establish Part 131, the language from 40 CFR 35.1550(b)(2) was maintained:

> Each State must specify appropriate water uses to be achieved and protected. The classification of the waters of the State must take into consideration the use and value of water for public water supplies, protection and propagation of fish, shellfish and wildlife, recreation in and on the water, agricultural, industrial, and other purposes including navigation.

47 Fed. Reg. 49234, at 49247 (October 29, 1982). In the final rule, USEPA added the "In no case" language without discussion. In a "Summary of the Changes Made in the Proposed Regulation" table, USEPA simply stated: "Statement added to [131.10(a)] prohibiting *designating a stream* for waste transport or assimilation." 48 Fed. Reg. 51400, at 51404 (November 8, 1983) (emphasis added). The most that can be said, therefore, is that USEPA added the "In no case" language to avoid the prospect of states developing water quality standards to protect a stream for the beneficial use of waste assimilation or transport. There is nothing in the preambles to either the proposed or final rules to suggest USEPA intended the provision to prohibit construction of treatment control BMPs in receiving waters. Finding E.7 suggests that allowing construction of treatment control BMPs in a receiving water would be "tantamount to accepting waste assimilation as an appropriate use for that water body." The extent to which any assimilation and transport of waste is "appropriate" as an existing or incidental use is determined in accordance with state policy and water quality standards, including TMDLs. The CWA regulations cited in the Finding speak only to those uses that should and should not be identified as "designated uses" for the purpose of developing such water quality standards.

2. *USEPA's Part 2 Guidance Clearly Contemplates That Construction Of Treatment Control BMPs In Receiving Waters May Be The Best If Not Only Option*

The USEPA guidance cited in Finding E.7 and the Fact Sheet does not support prohibition of treatment control BMP construction in receiving waters. The Finding cites USEPA's *Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems* (November 1992) ("Part 2 Guidance"). Section 6 generally discusses the proposed management program and Section 6.4 specifically addresses structural controls. Because a CWA Section 404 permit might be required for some structural controls, including control projects that involve the discharge of dredged or fill material into waters of the U.S., including wetlands, the guidance suggests that municipalities should try to avoid locating such controls in natural wetlands:

> Applicants should note that CWA Section 404 permits may be required for some structural controls, including any control

> projects that involve the discharge of dredged or fill material into waters of the United States, including wetlands. States may also require permits that address water quality and quantity. ***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, and that the use of other nonstructural or source controls are not practicable or as effective. In addition, impacts to wetlands should be minimized by identifying those wetlands that are severely degraded or that depend on runoff as the primary water source. Moreover, ***natural wetlands should only be used in conjunction with other practices***, so that the wetland serves a "final polishing" function (usually targeting reduction of primary nutrients and sediments). Finally, practices should be used that settle solids, regulate flow, and remove contaminants prior to discharging storm water into a wetland.

Part 2 Guidance at p. 6-21 (emphasis added). Rather than supporting a prohibition of constructing structural BMPs in receiving waters, this guidance clearly contemplates that construction of such controls sometimes will be the best, if not only, option for treating storm water. Moreover, rather than an overriding concern for water quality, the guidance appears primarily concerned with the burden of having to obtain a CWA Section 404 permit if construction results in dredged or fill material being discharged into wetlands.

Thus Finding E.7 and the additional and revised SUSMP provisions at Section D.1(d)(6) of the Tentative Order are made without legal or factual support. This Finding and the proposed prohibitions on construction of structural treatment BMPs in receiving waters should be stricken from the Tentative Order.

B. The Proposed Prohibition Is Inconsistent With Water Code 13360(a)'s Prohibition On Specifying How Discharge Requirements Are To Be Met

The Tentative Order establishes waste discharge requirements for discharges of urban runoff. In establishing these requirements, the Porter Cologne Water Quality Control Act makes it abundantly clear that the Regional Board may order Copermittees to comply with the requirements, but it may not specify *how* they comply with the order. Water Code Section 13360(a) provides:

> 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 the 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 discussed above, it is *not* unlawful for Copermittees to construct treatment control BMPs in receiving waters. Accordingly, Section 13360(a) prohibits the Regional Board from specifying

that such BMPs must be located prior to discharge into receiving waters in an effort to achieve desired reductions in storm water pollution as required by the Tentative Order. Thus Finding E.7 and the proposed prohibitions on construction of structural treatment BMPs in receiving waters at Tentative Order Section D.1.(d)(6) should be stricken from the Tentative Order.

III. The Finding That All Requirements In The Order Are Necessary To Meet The MEP Standard Is Unsubstantiated And Appears Designed To Avoid The Requirements Of California Law Applicable To Permit Requirements Imposed By The State In The Exercise Of Its Reserved Jurisdiction

Finding E.6 of the Tentative Order provides:

> Requirements in this Order that are *more explicit* that the federal storm water regulations in 40 CFR 122.26 are prescribed in accordance with the CWA Section 402(p)(3)(B)(iii) and are necessary to meet the MEP standard. (Emphasis added.)

Finding E.6 is made without any identification of the "more explicit" provisions to which it refers and without the necessary analysis to support its conclusion that each such requirement is "necessary to meet the MEP standard." Moreover, Finding E.6 appears to be a "defensive finding" designed to avoid the requirements of Water Code Section 13241, which, together with Water Code Section 13263, requires the Regional Board to take economic considerations into account before adopting permit requirements that are more stringent than federal law requires. Moreover, to the extent that the Tentative Order imposes requirements more stringent than federal law requires, such requirements may be unfunded mandates prohibited by the California Constitution.

Because Finding E.6 refers to unspecified provisions of the Tentative Order and is not supported by any factual analysis of such provisions, it must be removed from the Order.

A. The Regional Board Cannot Simply Declare That All "More Explicit" Requirements In The Order Are Necessary To Meet MEP; It Must Identify Such Provisions and Demonstrate Why Each Requirement Is Mandated By Federal Law And Support Each Requirement With An Appropriate Finding

Relying on California Supreme Court precedent, the State Board has held that, not only must waste discharge requirements or an NPDES permit be supported by findings, but also, in order to withstand challenge, the findings must be supported by substantial evidence. In Order No. WQ 95-4, reviewing an NPDES permit issued by the San Francisco Bay Regional Board, the State Board agreed with petitioners' contention that the findings (particularly Findings 17 and 18) were inadequate. Citing *Topanga Association for a Scenic Community v. County of Los Angeles*, 11 Cal. 3d 506, 515 (1974), the State Board found that Findings 17 and 18 did not "bridge the analytic gap between the raw evidence and ultimate decision or order." Order No. WQ 95-4 at p. 23.

In *Topanga*, the California Supreme Court analyzed Section 1094.5 of the Code of Civil Procedure, which addresses the procedure for judicial review of adjudicatory decisions rendered by administrative agencies. "11 Cal. 3d at 514-15. Section 1095.4 clearly contemplates that at minimum, the reviewing court must determine both whether substantial evidence supports the administrative agency's findings and whether the findings support the agency's decision." *Id.*

Without identifying each of the "more explicit" requirements of the Tentative Order and demonstrating such requirements are necessary to meet the MEP standard, the Tentative Order lacks the requisite substantial evidence to support the conclusion that all such requirements are necessary to meet the MEP standard.

B. In Particular, The MEP Finding is Not Supported By Any Analysis in the Fact Sheet

In order to provide the substantial evidence necessary to support the MEP finding, the Regional Board would have to identify each "more explicit" requirement and establish that each such requirement in fact meets the definition of MEP. The Fact Sheet discussion of Finding E.6 makes no attempt to provide any factual analysis in support of the Finding. Fact Sheet at 68. The Fact Sheet is merely a summary of the Regional Board's reserved authority to implement its own standards and requirements, provided they are at least as stringent as those mandated by the CWA and federal regulations. The Fact Sheet further discusses the Regional Board's authority under CWA Section 402(p)(3)(B)(iii), which provides the statutory basis for the MS4 permitting program. Finally, the Fact Sheet refers to USEPA guidance, which "supports increased specificity in storm water permits . . . and expanded or better-tailored BMPs in subsequent permits, where necessary, to provide for the attainment of water quality standards." *Id.* at 69.

This Fact Sheet discussion may support increased specificity and more tailored BMPs, where needed, provided that the need for more specificity is supported by an evaluation of need for more specificity. The Fact Sheet does nothing to support the broad conclusion that all such "more specific" or "more explicit" requirements are "necessary to meet the MEP standard."[3] Accordingly, Finding E.6 is not supported by substantial evidence and should be deleted from the Tentative Order.

C. To The Extent The Tentative Order Imposes Requirements That, Rather Than Meeting MEP, Go Beyond MEP, Or Otherwise Represent The Exercise Of The State's Reserved Jurisdiction To Impose Requirements That Are Not Less Stringent Than The Federal CWA Mandate, The City of Burbank Decision Requires The Regional Board To Comply With State Law, Including The Requirement To Consider Economic Factors

In *City of Burbank v. State Water Resources Control Board*, 35 Cal. 4th 613 (2005), the California Supreme Court held that when a regional board issues an NPDES permit with requirements more stringent than what federal law requires, state law requires that the regional board take into account economic factors, including the discharger's cost of compliance. *Id.* at 618. Specifically, the court ruled that, where permit restrictions exceed the requirements of the Clean Water Act, the regional board must comply with Sections 13263 and 13241 of the Porter Cologne Water Quality Control Act. *Id.* at 626. Read together, Sections 13263 and 13241 require regional boards to take into account economic considerations when adopting waste discharge requirements.

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[3] Given that the Fact Sheet and Tentative Order provide no analysis of the Tentative Order requirements in relation to the MEP standard, the County reserves its right to comment on the definition of MEP contained in the Tentative Order at C-5, and the Fact Sheet at 35-36, should the need for analysis of requirements in light of the MEP standard arise in the future.

As noted above, by stating that the "more specific" or "more explicit" requirements in the Tentative Order are necessary to meet the MEP standard (*i.e.,* the federal requirement), without any support in the Fact Sheet, Regional Board staff appear to be making a defensive finding designed to ward off challenges that, in adopting the Tentative Order, the Regional Board failed to take into account economic considerations for those requirements that exceed the federal CWA mandate.

However, the California Supreme Court made clear in *City of Burbank* that whether, on the one hand, a permit requirement is mandated by federal law, or, on the other hand, is the exercise of the state's reserved jurisdiction to impose its own requirements so long as they are at least as stringent, is an issue of fact. *Id.* at 627. Thus the Regional Board cannot seek to cloak its more stringent requirements in the broad assertion that all such requirements are required to meet the MEP standard. That finding cannot be supported without a factual determination whether each such requirement is indeed "necessary to meet the MEP standard." The finding that all more "explicit" requirements in the Tentative Order are "necessary to meet the MEP standard" is an example of this. The Court in *City of Burbank* remanded the case to the trial court to decide whether certain requirements were "more stringent" and thus should have been subject to economic considerations in accordance with California law. *Id.*

To the extent the Tentative Order does include requirements that, in fact, do go beyond the federal mandate (which Copermittees believe it does), the Regional Board must subject such requirements to the required economic analysis as required by state law. Many such requirements are identified in Attachment B. For example, see the discussion of the Tentative Order's prescriptive JURMP provisions in Attachment B (pages 8-21) and the Fiscal Analysis provisions in Attachment B (pages 23-26).

D. To The Extent The Requirements Of The Tentative Order Exceed Federal Law, They Are Unfunded Mandates Under The California Constitution

In addition to considering economic factors, to the extent the Regional Board has true choice or discretion in the manner it implements federal law, and chooses to impose costs on Copermittee that are not mandated by federal law, the state will have to fund the costs of complying with the requirements.

Under article XIII B, Section 9(b) of the California Constitution, federally mandated appropriations include "mandates of . . . the federal government which, *without discretion*, require an expenditure for additional services or which *unavoidably make the providing of existing services more costly*." *Sacramento v. California (Sacramento II)*, 50 Cal. 3d 51, 71 (1990) (quoting Cal. Const. art. XIII B, § 9(b)) (emphasis in original). In contrast, federal mandates that impose costs on local agencies do not require reimbursement by the state. *Hayes v. Commission on State Mandates*, 11 Cal. App. 4th 1564, 1593 (1992). This includes when a state implements a statute or regulation in response to a "federal mandate so long as the state had no 'true choice' in the manner of implementation of the federal mandate." *Id.* (citing *Sacramento II*).

In contrast, article XIII B, Section 6 of the California Constitution requires the state to reimburse local governments for the costs associated with a new program or higher level of service mandated by the Legislature or any state agency. Cal. Const. art. XIII B, § 6. Costs imposed on local agencies by the federal government "are not mandated by the state and thus would not require a state subvention." *Hayes*, 11 Cal. App. 4th at 1593.

Thus, under both *Hayes* and *Sacramento II*, if the state has a "true choice" or discretion in the implementation of the federal law, then the state cannot avoid its reimbursement function under Section 6. "If the state freely chose to impose the costs upon the local agency as a means of implementing a federal program then the costs are the result of a reimbursable state mandate regardless whether the costs were imposed upon the state by the federal government." *Hayes*, 11 Cal. App. 4th at 1594. Therefore, federal law giving discretion to the states does not constitute a federal mandate.

In relation to Finding E.6 regarding "more explicit requirements," the Fact Sheet states that "CWA section 402(p)(3)(B)(iii) *clearly provides states with wide-ranging discretion*, stating that municipal storm water permits "[s]hall 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." Fact Sheet at 68 (emphasis added).

In the Report of Waste Discharge (ROWD) for the Tentative Permit, Copermittees described the extensive evaluations they have performed to identify weaknesses in their MS4 program. Where weaknesses were identified, the Copermittees recommended additional and more stringent BMPs to address them. While Regional Board staff accepted some of these recommendations in the Tentative Order, the Tentative Order includes other new requirements that lack any similar foundation in program analysis and evaluation. We would argue that these are not only "discretionary," but impose unnecessary financial burdens on the Copermittees.

The Regional Board should require its staff to identify those requirements that are not based upon Copermittee recommendations in the ROWD and determine whether such requirements indeed are necessary to meet the federal standard. If not, they should be deleted from the Order.

IV. The Tentative Order Impermissibly Imposes Third-Party Obligations On Copermittees

Finding D.3.d of the Tentative Order states that MS4 operators "cannot passively receive and discharge pollutants from third parties" and that where these operators do so, they "essentially accept[ ] responsibility" for such illicit discharges. Section D.3.h. of the Tentative Order would hold Copermittees responsible for sewage overflows and infiltration that may discharge into their MS4s, regardless of whether Copermittees owned or controlled the sewage system

To the extent the Tentative Order imposes obligations on Copermittees that are properly the responsibility of others (*e.g.,* the Regional Board, sanitary sewer districts, etc.) or over whom Copermittees otherwise have no control, the County objects.

A. Although The Copermittees May Have A Role In Regulating Industrial And Construction Sites, The Order Impermissibly Requires Copermittees To Assume Responsibilities Duplicating The Regional Board's Responsibilities Under The Statewide General Storm Water Permitting Programs

Under the Tentative Order, discharges from industrial and construction sites are subject to dual (state and local) regulation. *See* Tentative Order, Finding D.3.a. The Finding and Fact Sheet acknowledge that many industrial and construction sites are subject to the General Industrial Permit[4] and the General Construction Permit,[5] adopted by the State Board and enforced by the Regional Board, but claim that USEPA supports an approach holding the Copermittees responsible for the control of discharges from industrial and construction sites in their jurisdictions.

While the Copermittees may have a role in regulating industrial and construction sites, to the extent that the Tentative Order requires the Copermittees to assume responsibilities which either duplicate the Regional Board's responsibilities for the statewide general permitting program or are more extensive than those mandated under the CWA regulations applicable to MS4s, the County objects.

1. *Duplication Of The Regional Board's Responsibilities Under Statewide General Permits*

Contrary to the assertion made in the Fact Sheet at 51-51 and Finding D.3.a, USEPA in fact rejected placing responsibility for regulating discharges from industrial sites (including certain construction sites[6]) with municipalities. In USEPA's proposed Phase I storm water regulations, USEPA actually *considered* placing responsibility for industrial discharges through MS4s with the local municipalities (*see* 55 Fed. Reg. 47990, at 47997 (Nov. 16, 1990)), but ultimately rejected this approach, placing the responsibility for regulating industrial discharges through MS4s with the state and/or regional boards and requiring industrial dischargers to obtain their own permits. *Id.* at 48000. According to USEPA, "this approach . . . address[ed] the concerns of municipalities that they lack sufficient authority and resources to control all industrial contributions to their storm sewers and will be liable for discharges outside of their control." *Id.* at 48001. Instead of having *responsibility* for industrial site discharges, municipalities would only have "an important role in source identification and the development of pollutant controls" for industries that discharged through MS4s. *Id.* at 48000.

Furthermore, the Fact Sheet's reliance on the Phase II storm water regulations is misplaced. First, the Phase II regulations do apply to Phase I permits. Even if they are relevant to medium and large MS4s, the Phase II regulations only provide that small MS4s are to develop and implement ordinances or other regulatory mechanisms to require *erosion and sediment controls* for construction sites, as well as sanctions to ensure compliance, to the extent allowable under state, local or tribal law. 40 C.F.R. § 122.34(b)(4)(ii)(A) (emphasis added). This provision clearly does not make the Copermittees *responsible* for erosion and sediment from construction

[4] The "General Industrial Permit" refers to State Water Resources Control Board Water Quality Order No. 97-03-DWQ National Pollutant Discharge Elimination System General Permit No. CAS000001, Waste Discharge Requirements for Discharges of Storm Water Associated with Industrial Activities Excluding Construction Activities.

[5] The "General Construction Permit" refers to State Water Resources Control Board Order No. 99-08-DWQ National Pollutant Discharge Elimination System General Permit No. CAS000002, Waste Discharge Requirements for Discharges of Storm Water Runoff Associated with Construction Activity.

[6] "Industrial activity" is defined to include construction activity that results in the disturbance of more than five acres of total land area. 40 C.F.R. § 122.26(b)(14)(x).

sites. Nor does it provide the Regional Board with authority to shift its responsibility for regulating construction site storm water to the Copermittees by requiring them to establish a duplicative program.

In fact, in the USEPA Storm Water Phase II Compliance Assistance Guide cited to in the Fact Sheet, USEPA explicitly says that in order to aid construction site operators to comply with both local requirements and their own NPDES permit, the Phase II Final Rule includes a provision that "allows the NPDES permitting authority to reference a 'qualifying . . local program' in the NPDES general permit for construction." USEPA Storm Water Phase II Compliance Assistance Guide, p. 4-32. This means that *if* a small municipality has a construction permit program that satisfies the NPDES requirements of the general construction permit program, then the site operator's compliance with the local program would constitute compliance with the General Construction Permit. In other words, USEPA does not *require* small MS4s to assume the construction permit obligations of the Regional Board; it simply allows small MS4s to take on those obligations. *Id.*

Thus, rather than supporting an approach that would have municipalities duplicating the responsibilities of the State under the statewide general industrial and construction permits, USEPA's regulations seek to avoid such duplication, clearly placing responsibility for discharges from industrial and construction sites with the State and the site discharger.

2. Proper Limits Of The Copermittees' Obligations

The scope of obligations that can be legitimately imposed on the Copermittees with respect to discharges from industrial and construction sites is narrow. The Copermittees are required to demonstrate adequate *legal authority* to control the contribution of pollutants to the MS4 by storm water discharges associated with industrial activity (which includes certain construction sites). 40 C.F.R. § 122.26(d)(2)(i)(A). They are also required, to the extent practicable and applicable, to describe in their MS4 permit application a proposed program to monitor and control pollutants in storm water discharges to MS4s from certain industrial sites and a proposed program to implement and maintain structural and non-structural BMPs to reduce pollutants in storm water runoff from construction sites to MS4s. 40 C.F.R. §§ 122.26(d)(2)(iv)(C) and (D); 40 C.F.R. § 122.26(d)(2)(viii). Tentative Order requirements that have the Copermittees duplicating the State's program for industrial and construction sites and diverting resources to sites that are not significant sources of pollutants are poor public policy.

B. Simply Because A Municipality Has An Obligation To Establish And Enforce Prohibitions Against Illicit Discharges Does Not Mean It Ise "Responsible For" Such Discharges; Copermittees Only Have The Power To Establish And Enforce Prohibitions Against Illicit Discharges And To Pursue Violations Of Such Prohibitions When They Are Identified

Finding D.3.d. states that operators of MS4s "cannot passively receive and discharge pollutants from third parties" and that where these operators do so, they "essentially accept[ ] responsibility" for such illicit discharges. As support for this contention, the Fact Sheet cites to Section 402(p) of the CWA, which requires municipal NPDES permits to "include a requirement to effectively prohibit non-storm water discharges into the storm sewers." *See* 33 U.S.C. § 1342(p)(3)(B)(ii).

Simply because a municipality has an obligation to establish and enforce prohibitions against illicit discharges does not mean they are "responsible for" such discharges. Nor does anything in the Porter Cologne Act or the CWA support such a contention. The Copermittees do not and cannot physically control discharges into their MS4s, and short of blocking all storm drains, cannot prevent all illicit discharges from occurring. Rather, the Copermittees only have the power to establish and enforce prohibitions against illicit discharges, to educate the public concerning the prohibitions and to pursue violations of such prohibitions when they are identified.

USEPA made this clear in the preamble to the Phase I Storm Water Regulations when it stated that under the regulations, municipal applicants would be required "to develop a recommended site-specific management plan to detect and remove illicit discharges (or ensure they are covered by an NPDES permit) and to control improper disposal to municipal separate storm sewer systems." 55 Fed. Reg. 47990, at 48037 (Nov. 16, 1990) ("Phase I Storm Water Rulemaking").

Moreover, Copermittees may lack legal jurisdiction over storm water discharges into their systems from some state and federal facilities, utilities and special districts, Native American tribal lands, waste water management agencies and other point and non-point source discharges otherwise permitted or controlled by the Regional Board. Similarly, certain activities that generate pollutants present in storm water runoff may be beyond the ability of the Copermittees to control. Examples of these include operation of internal combustion engines, atmospheric deposition, brake pad wear, tire wear and leaching of naturally occurring minerals from local geography.

Accordingly, the County recommends the modification of Finding D.3.d. to acknowledge the limitations of the Copermittees' authority to control certain discharges and activities beyond their regulatory jurisdiction.

C. The Tentative Order Would Impose Requirements With Respect To Sewage Overflows And Infiltration That The State Board Specifically Stayed In The Current Permit And Which Are Duplicative To Requirements Imposed By the State Board And Regional Board

Section D.4.h. of the Tentative Order would hold Copermittees responsible for sewage overflows and infiltration that may discharge into their MS4s, regardless of whether Copermittees owned or controlled the sewage system. The current permit contains a similar provision. *See* Section F.5.f. of R9-2002-0001. However, because the owners of sewage systems at issue already were regulated by sanitary sewer NPDES permits, the State Board issued a stay of this provision. *See* State Board Order No. WQ 2002-0014. Having a dual system of regulation of the sanitary sewers, the Board found, could lead to "significant confusion and unnecessary control activities." WQ 2002-0014 at p. 8. With the State Board's adoption of statewide general waste discharge requirements for sanitary sewer systems (Order No. 2006-0003-DWQ) and the Regional Board's own waste discharge requirements for sewage collection agencies (R9-2007-0005), the newly proposed requirements of the Tentative Order would likely result in even greater "confusion and unnecessary control activities."

Given the previous findings of the State Board on this same issue, and given that none of the factual reasons supporting the State Board's decision have changed, the Regional Board should remove this provision so as to reduce duplicity of effort and the implementation of unnecessary control activities.[7]

V. The Tentative Order's Requirements For Fiscal Analysis Exceed Federal Law And Have No Foundation In State Law

Section F (at p. 74) of the Tentative Order requires the Copermittees to secure the resources necessary to implement the permit and conduct a fiscal analysis of the capital and operating costs of its program, as required by the federal regulations. However, in addition, Section F requires the fiscal analysis to include "a qualitative or quantitative description of fiscal benefits realized from implementation of the storm water protection program." Section F further requires each Copermittee to submit to the Regional Board a "Business Plan that identifies a long-term funding strategy for program evolution and funding decisions." While the County agrees with Regional Board staff that there is an identified need to prepare a fiscal reporting strategy to better define the expenditure and budget line items and to reduce the variability in the reported program costs (and have committed to do so in the ROWD), the County takes exception to the requirements to identify the fiscal benefits realized from the program and develop a long-term funding strategy and business plan. These requirements are not required by federal law and

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[7] The Regional Board also should delete Finding D.3.e., which provides that "pollutant discharges ***into*** MS4s must be reduced to the MEP" (emphasis supplied). This statement is inconsistent with federal law and State Board precedent. MS4 permit requirements are dictated by CWA section 402(p)(3)(B), which provides that permits for discharges "from" MS4s shall require controls to reduce the discharge of pollutants to the maximum extent practicable. 33 U.S.C. § 1342(p)(3)(B)(iii). Such permits also must include a requirement to effectively prohibit non-storm water discharges "into" the storm sewers. 33 U.S.C. § 1342(p)(3)(B)(ii). The CWA is thus very clear that except for non-storm water discharges, municipal storm water permits may only apply the MEP standard to discharges *from* MS4s, not *into* MS4s.

This was the conclusion of the State Board in *In re Building Industry Association of San Diego County*, Order WQ 2001-15. Agreeing with petitioner's argument that the CWA authorizes permits only for discharges "from" MS4s, the State Board stated:

> We find the permit language is overly broad because it applies the MEP standard not only to discharges "from" MS4s, but also to discharges "into" MS4s. . . . [T]he specific language in this prohibition too broadly restricts all discharges "into" an MS4, and does not allow flexibility to use regional solutions, where they could be applied in a manner that fully protects receiving waters.

Order WQ 2001-15 at p. 9-10. Finding D.3.e., accordingly, should be deleted.

are not based upon any analysis of whether they are necessary for the Copermittee programs, which the Copermittees have funded successfully for 16 years. *See* discussion in Attachment B (pages 23-26).

Federal law requires neither a business plan nor identification of fiscal benefits of the MS4 program. The federal regulations require only that Copermittees provide, for each fiscal year to be covered by the permit,

> [A] fiscal analysis of the necessary capital and operation and maintenance expenditures necessary to accomplish the activities of the program under paragraphs (d)(2)(iii) and (iv) of this section. Such analysis shall include a description of the source of funds that are proposed to meet the necessary expenditures, including legal restrictions on the use of such funds.

40 CFR 122.26(d)(2)(vi).

Nor does state law require a business plan or identification of fiscal benefits. Section 13377 of the Water Code, which the Fact Sheet cites in support for the fiscal analysis requirement, simply requires the Regional Board to issue waste discharge requirements that apply and ensure compliance with all applicable provisions of the CWA. Because the CWA does not require a business plan or identification of fiscal benefits, neither does Section 13377 of the Water Code.

According to the Fact Sheet, the requirement for a business plan, including a long-term funding strategy, and the requirement to identify fiscal benefits are based on recommendations in guidance from the National Association of Flood and Storm water Management Agencies (NAFSMA). Fact Sheet at 111. These recommendations were prepared for small MS4s as a basis for developing fee-based programs and have no relevance to the Copermittees MS4 programs. This is discussed in more detail in the Attachment B (page 26).

Given that these Section F requirements are not required by state or federal law and are based on recommendations by NAFSMA that were not intended for Phase I MS4s, the County requests that Provision F of the Tentative Order be revised consistent with the requirements of applicable law.

VI. The Proposed Order Is Increasingly Prescriptive Without The Appropriate Findings Of Fact And Legal Or Technical Justification

A. The Prescriptive Nature of the Tentative Order is Inconsistent with Both State and Federal Law

The Tentative Order, both generally and particularly with respect to the JURMP/SUSMP requirements, is unlawfully prescriptive under Section 13360 of the Water Code and does not comport with the MS4 programs envisioned by USEPA in the CWA implementing regulations and subsequent USEPA guidance.

1. *The Tentative Order Mandates The Particular Manner Of Achieving Compliance, Rather Than Allowing Compliance "In Any Lawful Manner" as Required by State Law*

In its current form, the Tentative Order, not including its five separate attachments, is over 80 pages in length. By comparison, the current permit is approximately 80 pages in length *including* its five attachments. The principal reason for this added length is that the Regional Board staff continues to add detailed requirements that usurp the Copermittees' right to determine how best to achieve the performance goals set out in the CWA regulations and the Tentative Order. This approach is unduly prescriptive and in direct conflict with Water Code Section 13360 which, as previously discussed, states:

> 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.*

Cal. Water Code § 13360(a) (emphasis added).

Section 13360 grants a Copermittee unlimited authority to determine how best to meet the substantive obligations imposed under its storm water permit. This authority enables a Copermittee to constantly improve its programs while ensuring that its resources are used in the most efficient manner possible. During the term of the third-term permit, the Copermittees extensively evaluated the effectiveness of their programs. Based on these assessments, the Copermittees determined that most aspects of their programs were working well and identified areas that could be improved. Based on these assessments, the Report of Waste Discharge recommended the Regional Board reissue the permit substantially in its current form with the recommended changes designed to address needed improvements. While the Tentative Order reflects some of the Copermittees' recommendations, it also includes many additional requirements that increase the burdens on Copermittees' resources without any demonstration that they will achieve commensurate water quality improvements.[8]

The Regional Board cannot and should not ignore the limitations on its statutory authority. While the Regional Board may set performance goals for the Copermittees, it cannot tell the Copermittees how to achieve these goals.

2. *The Clean Water Act Regulations Were Designed To Preserve Flexibility And Allow Municipal Copermittees To Fashion Storm Water Management Programs Meeting Their Local Needs And Circumstances*

When enacting the 1987 amendments to the CWA, which added the municipal storm water permit requirements, Congress was aware of the difficulties in regulating discharges from MS4s solely through traditional end-of-pipe treatment. *See* 55 Fed. Reg. at 48037-38. In earlier

[8] Ironically, the issue of prescriptive MS4 permits has been addressed by the Regional Board's own legal counsel. As noted in the County of San Diego's comments on Tentative Order No. 2001-01 ("San Diego Comments"), in December 1997 the Regional Board staff sought advice concerning the permissible level of detail for municipal storm water permits. *See* San Diego Comments, p. A-3. In response, the Regional Board's legal counsel stated that while storm water permits could set forth certain performance goals, they could not specify the manner of complying with such goals. *Id.* Similarly, legal counsel advised that storm water permits could not prescribe the particular pollution control strategies to be used by the permittees. *Id.*

rulemakings, much of the criticism of the concept of subjecting discharges from MS4s to NPDES permits focused on the perception that "the rigid regulatory program applied to industrial process waters and effluents from [POTWs] was not appropriate for the site-specific nature and sources which are responsible for the discharge of pollutants from [MS4s]." *Id.* at 48038.

The water quality impacts of discharges from MS4s depend on a wide range of factors, including: the magnitude and duration of rainfall events, the time period between events, soil conditions, the fraction of land that is impervious to rainfall, land use activities, the presence of illicit connections, and the ratio of the storm water discharge to receiving water flow. *Id.* In enacting the 1987 amendments, Congress recognized that:

> [P]ermit requirements for [MS4s] should be developed in a flexible manner to allow site-specific permit conditions to reflect the wide range of impacts that can be associated with these discharges. . . . "All types of controls listed in subsection [402(p)(3)(C)] are not required to be incorporated into each permit."

Id. (*quoting* from 132 Cong. Rec. HI0576 (Daily Ed. Oct. 15, 1986) Conference Report).

Consistent with Congressional intent, the Phase I Storm Water regulations "set[] out permit application requirements that are sufficiently flexible to allow the development of site-specific permit conditions." *Id.* While USEPA believed that all municipalities should face essentially the same responsibilities and commitments for achieving the goals of the CWA, it "agree[d] that as much flexibility as possible should be incorporated into the [MS4] program." *Id.*[9]

USEPA's *Interim Permitting Approach* is not inconsistent with the requirement of flexibility in MS4 permits.[10] The guidance simply (and logically) provides that where existing BMPs are not adequately controlling the discharge of pollutants from MS4s, "expanded or better-tailored BMPs in subsequent permits" should be implemented. 61 Fed. Reg. at 43761. More specific conditions or limitations may be appropriate in MS4 permits only where "adequate information exists" and only where "necessary and appropriate." *Id.* In other words, USEPA does not suggest each iteration of the MS4 should necessarily become increasingly prescriptive; more detailed MS4 conditions only may be prescribed where necessary and appropriate. The *Interim Permitting Approach* does not provide support for the Regional Board to make Copermittees' MS4 permit ever more prescriptive simply for the sake of, for example, making it easier to enforce.

The prescriptive approach mandated by the Tentative Order clearly is at odds with both Congress' intent in enacting the municipal storm water program and with USEPA's intent in implementing it. Rather than allowing the Copermittees the flexibility to develop and implement

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[9] Notwithstanding that the Fact Sheet cites to the guidance in support of the prescriptive Tentative Order, USEPA's mandate of *flexibility* is confirmed in USEPA's Part 2 Guidance: "The Part 2 application requirements provide each MS4 with the flexibility to design a program that best suits its site-specific factors and priorities. . . . [F]lexibility in developing permit conditions is encouraged by allowing municipalities to emphasize the controls that best apply to their MS4." Part 2 Guidance, *supra*, at p. 6-1.

[10] *Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits*, 61 Fed. Reg. 43761 (August 26, 1996).

their own storm water management programs within the parameters set forth by USEPA, the Tentative Order would dictate more and more prescriptive programmatic requirements that are not warranted in the context of the Orange County Storm Water Program. Attachment B identifies numerous such overly prescriptive requirements.

B. To The Extent The Tentative Order's Prescriptive Requirements Are Permissible And Appropriate, They Must Be Supported By Findings And A Fact Sheet Providing Legal And Technical Justification

As discussed above, the requirements of the Tentative Order must be supported by a fact sheet and findings, which in turn must be supported by substantial evidence. *See, e.g.,* State Board Order No. WQ 95-4; State Board Order No. WQ 2001-15; *Topanga Association for a Scenic Community v. County of Los Angeles, et al., supra* at p. 8. Even assuming the prescriptive nature of the Tentative Order did not run afoul of state and federal law as discussed above, it still would be fatally flawed in that the prescriptive requirements are not supported by a fact sheet providing legal or technical justification for the specific requirements nor are the requirements supported by adequate findings.

ATTACHMENT B

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

INTRODUCTION

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

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

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

GENERAL COMMENTS

TENTATIVE ORDER INAPPROPRIATELY USES THE TERM "VIOLATION" INSTEAD OF "EXCEEDANCE"

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

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

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

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

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

- Page 5, Finding C.7.
- Page 7, Finding D.1.b.
- Page 11, Finding D.3.d.
- Page 12, Finding E.1.
- Page 15, A.3.
  The term "violation" in this section is inconsistent with SWRCB Order WQ 99-05 and needs to be modified to "exceedance ". The iterative language in the receiving water limitations speaks to exceedances of water quality standards, not violations.
- For Monitoring and Reporting Program Page 12.B.1., we recommend the following alternative language:

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

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

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

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

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

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

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

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

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

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

[1] Fact Sheet/Technical Report for Tentative Order No. R9-2007-0002, Page 34
[2] Fact Sheet/Technical Report for Tentative Order No. R9-2007-0002, Page 34
[3] Fact Sheet/Technical Report for Tentative Order No. R9-2007-0002, Page 35

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

FINDINGS

DISCHARGE CHARACTERISTICS

- **Categories of Pollutants (Finding C.2. Page 3)**
  Finding C.2. identifies common categories of pollutants in urban runoff. For some, but not all pollutants, the finding identifies sources [total suspended solids, sediment (due to anthropogenic activities)]. Since the Copermittees are not responsible for pollutants from all types of sources (atmospheric deposition, etc.), this Finding should be modified to identify the pollutants commonly found in urban runoff without specifying sources unless a more thorough discussion of sources is provided.

- **Clean Water Act 303(d) Impaired Waters (Finding C.6. Page 4)**
  Finding C.6. includes Table 2a. which is titled "Common Watersheds and CWA Section 303(d) Impaired Waters". By paraphrasing the 303(d) list Table 2a unfortunately connotes systemic water quality issues that are, in fact, limited to specific water quality segments. In addition, a number of contaminants are incorrectly identified as causes of impairment. For example, Aliso Creek is not listed for benzo[b]flouranthene, dieldrin, and sediment toxicity. The table needs to present the 303(d) list exactly in accordance with the 303(d) list approved by the State Board on 10/25/06 or be deleted.

- **Water Quality Monitoring Data (Finding C.7. Page 5)**
  Finding C.7. states in part that ". . . water quality data submitted to date documents persistent violations . . .". For the reasons discussed above and to be consistent with the Fact Sheet (page 8), the term "violation" should be changed to "exceedances."

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

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

URBAN RUNOFF MANAGEMENT PROGRAMS

- **New or Modified Requirements (Finding D.1.c. Page 7)**
  Finding D.1.c. states that the Tentative Order "contains new or modified requirements that are necessary to improve the Copermittees' efforts to reduce the discharge of pollutants to the MEP and achieve water quality standards". The Finding further states some of these new or modified requirements "address program deficiencies that have been noted in audits, report reviews, and other Regional Board compliance assessment activities." In fact, in many cases the new or modified requirements do not have adequate findings of fact and technical justification.

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

- **Development Planning - Treatment Control BMPs (Finding D.2.b. Page 9)**
  Finding D.2.b. states that end-of-pipe BMPs are more effective when used as polishing BMPs. Treatment BMPs are not particularly effective as polishing BMPs and work best when the pollutant load is high. The finding should be modified to remove the statement that end-of-pipe BMPs are more effective when used as polishing BMPs.

- **Heavy Industrial Sites (Finding D.2.e. Page 9)**
  Finding D.2.e. states that the one-acre threshold for heavy industrial sites is appropriate "since it is consistent with the requirements in the Phase II NPDES stormwater regulations that apply to small municipalities". The Phase II stormwater regulations do not apply to the Phase I communities. 40 CFR 122.32. The reference to Phase II NPDES regulations and, as discussed below, the corresponding change in the permit provisions should be deleted.

- **Discharges "Into" the MS4 (Finding D.3.e Page 11)**
  Finding D.3.e. states that pollutants discharged "into" an MS4 must be reduced to the MEP. This appears to be an error. The corresponding Tentative Order Section A.2 prohibits only discharges "from" an MS4 that contain pollutants which have not been reduced to the MEP. Finding D.3.e should be revised accordingly.

STATUTE AND REGULATORY CONSIDERATIONS

- **Treatment and Waters of the U.S. (Finding E.7. Page 14)**
  Finding E.7. states that,"[u]rban runoff treatment and/or mitigation must occur prior to the discharge of urban runoff into a receiving water." We believe that Finding E.7. is based on a misinterpretation of CWA regulations and misconstrues USEPA guidance on storm water treatment BMPs. This is discussed in detail in Attachment A (Pages 1-7). We wish to comment here on the implications it has for watershed restoration activities.

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

  The Aliso Creek Water Quality SUPER Project proposes a multi-objective approach to Aliso Creek watershed development and enhancement, accommodating channel stabilization, flood hazard reduction, economic uses, aesthetic and recreational opportunities, water quality improvements, and habitat concerns. The project is aimed at water supply efficiency and system reliability through reclamation, along with benefits for flood control and overall watershed management and protection. The ecosystem restoration and stabilization component of the project will include:
  - Construction of a series of low grade control structures and reestablishment of aquatic habitat connectivity;
  - Shaving of slide slopes to reduce vertical banks; and
  - Invasive species removal and riparian revegetation and restoration of floodplain moisture.

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

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

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

PERMIT PROVISIONS

LEGAL AUTHORITY

- **Effectiveness of BMPs (Section C.1.j. Page 19)**
  The Tentative Order includes a new provision that requires the Copermittees to demonstrate that they have the legal authority to require documentation on the effectiveness of BMPs. This provision is inappropriate. It ignores the fact that the New Development/Significant Redevelopment section of the DAMP (Section 7.0) establishes a process for the selection, design, and long-term maintenance of permanent BMPs for new development and significant redevelopment projects and requires development to select BMPs that have been demonstrated as effective for their project category. In addition, it ignores the fact that the Copermittees have already established legal authority for their development standards so that project proponents have to incorporate and implement the required BMPs. This Section C.1.j. should be deleted from the Order.

JURISDICTIONAL URBAN RUNOFF MANAGEMENT PROGRAM

Development Planning Component

- **Infiltration and Groundwater Protection (Section D.1.c.(6) Page 22)**
  Section D.1.c.(6)(a) requires urban runoff to undergo pretreatment prior to infiltration. This is problematic for several reasons. First, this requirement unnecessarily constrains the use of infiltration devices, which should be at the discretion of the designer, and diminishes the beneficial aspects of infiltration devices. At the same time, the volume of stormwater that can be treated will be reduced since the volume will be limited to the sizing of the pretreatment device and not the sizing of the infiltration device. Besides, pollution prevention and source control BMPs are required prior to infiltration.

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

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

  Section D.1.c.(6)(g) restricts the use of infiltration treatment control BMPs in areas of industrial or light industrial activity and areas subject to high vehicular traffic. High vehicular traffic is defined as 25,000 or greater average daily traffic on main roadway or 15,000 or more average daily traffic on any intersecting roadway. There is no technical basis for this restriction or the definition of "high vehicular traffic" included within the Fact Sheet. As such, prescriptive

requirements should not be included in the Tentative Order unless there is a strong technical basis. Although SWRCB Order WQ 2000-11 provides guidance on some of the restrictions on the use of infiltration treatment control BMPs contained in the Tentative Order, there is no mention of restrictions related to areas subject to high vehicular traffic. Moreover, we are not aware of any demonstrated relationship between traffic counts and frequency of materials deposited on the street.

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

- **Standard Urban Storm Water Mitigation Plans (SUSMPs) (Section D.1.d. Page 23)**
  Section D.1.d. requires each Copermittee to implement an updated local SUSMP within twelve months of adoption of the Order. The schedule for the update of the SUSMP is overly aggressive and does not allow the time necessary for the Copermittees to incorporate changes and implement an updated SUSMP. Since the modifications for the SUSMP will take longer than the 12-month period identified in the Tentative Order, the provision should be modified to require each Copermittee to implement an updated local SUSMP within 24 months of adoption of the Order.

- **Definition of Priority Development Project (Section D.1.d.(1)(b) Page 23)**
  Section D.1.d.(1)(b) defines Priority Development Projects as "redevelopment projects that create, add, or replace at least 5,000 square feet of impervious surfaces on an already developed site that falls under the project categories or locations listed in section D.1.d.(2)". This Section is not clear on whether the "already developed site" or the redevelopment project must fall under one of the categories in section D.1.d.(2) in order for the project to be considered a Priority Development Project. The Copermittees request clarification regarding this Section.

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

- **Priority Development Project Categories (Section D.1.d.(2) Page 24)**
  Section D.1.d.(2) defines Priority Development Project Categories. In an introduction to the listed categories, this section states that, where a new development project feature, such as a parking lot, falls into a Priority Development Project Category, the entire project footprint is subject to SUSMP requirements. As currently written this provision would require a new

development that has a 5,000 square foot parking lot feature and 100,000 square feet of other land uses that are not Priority Development Project Categories, to provide treatment for the entire project (105,000 square feet). This requirement would unduly burden the landowner in this case with the cost of treating runoff from 105,000 square feet when only 5,000 square feet should be subject to SUSMP requirements and treatment controls.

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

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

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

- **Commercial Developments (Section D.1.d.(2)(b) Page 24)**
  Section D.1.d.(2)(b) lowers the threshold criterion for commercial developments required to comply with SUSMP requirements from 100,000 square feet (2.3 acres) to one acre. The Fact Sheet states that this provision has been modified to be consistent with US EPA Phase II Guidance. However EPA Phase II guidance is not relevant to a Phase I permit.

  The Fact Sheet also states that this Provision is based on Copermittee findings that smaller commercial facilities pose high threats to water quality. This is not the case. The Copermittees indicated that commercial facilities of 100,000 square feet or less receive a score of 3 out 5 (a medium threat) in Table 9-8 in the 2007 DAMP. Since the Fact Sheet does not provide any technical basis for

lowering the threshold criterion for commercial developments required to comply with SUSMP requirements from 100,000 (2.3 acres) square feet to one acre, the category should be described as, "Commercial developments greater than 100,000 square feet."

- **Industrial Developments (Section D.1.d.(2)(c) Page 24)**
  Section D.1.d.(2)(c) requires industrial developments of greater than one acre to comply with SUSMP requirements. The Fact Sheet states that this provision has been modified to be consistent with US EPA Phase II Guidance. Again EPA Phase II guidance is not relevant to a Phase I permit. In addition, the Fact Sheet does not provide a technical basis for adding industrial sites to the Priority Development Project Categories and consequently Section D.1.d.(2)(c) should be deleted from the permit.

- **Streets, Roads, Highways, and Freeways (Section D.1.d.(2)(i) Page 25)**
  Section D.1.d.(2)(i) includes as a Priority Development Project Category streets, roads, highways, and freeways including any paved surface of 5,000 square feet or greater that is used for transportation. It is unclear whether a project such as the addition of a right turn pocket to a roadway would subject the entire roadway to SUSMP requirements and treatment controls. This provision should be revised to include language clarifying that only the subdrainage area where the roadway improvements are occurring is subject to SUSMP requirements and required to include BMPs, not the entire roadway.

- **Retail Gasoline Outlets (Section D.1.d.(2)(j) Page 25)**
  Section D.1.d.(2)(j) includes as a Priority Development Project Category Retail Gasoline Outlets (RGOs) that meet the criteria of 5,000 square feet or more or have a projected Average Daily Traffic (ADT) of 100 or more vehicles per day. SWRCB Order WQ 2000-11 provides guidance on whether RGOs are subject to SUSMP requirements. The State Board states in this Order that "In considering this issue, we conclude that construction of RGOs is already heavily regulated and that owners may be limited in their ability to construct infiltration facilities. Moreover, in light of the small size of many RGOs and the proximity to underground tanks, treatment may not always be feasible, or safe." Although the State Board does not prohibit subjecting RGOs to SUSMP requirements, the State Board provides a number of reasons for not doing so, including that fact that RGOs are already heavily regulated. It should also be noted that the DAMP already prescribe a suite of BMPs specific to RGOs. Subjecting RGOs to SUSMP requirements imposes duplicity where it is not needed. Section D.1.d.(2)(j) should be removed from the permit.

- **Treatment Control BMP Requirements (Section D.1.d.(6)(ii)(f) and (g) Page 28)**
  Section D.1.d.(6)(ii)(f) require treatment control BMPs be implemented prior to discharging into waters of the U.S. and provision D.1.d.(6)(ii)(g) requires that treatment controls not be constructed within waters of the U.S. or waters of the

State. These provisions of the Tentative Order greatly limit the use of regional BMP and watershed-based approaches. The provisions demand a lot-by-lot approach in implementing BMPs that is analogous to the site-by-site septic tank approach that has been discredited as an effective strategy for sewage treatment in urban areas. Similarly, the Copermittees submit that such an approach is also ineffective for stormwater and will lead to a diversion of limited resources to managing thousands of site-by-site treatment controls, which are managed by parties that have limited or no experience, instead of hundreds of regional controls, that are managed by parties and governmental agencies that have expertise in BMP management.

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

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

- **Low Impact Development (LID) Site Design BMP Substitution Program (Section D.1.d (8) Page 30)**
  Section D.1.d.(8)(e) states that the LID Site Design BMP Substitution Program must not apply to automotive repair shops or streets, roads, highways, or freeways that have high levels of average daily traffic. The Copermittees do not design, construct or operate freeways. It is suggested that the word "freeways" be removed from this provision.

- **Treatment Control BMP Maintenance Tracking (Section D.1.f Page 32)**
  Section D.1.f.(2)(c) requires a very prescriptive and resource intensive inspection program for the treatment controls. For example, (iii) requires Copermittees to annually inspect of 100% of projects with treatment control BMPs that are high priority. Annual inspection of structural BMPs will create a burgeoning and resource intensive inspection program that is not warranted. The Provision should be amended to reduce the prescriptive nature of the inspection program and allow the Copermittees to develop an inspection program that will meet the intent of the provision while balancing the need for a variety of approaches to complete this element of the program in a cost effective manner. This is important because such approaches include not only inspections but also

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- **Reporting (Section D.1.j Page 37)**
  Section D.1.j. details the reporting requirements of the development Planning Component. This provision substantially increases the Copermittees' reporting obligations. This level of effort will divert program resources from pollution reduction projects. This provision should be amended to reflect the level of reporting requirements included in the current permit Order No. R9-2002-01.

Construction Component

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

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

- **Site Planning and Project Approval Process (Section D.2.c.(2) Page 39)**
The Tentative Order requires that, prior to permit issuance, the Copermittees require and review a project proponent's stormwater management plan to verify compliance with local grading ordinances and other applicable ordinances. We interpret this to refer to the stormwater pollution prevention plan (SWPPP) required by the Statewide General Construction Stormwater Permit.

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

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

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

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

- **BMP Implementation (Section D.2.d Page 40-41)**
Section D.2.d.(1)(a)(ii) requires the development and implementation of a site-specific stormwater management plan. For the same reasons discussed above, the Copermittees recommend that this section be modified as follows:

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

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

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

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

Municipal

- **Flood Control Structures (Section D.3.a.(4)(c) Page 47)**
  Section D.3.a.(4)(c) requires the Copermittees to evaluate existing flood control devices to identify those that are causing or contributing to a condition of pollution, identify measures to reduce or eliminate the structure's effect on pollution, and evaluate the feasibility of retrofitting the structure. This provision is problematic for several reasons as described below.

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

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

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

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

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

(4). BMP Implementation for Flood Control Structures
(c) Each Permittee who owns or operates flood control devices/facilities must continue to evaluate its existing flood control devices/facilities, ~~identify devices causing or contributing to a condition of pollution, identify measures to reduce or eliminate the structure's effect on pollution,~~ as needed and identify opportunities and the feasibility of configuring and/or reconfiguring channel segments/structural devices to function as pollution control devices to protect beneficial uses. The ~~inventory and~~ updated evaluation must be completed by July 1, 200~~8~~10 and submitted to the Regional Board with the Fall 200~~8~~10 annual report.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Commercial/Industrial

- **Commercial Sites/Sources (Section D.3.b.(1)(a) Page 53)**
The Tentative Order added four new categories of commercial sites/sources: food markets, building material retailers and storage, animal facilities, and power washing services. The Fact Sheet notes that these facilities were added because these activities were identified as potentially significant sources of pollutants in annual reports.

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

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

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

- **Mobile Businesses (Section D.3.b(3)(a) Page 55)**
The Tentative Order has added a new requirement to develop and implement a program to address discharges from mobile businesses. The program must include the identification of BMPs for the mobile business, development of an enforcement strategy, a notification effort, the development of an outreach and education program, and inspection as needed. This provision is problematic for several reasons as described below.

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

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

  The Fact Sheet indicates that this provision is not significantly different than the existing requirements, but then acknowledges that "mobile businesses present a unique difficulty in stormwater regulation" for several reasons including:
    - The regular, effective practice of unannounced inspections is difficult to implement;
    - Tracking these mobile businesses is difficult because they are often not permitted or licensed; and
    - Mobile businesses are transient in nature and may have a geographic scope of several cities or the entire region

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

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

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

- **Food Facility Inspections (Section D.3.b.(4)(c) Page 56)**
The Tentative Order includes new, prescriptive requirements for food facility inspections and requires that the scope of the inspections be expanded to address maintenance of greasy roof vents (c)(iv) and identification of outdoor sewer and MS4 connections (c)(v). While the issue of grease on roof vents has been discussed at the Aliso Creek meetings, the Findings and Fact Sheet do not provide any justification for the additional requirements, any clarification as to how the Copermittees would inspect for these issues, or any rationale as to how this would make the inspection program more effective or improve water quality.

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

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

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

- **Third Party Inspections (Section D.3.b(4)(d) Page 57)**
The Tentative Order includes new, prescriptive requirements for third party inspections that provide a significant amount of detail as to how the inspection program must be managed. However, the Findings and the Fact Sheet do not address the need for these expanded requirements or provide any rationale as to how these new requirements would make the third-party inspection program more effective.

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

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

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

ID/IC Program

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

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

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

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

- **Elimination of Illicit Discharges and Connections (Section D.4.f Page 64)** The Tentative Order requires that the Copermittees "take immediate action to eliminate all detected illicit discharges...." And that illicit discharges that pose a serious threat...."must be eliminated immediately". Although the Copermittees understand and agree with the intent of the permit language, the existing language is onerous and does not recognize the time and/or resources that are

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

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

Watershed Urban Runoff Management Program (Section E. page 66)
The Tentative Order includes increasingly prescriptive requirements for the Watershed Urban Runoff Management Program (WURMP) including the designation of default Copermittee leads for each of the watershed management areas, the specific role of the Lead Permittee, the number of water quality and watershed activities that need to be implemented on an annual basis within each WMA, and a requirement for the description and assessment of each structural and non-structural management practice implemented.

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

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

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

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

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

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

- **Lead Watershed Permittee (Section E.1.a. page 67)**
  The Tentative Order has designated which entity within the watershed should be the default lead Permittee and what those responsibilities entail. The Copermittees contend that this level of detail is inappropriate for a permit provision and should, instead, be a collaborative decision that is made among the various watershed stakeholders based on locally determined criteria and needs.

  The Copermittees propose that the language be modified as follows:

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

- **BMP Implementation and Assessment (Section E.1.e. page 70)**
  The Tentative Order requires an arbitrary minimum number of "watershed program activities" to occur in each year (during each reporting period the Copermittees must implement no less than 2 "watershed water quality activities" and 1 "watershed education activity"). The Fact Sheet states that the Copermittees have completed the assessments, prioritization, and collaboration and now need to implement the activities identified.

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

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

Fiscal Analysis (Section F. Page 74)

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

Long Term Funding Strategy and Business Plan

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

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

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

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

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

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

- Shared Costs – Over the last three permit terms the shared costs have increased from just under $300,000 to almost $6 million. The shared costs are those costs that fund the activities performed by the County of Orange as Principal Permittee

- Individual Costs - Over the last three permit terms the individual costs have increased from just over $30 million to a projected amount of almost $102 million for 2006-2007. Individual costs are those costs incurred by the Copermittees for the implementation of their local program (including capital and operation and maintenance costs).

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

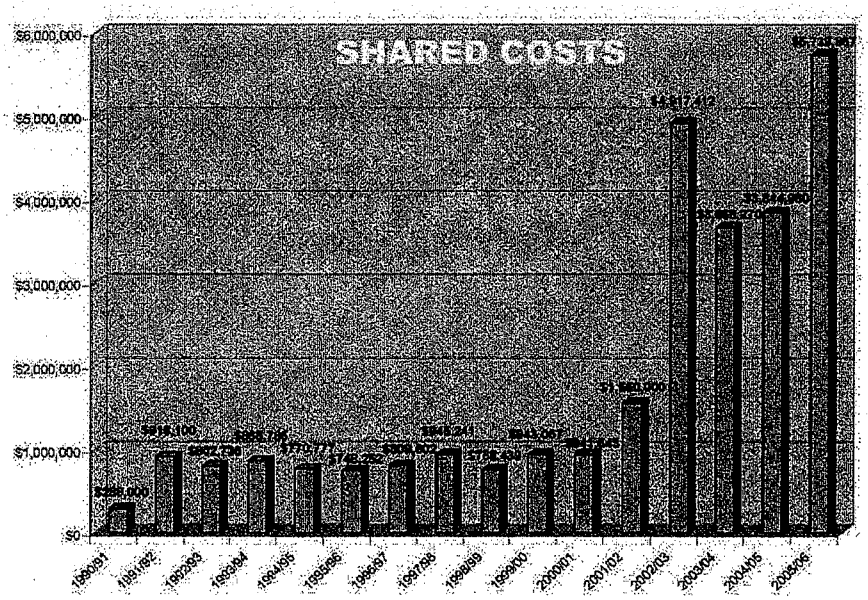
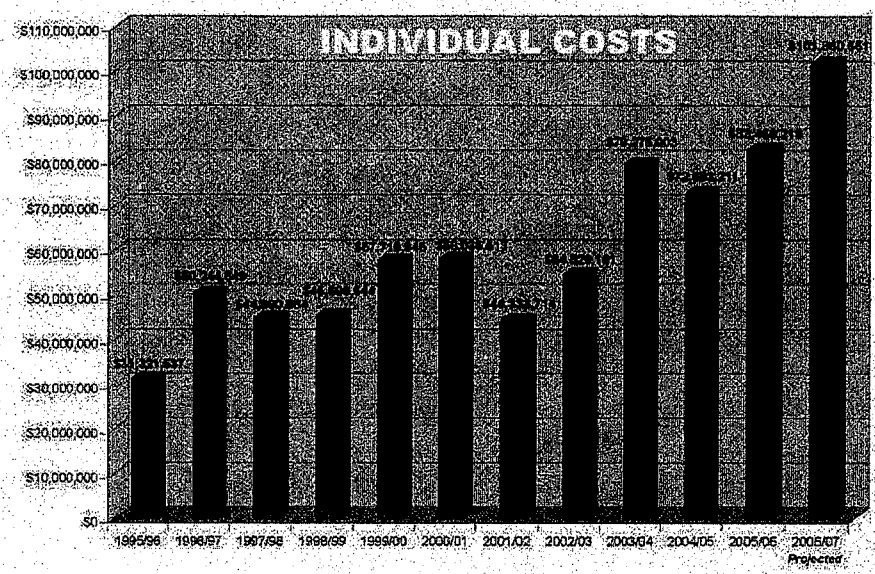


Figure 2. Historical Review of Individual Costs (1995-2007)



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

Fiscal Benefits

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

The federal regulations [40 CFR, Part 122.26(d)(2)(vi)] require the following:

> *(vi) Fiscal Analysis.* For each fiscal year to be covered by the permit, a fiscal analysis of the necessary capital and operation and maintenance expenditures necessary to accomplish the activities of the program under

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

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

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

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

Program Effectiveness Assessment (Section G. Page 75)

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

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

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

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

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

The proposed language is:

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

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

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