Compliance with Permit

Compliance with Section C shall be determined as follows:

Dischargers shall be deemed to be out of compliance with this Order if the Copermittee failed to take the prescribed responsive actions in response to an exceedance of a numeric action level. Regardless of the Copermittee's actions in response to an exceedance, they are still subject to the prohibitions found in Sections A and B of the Order.

When determining to take an action in response to the NALs and more than one sample result is available in a month, the discharger shall consider the frequency, magnitude, and number of constituents exceeding the NALs.

Page 155, Section F.4.e. Illicit Discharge Detection and Elimination (Investigations)

The Copermittees currently use action levels to facilitate the determination of when source investigation studies are warranted based on data from the dry-weather monitoring program. One set of criteria is based on regional averages of constituent concentrations that were developed based on randomly selected storm drains. Another set of criteria is based on trends at a particular station. These are reasonable criteria if decision-makers are properly trained and action levels set by the County are in compliance with dry weather non-storm water action levels as required in Section C. The ability of the local managers to interpret dry-weather monitoring data collected by the County has greatly improved in the last two years, and continued training is required in section F.4.i.

Page 178, Section T. Attachment E – Receiving Waters and MS4 Discharge Monitoring and Reporting Program

Considering the benefits described above, the Receiving Waters Monitoring and Reporting Program (MRP) has been designed to determine impacts to receiving water quality and beneficial uses from storm water runoff and to use the results to refine the Copermittees' storm water runoff management programs for the reduction of storm water pollutant loadings to the MEP. For non-storm water discharges, monitoring has been designed for the identification of prohibited illicit discharges and to determine appropriate actions to take in response to dry weather non-storm water action levels. Additionally, the results from dry weather non-storm water monitoring can be used to evaluate exempted non-storm water discharges as a source or conveyance of pollutants. The primary goals of the MRP include:

Page 186,

Dry Weather Non-storm Water Action Levels

Deleted: Calculations for Discharges to Inland Surface Waters, Enclosed Bays, and Estuaries.¶
On the basis of the foregoing discussion, the NALs were calculated with the following considerations and assumptions:¶
No dilution credit is considered for the discharge. Therefore, the discharge must comply with the Water Quality Objective at the point of discharge.¶
For NALs based on CTR, implementation was done using the procedure list as outlined in the SIP (see below example).¶
NAL CTR/SIP Calculation – Zinc Example: ¶
Criteria for Priority Toxic Pollutants in the State of California is described in the CTR table listed in 40 CFR 131.38.¶
Insert Table¶
These criteria are expressed in terms of the dissolved fraction of the metal in the water column. [See footnote "m" to Table in paragraph (b)(1) of 40 CFR 131.38].¶
40 CFR 122.45(c) requires that this Order include effluent limitations as total recoverable concentration; therefore it is appropriate to include action levels also as total recoverable concentration.¶
The SIP requires that if it is necessary to express a dissolved metal value as a total recoverable and a site-specific translator has not yet been developed, the Regional Board shall use the applicable conversion factor from 40 CFR 131.38.¶
The term "Conversion Factor" (CF) represents the recommended conversion factor for converting a metal criterion expressed as th ... [2]

Deleted: Action levels (Priority Pollutants)

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Deleted:)

Deleted: AMALs

Deleted: compute the arithmetic mean unless the data set contains one or more reported determinations of DNQ or ND. In those cases, the discharger shall compute the median in place of the arithmetic mean in accordance with the following procedure:¶ ... [3]

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Section II.C of the MRP describes the monitoring to be conducted by the Copermittees to determine exceedances of dry weather non-storm water action levels.

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Section II.B.3 has been changed by removal of the Dry Weather Field Screening and Analytical Monitoring and subsequent replacement with section II.C for Dry Weather Non-Storm Water Action Level Monitoring.

This change is required to assess exceedances of action levels for non-storm water discharges from the MS4 into receiving waters. The required sampling frequency has been changed to allow Copermittees to sample a representative number of discharge points and the sampling methodology has been changed to grab sampling. This is expected to allow Copermittees to maintain a cost-neutral dry weather monitoring program that is similar to their existing IC/ID monitoring program.

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Page 189, U. Attachment F – Source Data

Attachment F contains data utilized for the development of Storm Water Action Levels and Non-storm Water Action Levels.

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Page 5: [1] Deleted Author

Cadmium (Total Recoverable)	= exp(0.7852[in(hardness)] – 2.715)
Chromium III (Total Recoverable)	= exp(0.8190[in(hardness)] + 6848)
Copper (Total Recoverable)	= exp(0.8545[in(hardness)] – 1.702)
Lead (Total Recoverable)	= exp (1.273[in(hardness)] – 4.705)
Nickel (Total Recoverable)	= exp (.8460[in(hardness)] + 0.0584)
Silver (Total Recoverable)	= exp (1.72[in(hardness)] – 6.52)
Zinc (Total Recoverable)	= exp (0.8473[in(hardness)] + 0.884)

b. Action levels for discharges to bays, harbors and lagoons/estuaries:

Insert Table 4.b: General Constituents

c. Action levels for discharges to the surf zone:

Insert Table 4.c: General Constituents

Page 17: [2] Deleted Author

Calculations for Discharges to Inland Surface Waters, Enclosed Bays, and Estuaries.

On the basis of the foregoing discussion, the NALs were calculated with the following considerations and assumptions:

No dilution credit is considered for the discharge. Therefore, the discharge must comply with the Water Quality Objective at the point of discharge.

For NALs based on CTR, implementation was done using the procedure list as outlined in the SIP (see below example).

NAL CTR/SIP Calculation – Zinc Example:

Criteria for Priority Toxic Pollutants in the State of California is described in the CTR table listed in 40 CFR 131.38.

Insert Table

These criteria are expressed in terms of the dissolved fraction of the metal in the water column. [See footnote "m" to Table in paragraph (b)(1) of 40 CFR 131.38].

40 CFR 122.45(c) requires that this Order include effluent limitations as total recoverable concentration; therefore it is appropriate to include action levels also as total recoverable concentration.

The SIP requires that if it is necessary to express a dissolved metal value as a total recoverable and a site-specific translator has not yet been developed, the Regional Board shall use the applicable conversion factor from 40 CFR 131.38.

The term "Conversion Factor" (CF) represents the recommended conversion factor for converting a metal criterion expressed as the total recoverable fraction in the water column to a criterion expressed as the dissolved fraction in the water column.

Total recoverable concentration * CF = Dissolved concentration criterion

or

Total recoverable concentration = Dissolved concentration criterion/ CF

Insert Table

Effluent Variability multiplier and Coefficient of Variation (CV)

For each concentration based on an aquatic life criterion, the long-term average (LTA) is calculated by multiplying the concentration with a factor that adjusts for effluent variability. The multiplier can be found in Table 1 of the SIP. Since this Order does not have existing data to properly conduct a variability analysis in accordance with the SIP, the CV has been set equal to 0.6 per SIP requirements. The current effluent data is limited due to the small number of representative outfalls sampled, the lack of outfalls discharging to representative waterbodies within the Region, and the targeted nature of the sampling design.

Based upon a CV of 0.6, Table 1 of the SIP requires an effluent variability as follows:

Acute Multiplier = 0.321

Chronic Multiplier = 0.527

The long-term average (LTA) is calculated by multiplying the total recoverable concentrations for zinc with the acute and chronic multipliers:

LTA Acute = 95 ug/L * 0.321 = 30.5

LTA Chronic = 86 ug/L * 0.527 = 45.3

The MDAL and AMAL will be based on the most limiting of the acute and chronic LTA, in the case for copper the most limiting LTA is the acute of 30.5 ug/L

NALs are calculated by multiplying the most limiting LTA with a multiplier that adjusts for the averaging periods and exceedance frequencies of the criteria and the effluent limitations. The multiplier can be found in Table 2 of the SIP. Since

this Order has insufficient data, the CV has been set to 0.6 and since sampling frequency is four times a month or less, n has been set equal to 4 per the SIP.

Insert Table 2.

Therefore, from Table 2 of the SIP, the LTA multipliers will be as follows:

MDAL Multiplier = 3.11

AMAL Multiplier = 1.55

The MDAL and AMAL limits are calculated by multiplying the LTA with an LTA multiplier for each limit:

MDAL = 30.5 ug/L * 3.11 = 95 ug/L

AMAL = 30.5 ug/L * 1.55 = 47 ug/L

Calculations for Discharges to the Surf Zone

The Average Monthly and Maximum Daily NALs were calculated with the following considerations and assumptions:

No dilution credit is considered for the discharge. Therefore, the discharge must comply with the Water Quality Objective at the point of discharge. Whole Effluent Toxicity (WET) Testing Requirements

A WET limit is required if a discharge causes, has a reasonable potential to cause, or contributes to an exceedance of applicable water quality standards, including numeric and narrative. Since these types of discharges are prohibited under this Order, WET limits are not applicable.

Discussion of AMALs, MDALs and Instantaneous Maximums

Where practical, action levels in this Order have been expressed as both AMALs and MDALs. Certain action levels may not practicably be expressed as AMALs and MDALs due to specific BPO language, sampling requirements and/or a lack of Criteria. Based upon the likely sampling frequency of the Copermittees, the frequency of sampling will occur such that grab samples are taken once per sampling day. This single sample would then be subject to MDALs and Instantaneous Maximum levels. In this case, the more conservative action level would apply. In addition, it is expected that some effluent monitoring will occur less than or equal to once per month. In this scenario, the MDAL, AMAL and Instantaneous Maximum levels would need to be met based upon one sample, unless sampling did not occur. For some BPOs, AMALs have been excluded and only MDALs/Instantaneous Maximums set to prevent redundancy in action levels.

Page 17: [3] Deleted Author

compute the arithmetic mean unless the data set contains one or more reported determinations of DNQ or ND. In those cases, the discharger shall compute the median in place of the arithmetic mean in accordance with the following procedure:

(1) The data set shall be ranked from low to high, reported ND determinations lowest, DNQ determinations next, followed by quantified values (if any). The order of the individual ND or DNQ determinations is unimportant.

(2) The median value of the data set shall be determined. If the data set has an odd number of data points then the median is the middle value. If the data set has an even number of data points, then the median is the average of the two values around the middle unless one or both of those points are ND or DNQ, in which case the median value shall be the lower of the two data points where DNQ is lower than a value and ND is lower than DNQ.

PATRICIA C. BATES
CHAIR, ORANGE COUNTY BOARD OF SUPERVISORS
SUPERVISOR, FIFTH DISTRICT

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September 28, 2009

By E-mail and U.S. Mail

Dr. Richard Wright
Chair
California Regional Water Quality Control Board, San Diego Region
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4340

Subject: Comment Letter, Tentative Order No. R9-2009-0002 NPDES No. CAS0108740

Dear Dr. Wright:

On behalf of the County of Orange, we provide these comments on Tentative Order No. R9-2009-0002, NPDES No. CAS0108740 - *Waste Discharge Requirements for Discharges of Runoff from the Municipal Separate Storm Sewer Systems (MS4s) Draining the Watershed of the County of Orange, the Incorporated Cities of Orange County, and the Orange County Flood Control District within the San Diego Region.* The comments were prepared in consultation with our co-permittees and the cities of Aliso Viejo, Dana Point, Laguna Hills, Laguna Woods, Lake Forest, Mission Viejo, Rancho Santa Margarita, San Clemente, and San Juan Capistrano have directed that they be recognized as concurring entities. This cover letter focuses on general areas of concern with the Tentative Order. Detailed technical and legal comments are attached.

At the Public Hearing on July 1, 2009, your Board members highlighted two key issues of common concern: the permit's consistency with May 2009 permit adopted in the Santa Ana Region and cost neutrality with our current permit in the San Diego Region. Permitting consistency is a key issue for the Orange County Stormwater Program because our compliance programs are integrated countywide and four jurisdictions are split between the two regions.

Fundamentally different requirements between our two permits — particularly within the same city — damage the credibility of the regulatory framework and thwart our ability as local government to cost effectively address key environmental mandates. Since the Tentative Order continues to present a number of unprecedented requirements, it is necessary for us to continue to seek revisions to the Tentative Order that support alignment between the North and South County permit requirements.

With respect to "cost neutrality" and cost effectiveness, there are three aspects of the permit to bring to your attention. First, your staff has indicated its intention to remain steadfast on the inclusion of numeric effluent limits for dry weather flows. Even though exceedances of these limits are written to function as "action levels," by using the term "effluent limits" and specifically "numeric effluent limits" (NELs) the permit potentially subjects permittees to mandatory minimum penalties under the Water Code for exceedances of NELs. While we would strongly oppose any effort to impose mandatory minimum penalties in such a situation, the entire process imposes potentially significant legal and transactional costs upon the Permittees.

Our analysis of environmental quality data shows that a number of these NELs will not be achieved at any time or in any part of our storm drain system. Moreover, they are not being achieved at reference sites in areas completely removed from any urban influence. Their technical derivation is clearly flawed and there is no legal requirement for their inclusion. Consequently, we strongly object to the inclusion of NELs in the Tentative Order and would once again recommend the model application of water quality benchmarks in our existing dry weather reconnaissance program as the basis of non-stormwater permitting. This approach will achieve meaningful water quality improvements in a cost effective manner and is consistent with the Santa Ana Region permit.

There is a second cost concern presented by the escalating administrative burden from a number of the Tentative Order's provisions. New requirements arbitrarily establish municipal

responsibility for sanitary sewer collection systems already subject to separate State regulation. Annual inspection of treatment controls in completed land development and redevelopment projects would be required for the first time. Greater regulatory oversight of and attention on private residences and mobile businesses is prescribed. There is a requirement to augment existing countywide, regional, watershed, and jurisdictional plans, with an additional jurisdictional planning process. In addition, technically challenging new standards will need to be developed and implemented for land development. There are also significant new monitoring obligations. All of these new requirements have significant resource implications for local government. In the current economy, local governments in Orange County are dealing with shrinking budgets not unlike State agencies. Consequently, a key test of the acceptability of the Tentative Order will be a calculation that shows that all of the prescriptive new requirements represent the most cost effective and cost neutral means of achieving our common goal of further improved water quality.

Finally, a major portion of the additional cost burden presented by the Tentative Order will ultimately be borne by the proponents of land development and redevelopment projects and therefore new owners of property. There is significant concern here regarding the potential imposition requirements that will stymie redevelopment, lead to limited environmental benefits and possibly even undesirable environmental outcomes, and for which there is currently no technical consensus. To illustrate this uncertainty, each recently released municipal stormwater permit in California applies its own version of hydromodification standards for land development. The North Orange County Permittees are now working to craft a model for land development that presumes the application of low impact development (LID) best management practices (BMPs) based upon a prioritized consideration of infiltration, capture and reuse, evapotranspiration, and bio-retention/bio-filtration, and requires treatment of residual runoff volumes when the application of LID BMPs has been determined to be infeasible at site, sub-

regional, and regional scales. The model will also integrate options for water quality credits and provide for alternate compliance approaches including participation in a watershed project and contributions to an in-lieu fund. Because it is imperative that the Order eventually adopted by the Board provide similar direction for land development as the North County permit, deliver meaningful water quality outcomes, and be accepted by the development community, there is now a vital need for a change in direction in this key area of the Tentative Order.

Our specific comments and concerns pertaining to the legal and policy, technical, and monitoring and reporting provisions of the Tentative Order are presented in the following Attachments:

- Attachment A presents initial comments on our main legal and policy issues.
- Attachment B presents initial technical comments and suggested language on specific requirements contained within the Tentative Order.
- Attachment C includes initial comments on the Monitoring and Reporting Program.

Thank you for your attention to our comments. Please contact Mary Anne Skorpanich at (714) 955-0601 with any questions on this matter.

Sincerely,

Pat Bates
Chair, Orange County Board of Supervisors

Attachment A: County of Orange Legal Comments
Attachment B: County of Orange Technical Comments
Attachment C: County of Orange Monitoring & Reporting Program Comments

cc: John Robertus, Executive Officer
City Permittees

ATTACHMENT A

**ORANGE COUNTY LEGAL COMMENTS ON
CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION
TENTATIVE ORDER No. R9-2009-0002
NPDES NO. CAS0108740**

INTRODUCTION

This Attachment A contains the principal legal comments of the County of Orange (the "County") on Tentative Order No. R9-2009-0002 dated August 12, 2009 ("Tentative Order"). Although the Fact Sheet/Technical Report dated August 12, 2009 is referenced in this attachment, the County has not provided detailed legal comments on the document. The County reserves the right to provide additional legal comments, on both the Tentative Order and Fact Sheet/Technical Report, before the close of the public hearing to adopt the Tentative Order.

Regional Board staff suggested that comments on the Tentative Order should focus on changes made since the last draft and errata were presented to the Board on July 1, 2009. However, staff have not provided a "redline" showing these changes. The last public release draft of the Tentative Order was dated March 13, 2009 (this draft itself is published on the Board's web site as a redline). Since that draft, staff have circulated several "tentative" and "draft" updates and errata. Because of potential for confusion that these various drafts, updates and errata have created, the County's comments focus on all substantive issues of concern, including staff's July 1, 2009 Response to Comments. In other words, the County is commenting on changes made and changes not made from prior drafts of the Tentative Order.

The County incorporates by reference its written comments on all prior versions of the Tentative Order (including Tentative Order Nos. R9-2007-0002 and R9-2008-0001) to the extent they have not been adequately addressed by the August 12, 2009 draft.

Primary Legal Comments

I. The Non-Stormwater Provisions of the Tentative Order Are Not Supported by Federal Law

Directives B and C of the Tentative Order include provisions that are not supported by and go beyond the requirements of the Clean Water Act and federal regulations. Directive B.2 is inconsistent with federal law in that it regulates categories of non-stormwater discharges into the MS4 that U.S. EPA explicitly designated as exempt, and gives the Regional Board greater authority over these discharge categories than provided by the federal regulations. Similarly, the numeric effluent limitations imposed on non-stormwater discharges from the MS4 in Directive C are completely without support under the Clean Water Act or federal regulations.

In general, as discussed below, because federal law regulates the discharge of *pollutants* from the MS4, the Tentative Order's differentiation throughout the permit between discharges of stormwater and non-stormwater from the MS4 are inappropriate, confusing and not supported by law.

A. The Clean Water Act and Federal Regulations are Very Clear as to the Scope of Non-Stormwater Regulation Required in an MS4 Permit

Section 402(p)(3)(B)(ii) of the Clean Water Act requires that MS4 permits include a requirement to effectively prohibit non-stormwater discharges into the MS4. The federal regulations include two requirements or provisions designed to begin implementation of the "effective prohibition." 55 Fed. Reg. 47989, 48037 (Nov. 16, 1990). The first provision requires permittees to perform a screening analysis, intended to provide sufficient information to develop priorities for a program to detect and remove illicit discharges.[1] *Id.*; 40 C.F.R. 122.26(d)(1)(iv)(D). The second provision requires permittees 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 MS4s. *Id.*; 40 C.F.R. 122.26(d)(2)(B). The federal regulations, thus, focus on two types of non-stormwater discharges:

- Illicit discharges (discharges that are plumbed into the MS4 or that result from leakage of sanitary sewer systems); and
- Improper disposal of materials such as used oil and other toxic materials.

Id. at 48055.[2]

Of the second provision to implement the "effective prohibition" standard, the preamble to the federal rule says that permittees are required to "detect and remove" or prevent illicit discharges (or ensure they are covered by an NPDES permit) and to "control" improper disposal. 55 Fed. Reg. at 48037.

1. Illicit Discharges

With respect to detecting and removing illicit discharges, the proposed stormwater rule required permittees to have a program to prevent ***all*** illicit discharges into the MS4. 53 Fed. Reg. 49415, 49472 (December 7, 1988); 40 C.F.R. 122.26(d)(2)(iv)(B)(1). Commenters on the proposed rule suggested that there was no need to prevent numerous categories of commonly occurring discharges that did not pose significant environmental problems. 55 Fed. Reg. at 48037. U.S. EPA disagreed that the commonly occurring discharges would never pose significant environmental problems, but did admit that it was unlikely that Congress intended to require permittees to effectively prohibit "seemingly innocent flows that are characteristic of human existence in urban environments and which discharge to municipal separate storm sewers." *Id.*

As a compromise, U.S. EPA revised the final rule by generally exempting from the illicit discharge prevention program the categories of discharges identified by commenters. As stated in the preamble: "the following categories of non-storm water ***discharges*** or flows [must be addressed by the program] only where such ***discharges*** are identified ***by the [permittee]*** as

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[1] An "illicit discharge" is defined in the federal regulations as any discharge to an MS4 that is not composed entirely of storm water except discharges pursuant to a NPDES permit (other than the NPDES permit for discharges from the MS4) and discharges resulting from fire fighting activities. 40 C.F.R. 122.26(b)(2).

[2] Contrary to the assertion in the Response to Comments, the federal regulations and/or preamble do not define "non-stormwater discharges" as "illicit discharges."

sources of pollutants to waters of the United States..."[3] 55 Fed. Reg. at 48037 [emphasis added]. U.S. EPA summarized the requirement in its *Guidance Manual for the Preparation of Part 2 of the NPDES Permit Application for Discharges from Municipal Separate Storm Sewer Systems*, November 1992 *("Part 2 Guidance Manual")*:

> While EPA does not consider these flows to be innocuous, they are only regulated by the storm water program to the extent that they may be identified [by the permittee] as significant sources of pollutants to waters of the United States under certain conditions.

Part 2 Guidance Manual at p. 6-33.

Where a permittee identifies a specific discharge, within an otherwise exempt category, that is a source of pollutants to waters of the United States, the permittee must address the discharge as part of its illicit discharge program. *See* 55 Fed. Reg. at 47995 (discharges identified on a case-by-case basis); Part 2 Guidance Manual at p. 6-33 (landscape irrigation from a particular site may result in a water quality impact).

2. Improper Disposal

With respect to controlling improper disposal, the preamble provides that permittees' program is to "assist and facilitate in the proper management of used oil and toxic materials." 55 Fed. Reg. at 48056. The regulation itself provides that the program is to include a description of educational activities, public information activities, and other appropriate activities to facilitate the proper management of used oil and toxic materials. 40 C.F.R. 122.26(d)(2)(B)(6). Thus, rather than using a stick to mandate that no used oil or other toxic materials ever enter the MS4, the regulations require that permittees assist and facilitate, through public education, the proper disposal of these materials such that they shouldn't enter the MS4. Improper disposal does not have to be prevented, it has to be controlled.

The Tentative Order ignores much of these clear requirements for regulating non-stormwater through preventing illicit discharges and controlling improper disposal. It allows the Regional Board to identify as sources of pollutants discharges within otherwise exempt non-stormwater categories, rather than just permittees as provided by federal law. It deletes three entire categories of exempt non-stormwater discharges rather than just the specific discharges within those categories that may be a source of pollutants. More significantly, it imposes numeric effluent limitations on non-stormwater discharges from the MS4. Because none of these requirements or acts are authorized by federal law (and the Regional Board has not indicated it is relying on state law), as discussed below in more detail, the County requests that all of them be removed, revised or undone.

[3] In the text of the final rule, the word "only" was dropped. 55 Fed. Reg. at 48071.

B. For Exempt Categories of Non-Stormwater Discharges, Only Where a Permittee Identifies a Specific Discharge of Non-Stormwater to the MS4 as a Source of Pollutants to Waters of the U.S. Must the Permittee Prevent the Discharge to the MS4

Staff's response to the County's May 15, 2009 comment on this issue ignores authority cited by the County, misreads other authority, and fundamentally misconstrues the reason U.S. EPA provided exempt categories of non-stormwater discharges.

The Part 2 Guidance Manual clearly explains, by way of example, that it is only where landscape irrigation runoff from a particular site results in a water quality impact that the MS4 permittee must address the discharge, either through its management plan or by requiring the discharger to obtain an NPDES permit. *See* Part 2 Guidance Manual at p. 6-33 (quoted in the County's May 15, 2009 comment letter). Staff's response to comments does not address this authority. Just because runoff from one site is a source of pollutants to waters of the United States doesn't mean that the entire landscape irrigation category loses its exempt status.

Staff does address language in the preamble to the federal regulation, but misreads it. U.S. EPA explains in the preamble the idea of exempt categories (or components) of non-stormwater:

> [I]n general, municipalities will not be held responsible for prohibiting some specific ***components*** of discharges or flows listed below through their municipal separate storm sewer system, even though such ***components*** may be considered non-storm water discharges, unless such ***discharges*** are specifically identified on a case-by-case basis as needing to be addressed.

55 Fed. Reg. at 47995 (emphasis added). Staff somehow reads this language as providing authority for removing entire categories (or components) of non-stormwater discharges from the list of exempt categories of non-stormwater discharges provided in the federal regulations. The language, however, very clearly refers to "discharges" being identified on a case-by-case basis as needing to be addressed (i.e., a source of pollutants). It does not refer to "categories" being identified as needing to be addressed.[4]

Moreover, as alluded to above, staff's position does not make sense. U.S. EPA established the list of exempt non-stormwater categories because Congress did not intend to require permittees to prohibit commonly occurring, "seemingly innocent flows that are characteristic of human existence in urban environments." 55 Fed. Reg. at 48037. Under staff's position, that is precisely the result. Any time a single discharge from an exempt discharge category is identified as a source of pollutants, the entire discharge category would be subject to the "effective prohibition" standard, regardless of whether any other discharges from that category presented a problem. This is not what U.S. EPA intended.

Finally, the County notes that the Tentative Order is inconsistent with federal law in that it allows the Regional Board to identify as sources of pollutants discharges within otherwise exempt non-

[4] Read in context, the fact that U.S. EPA suggests that a State may include permit conditions that prohibit "these types of discharges where appropriate" simply refers to individual discharges, not entire discharge categories. *See* 55 Fed. Reg. at 48037.

stormwater categories. As discussed above, the federal regulations and guidance are clear that it is the permittees alone that are to identify such discharges.[5]

For all of the above reasons, the County requests that the Board restore the three deleted exempt non-stormwater discharge categories in Directive B.2 (landscape irrigation, irrigation water, and lawn water) and strike "or the Regional Board" from the second line of the first paragraph of Directive B.2.

C. The Proposed Numeric Effluent Limits For Discharges of Non-Stormwater From The MS4 Are Contrary to Federal Law and Could Subject Permittees to Mandatory Minimum Penalties

The Tentative Order proposes numeric effluent limitations for non-stormwater dry weather discharges from the MS4. In its May 15, 2009 comment letter the County pointed out that the Clean Water Act requires that discharges from the MS4 meet the MEP standard, not numeric effluent limitations. The Response to Comments suggests that staff fundamentally misconstrues the authority provided by federal law to regulate MS4s.

1. The Relevant Clean Water Act Provision and Federal Regulations Regulate Discharges From MS4s

In response to Comment No. 39, staff begins their analysis by stating that section 402(p) of the Clean Water Act "regulates the discharge of storm water from a point source." This is not entirely accurate. Section 402(p) does regulate discharges of stormwater from a point source (e.g., the MS4), but it also regulates discharges of non-stormwater from the MS4. More accurately stated, section 402(p)(3)(B) regulates *the discharge of pollutants from the MS4*. In the clearest language possible, the relevant section provides in pertinent part:

> Permits for discharges from [MS4s] . . . shall require controls to reduce the discharge of pollutants to the maximum extent practicable [MEP]. . .

33 U.S.C. 1342(p)(3)(B)(iii).

Staff assert that, because section 402(p)(3)(B)(ii) requires permittees to effectively prohibit non-stormwater discharges into the MS4, the MEP standard in section 402(p)(3)(B)(iii) must apply only to discharges of stormwater. In essence, staff would re-write the Clean Water Act to provide:

> Permits for discharges from [MS4s] . . . shall require controls to reduce the discharge of pollutants ***in stormwater*** to the maximum extent practicable . . .

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[5] This has been the Regional Board's own position. In its FAQ web page regarding the Orange County MS4 permit, the Regional Board says, referring to the federal regulations, that certain non-stormwater discharges are exempt unless "the municipality determines it to be a source or pollutants..." *See* the Regional Board web site at: http://www.waterboards.ca.gov/sandiego/water_issues/programs/stormwater/ocfaq.shtml

That of course is not what the Clean Water Act says. If Congress had intended to apply the MEP standard only to stormwater discharges from the MS4, as suggested above, it would have been very easy to do. Congress, however, chose to apply the MEP standard to the discharge of *pollutants* from the MS4, regardless of the source. That makes sense in that it is pollutants, not stormwater or non-stormwater, that impacts receiving water quality.[6]

This is consistent with *Defenders of Wildlife v. Browner*, 191 F.3d 1159 (9th Cir. 1999). There, in discussing the two different standards applicable to industrial dischargers and municipal dischargers, the Court consistently tracked the language from the Clean Water Act, referring to "industrial storm-*water* discharges" and "municipal storm-*sewer* discharges." *See* 191 F.3d at 1164-65 (emphasis added). The Court did not refer to the standard as applying to stormwater discharges or non-stormwater discharges. The Court, of course, held that "Congress did not require municipal storm-sewer discharges to comply strictly with 33 U.S.C. § 1311(b)(1)(C) [e.g., water quality standards]."

2. All Discharges From the MS4 are Subject to the MEP Standard

Staff assert, in their response to comments and in Finding C.14 that non-stormwater discharges from the MS4 are not subject to the MEP standard. An examination of the federal regulations and preamble indicates otherwise.

The focus of the Clean Water Act and the federal regulations is on a management program or programs. Under the federal regulations, the overall goal of the management program is to include a comprehensive planning process to reduce the discharge of pollutants to the MEP. 40 C.F.R. 122.26(d)(2)(iv). One of the elements of the management program is the illicit discharge prevention program. 40 C.F.R. 122.26(d)(iv)(B)(1). Thus, the prevention of illicit discharges into the MS4 is intended to help achieve the overall MEP standard for discharges from the MS4. This is confirmed by the preamble to the federal regulations where U.S. EPA discusses the required elements of the management plans or programs. According to U.S. EPA:

> [Permittees are required] to develop management programs for four types of pollutant sources which discharge to large and medium municipal storm sewer systems. Discharges from large and medium municipal storm sewer systems are usually expected to be composed primarily of: (1) Runoff from commercial and residential areas; (2) storm water runoff from industrial areas; (3) runoff from construction sites; and ***(4) non-storm water discharges.*** Part 2 of the permit application has been designed to allow [permittees] the opportunity to propose ***MEP control measures for each of these components of the discharge.***

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[6] Staff assert that because the title of section 402(p) is "Municipal and industrial stormwater discharges," section 402(p) must regulate only stormwater discharges. While Congress' focus in enacting section 402(p) clearly was on regulating stormwater, as discussed below it understood that some non-stormwater likely would enter the MS4. To protect water quality, it thus chose to regulate all pollutants discharged from the MS4, not simply discharges of pollutants in stormwater. Additionally, from a statutory construction perspective, because the relevant language is clear in section 402(p)(3)(B), there is no need to look to the title of section 402(p) to determine Congressional intent.

55 Fed. Reg. at 48052 (emphasis added). *See also* 55 Fed. Reg. at 48045 ("Part 2 of the proposed permit application [which includes the illicit discharge prevention requirement] is designed to . . . provide municipalities with the opportunity of proposing a comprehensive program of structural and non-structural control measures that will ***control the discharge of pollutants, to the maximum extent practicable, from municipal storm sewers.***") (Emphasis added.)

Thus, just as the discharge of non-stormwater into the MS4 is subject to the "effective prohibition" standard, the discharge of pollutants in non-stormwater from the MS4 is subject to the MEP standard.

3. No "Narrative Prohibition" or "Zero Discharge" Requirement

In their Response to Comments, staff then go on to assert that the effective prohibition standard applicable to discharges of non-stormwater to the MS4 is, in effect a "narrative prohibition" of discharges of non-stormwater from the MS4; i.e., a "zero discharge" requirement. In support, staff assert that non-stormwater discharges are defined as "illicit discharges." This, again, is inaccurate.

First, as discussed above, "non-stormwater discharges" are not defined in federal law. As made clear in the preamble to the federal regulations, U.S. EPA intended to implement the "effective prohibition" mandate of the Clean Water Act by focusing on two types of non-stormwater discharges -- illicit discharges and improper disposal. While non-exempt categories of illicit discharges must be prevented from entering the MS4, improper disposal needs only be controlled, not prevented. Moreover, it is to be controlled not through direct enforcement or some "stick" approach, but rather through public education. In other words, U.S. EPA acknowledged and accepted that some non-stormwater likely would enter the MS4.[7] There is not a "narrative prohibition" or "zero discharge" requirement on non-stormwater discharges from the MS4. This doesn't present significant risk to water quality, however, because all pollutants discharged from the MS4 must be controlled or reduced to the maximum extent practicable.

Second, as noted, U.S. EPA's approach to regulating non-stormwater arises from trying to implement the Clean Water Act's "effective prohibition" standard. Congress did not say that non-stormwater discharges into the MS4 had to be "absolutely prohibited" or "completely prohibited" or even just "prohibited." Congress said that non-stormwater discharges into the MS4 had to be "effectively prohibited." As indicated by U.S. EPA's regulations, something may be effectively prohibited even when some of it is allowed. Effectively prohibiting the discharge of non-stormwater into the MS4 suggests that some non-stormwater may still enter the MS4.[8] Thus, there is no "zero discharge" requirement on discharges of non-stormwater from the MS4.

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[7] This focus on two types (not *the* two types) of non-stormwater also suggests that U.S. EPA acknowledged and accepted that some non-stormwater likely would enter the MS4.

[8] The Clean Water Act is not the only federal statute with an "effective prohibition" standard. For example, under Telecommunications Act, local zoning agencies' regulation of cell towers cannot "prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C. 332(c)(7)(B)(i)(II). In challenging zoning board actions, plaintiffs must prove that the zoning board's action constituted an "effective prohibition" of cell phone service. Courts have held that a zoning board can allow some service and still be subject to an "effective

4. BMPs versus NELs

Next staff appear to suggest that, because permittees' efforts at addressing non-stormwater discharges into the MS4 have not been successful, under 40 C.F.R. 122.44(k) and 122.44(d)(1), the Board can impose numeric effluent limits on discharges from the MS4. Once again staff is mistaken.

Section 122.44(k) simply provides that NPDES permits shall include BMPs (when applicable) under certain circumstances. The regulation does not govern when NELs must be included in an NPDES permit. Staff characterize permittees' efforts to address non-stormwater discharges into the MS4 as BMPs and then, because staff assert the BMPs are not working, suggest section 122.44(d)(1) allows the Board to impose numeric effluent limits on the discharge of non-stormwater from the MS4. To the extent section 122.44(d)(1) is applicable, it does not require numeric effluent limitations. It simply provides the method for determining when effluent limitations generally -- not necessarily a numeric limit -- are required to achieve water quality standards.

Because nothing in sections 122.44(k) or 122.44(d)(1) require numeric effluent limitations on the discharge of non-stormwater from the MS4, staff's reliance on these two sections is misplaced.

5. State Board Order WQ 2009-0008

In the August 12, 2009 Fact Sheet/Technical Report, staff place reliance on the State Board's recent Los Angeles County TMDL decision (WQ 2009-0008 [LA County TMDL Order]) to support the notion that the Clean Water Act requires (or at least authorizes) NELs for discharges of non-stormwater from the MS4. Such reliance is misplaced.

The issue in the LA County TMDL Order was not whether the Regional Board could impose NELs on discharges of non-stormwater from the MS4. The issue addressed in the order was the implementation of dry weather wasteload allocations (WLAs) in the LA County MS4 permit. The relevant TMDL established a bacteria WLA for summer dry weather of zero days of exceedance of the bacteria water quality standards. The TMDL included a WLA for MS4s.

The Los Angeles Regional Board amended the LA County MS4 permit to implement the summer dry weather bacteria WLA. As amended, the permit provided, as a receiving water limitation, that during summer dry weather "there shall be no discharges of bacteria from MS4s into the Santa Monica Bay that cause or contribute to exceedances in the Wave Wash, of the applicable bacteria objectives." The amendment also included corresponding discharge prohibition language. Los Angeles County argued that the receiving water limitation and discharge prohibition were improper numeric effluent limits and that, therefore, the permit amendment should be remanded.

The State Board disagreed. Interpreting summer dry weather as applying only to non-stormwater flows the Board found the authority cited to by LA County as inapposite. The State Board found, generalizing federal law, an overarching principle that "[f]ederal law requires municipal storm water permit limitations to be consistent with applicable wasteload allocations."

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prohibition" claim. In other words, an effective prohibition is not an absolute prohibition. *See, e.g. Second Generation Properties, L.P. v. Town of Pelham*, 313 F.3d 620 (1st Cir, 2002) (Court analyzed the common meanings of "effective" and "prohibition.")

Order WQ 2009-0008 at p. 9. Finding the permit amendment to be consistent with the dry weather bacteria WLA and with other federal and state requirements, the Board upheld the amendment.

Significantly for purposes of the Tentative Order, the Board held that the permit amendment *did not* impose NELs as asserted by LA County, but rather receiving water limitations.

> The contested provisions are receiving water limitations, not numeric effluent limitations. The contested provisions do not impose a numeric limitation measured at a point source outfall. Instead, compliance with the limitation is measured in the receiving water, and more specifically, at the "wave wash" for the individual beaches.

Order WQ 2009-0008 at p. 10.

By comparison, the NELs at issue here are to be measured at a point source outfall -- "at the end-of-pipe ***prior to discharge into the receiving water.***" Tentative Order, Directive C.4 (emphasis added). Thus, because the LA County order pertains to implementing a TMDL through receiving water limitations, it provides no support for staff's assertion that NELs are appropriate (or required) for non-stormwater discharges from the MS4.

Because NELs are not required by federal law, the County requests that Directive C be removed from the Tentative Order.

6. NELs, SALs and MMPs

The Tentative Order includes both NELs for the discharge of non-stormwater and stormwater action levels (SALs) for the discharge of stormwater. Both require that permittees monitor discharges from the MS4. To the extent exceedances of either the NELs or SALs are detected, permittees have to investigate and address the probable cause of the exceedance. An exceedance of either an NEL or an SAL is not a violation of the permit per se.

With respect to the NELs in Directive C, the Tentative Order explicitly provides that compliance requires that an exceedance of an NEL must result in investigation of the source of the exceedance and a determination that the source is natural in origin, an illicit discharge, or a discharge from an exempt category of non-stormwater discharge.[9] Depending on the source, appropriate action is required. Similarly an exceedance of a SAL requires that permittees to reevaluate and augment their stormwater control measures.

Notwithstanding that an NEL exceedance is not a permit violation and compliance with the NELs requires investigation and appropriate action, an exceedance of an NEL may still subject permittees to mandatory minimum penalties (MMPs) under section 13385 of the Water Code. The Tentative Order acknowledges this possibility in footnote 12 where it provides that permittees may not be subject to MMPs if they can show that an exceedance was caused by an intentional act of a third party.

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[9] As discussed above, the three possible outcomes upon an NEL exceedance ignore the fact that the source of the exceedance could be from improper disposal, not an illicit discharge.

Because there is little if any substantive difference between the NEL and SAL requirements, there is no reason for the difference in terminology. The County submits that, to the extent the final Order will include provisions similar to those currently provided in Directive C (and as discussed above the County strongly believes it should not), they should be re-characterized as non-stormwater action levels.[10]

C. Because NELs Are Not Required By Federal Law, To The Extent The Board Has Authority to Impose Them, The NELs Must Be Authorized by State Law and the Board Must Comply With All State Law Requirements

Neither the Clean Water Act nor the federal regulations require NELs in MS4 permits. Staff's prior "tentative draft update" of the Tentative Order conceded this significant point: "Compliance with numeric limits does not constitute compliance with CWA requirements which require non-storm water discharges into the MS4 to be effectively prohibited. . . " June 18, 2009 Draft Updates (Tentative) at p. 9 of 56.

To the extent the Board has discretion under the Clean Water Act to impose NELs (*see Defenders of Wildlife, supra*), the California Supreme Court has made it clear that the Board must comply with state law requirements. *See City of Burbank v. State Water Resources Control Board*, 35 Cal.4th 613 (2005). These state law requirements include considering the water quality that could reasonably be achieved by the NEL requirement, and economic considerations. *See* Water Code sections 13263(a) and 13241. Moreover, because the NEL requirement is not mandated by federal law, it would constitute an impermissible unfunded state mandate (unless the State proposes to fund the costs of implementing the program). *See, e.g., County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898.[11]

For all of the above reasons, the County requests that the Board revise the Tentative Order consistent with and pursuant to federal and state law.

II. Compliance With the Wasteload Allocations in The Tentative Order Should be Subject to the Iterative BMP Process

Finding E.11 provides that the Tentative Order incorporates only those MS4 WLAs developed in TMDLs that have been adopted by the Regional Board and approved by the State Board, OAL, and U.S. EPA. However, federal law does not require that MS4 permits incorporate WLAs as numeric limits. Nowhere in the Clean Water Act, or the federal stormwater or TMDL regulations, does it say that MS4 permits shall incorporate TMDLs/WLAs. The federal regulations do say that, when developing water quality-based effluent limits ("WQBELs") under 40 C.F.R. 122.44(d), the permitting authority must ensure that effluent limits developed to protect a

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[10] In a similar vein, the County suggests that, as the purpose of Directive C appears simply to provide some type of performance criteria to the effective prohibition requirement in Directive B, Directive B could be revised to include the non-stormwater action levels. For example, Directive B.4 could provide that "follow up investigations must be conducted as necessary ***and at a minimum upon an exceedance of a non-stormwater action level identified in Table 4*** to indentify and control any non-prohibited discharge categories."

[11] To the extent the Board can impose the NEL requirement, the County would argue that compliance with an NEL should be considered to be compliance with the effective prohibition requirement in Directive B.1.

narrative water quality criteria, a numeric water quality criteria, or both, "are ***consistent with*** the assumptions and requirements of any available wasteload allocation for the discharge prepared by the State and approved by EPA pursuant to 40 CFR 130.7" 40 C.F.R. 122.44(d)(1)(vii)(B) (emphasis added).

This section itself does not apply to all NPDES permits. Section 122.44(d) applies only when an NPDES permit must include provisions to achieve water quality standards established under section 303 of the Clean Water Act (33 U.S.C. 1311). As discussed above, the Ninth Circuit in *Defenders of Wildlife* has held that MS4 permits do not have to strictly comply with water quality standards under section 303.[12] Thus, section 122.44(d) does not necessarily apply to MS4 permits.

Even if it is applicable, section 122.44(d)(1)(vii)(B) simply says that WQBELs in the permit must be "consistent with the assumptions and requirements" of the WLA.[13] The permit does not have to incorporate the WLA as a numeric effluent limitation. U.S. EPA has indicated that an iterative BMP approach is appropriate for incorporating WQBELs in MS4 permits; numeric WQBELs are not required. 61 Fed. Reg. 43761 (Aug. 26, 1996) (U.S. EPA's "Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits").[14]

The County appreciates that Directive I of the Tentative Order provides that permittees are to achieve the interim and final WLAs through implementation of BMPs.[15] To be consistent with U.S. EPA's guidance, this section should be revised to clarify that any exceedances of the WLAs will be addressed through the iterative BMP approach.[16] As receiving water limitations, this would also be consistent with the required language of State Board Order WQ 99-05.

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[12] In its response to comments, staff quotes from an unidentified letter from U.S. EPA to the State Board in support of staffs' assertion that, notwithstanding the *Defenders of Wildlife* decision, "MS4s must indeed comply with water quality standards." Response to Comment No. 54. The County notes that the letter in question is apparently dated January 21, 1998, before the *Defenders of Wildlife* decision.

[13] The State Board's Office of Chief Counsel has confirmed the appropriate approach: "Under the [federal] regulations, WQBELs must be 'consistent with the assumptions and requirements of any available wasteload allocation . . . .' (40 C.F.R. § 122.44(d)(1)(vii)(B).) The regulations do not require WQBELs to be 'equivalent to' available waste load allocations." Memorandum from Chief Counsel, Craig M. Wilson, to State Board Chairman, Arthur Baggett, Jr., *Legal Authority for Offsets, Pollutant Trading, and Market Programs to Supplement Water Quality Regulation in California's Impaired Waters* (October 16, 2001), page 2.

[14] Contrary to staff's assertion in The Fact Sheet's discussion of Finding E.11, U.S. EPA's guidance does not state that, when adequate information exists, MS4 permits are to incorporate numeric WQBELs. Rather, U.S. EPA's guidance states that "where adequate information exists to develop more specific conditions or limitations to meet water quality standards, these conditions or limitations are to be incorporated into storm water permits." 61 Fed. Reg. at 43761.

[15] Directive I.1.a should be revised to clarify that the interim and final WLAs are described in Tables 6 and 7, not just Table 6.

[16] We note that in staff's response to comments, staff stated that an iterative process would be used to meet the WLAs. *See* Response to Comment No. 59.

III. Any Water Quality Benefits Achieved From the Retrofitting Requirement Will Be Significantly Outweighed by The Costs

The Tentative Order would require permittees to develop and implement a retrofitting program for existing development. While the County agrees that retrofitting existing development could have beneficial water quality impacts, the program required by the Tentative Order would be very expensive to develop and implement with very little if any water quality improvement to show for the effort. Moreover, the program is not authorized or required by federal law.

Permittees would be required to identify existing development candidates, evaluate and rank the candidate sites to prioritize them for retrofitting, cooperate with landowners of priority sites and encourage them to retrofit their properties, and track and inspect all sites that do complete retrofitting. Where constraints at a candidate site preclude retrofitting, permittees may propose regional mitigation projects. The weak link of this program is that permittees cannot force private landowners to retrofit their properties. So after all the expense of developing this program, there may be nothing gained from it.

Because permittees cannot necessarily force private landowners to retrofit their developments, U.S. EPA recognized that MS4 regulation would largely be limited to undeveloped sites (and sites being developed/redeveloped). "[O]pportunities for implementing [structural control] measures may be limited in previously developed areas." 55 Fed. Reg. at 48054. "The unavailability of land in highly developed areas often makes the use of structural controls infeasible for modifying many existing systems." *Id.* at 48055. As a result, none of the five required components to reduce pollutants in runoff from commercial and residential areas include a retrofitting requirement. *Id.* at 48054-55.

Because the retrofitting requirement as proposed in the Tentative Order would exceed the requirements of the Clean Water Act, the Board can impose the requirement, if at all, only after it has considered certain factors, including economic considerations and the water quality condition that could reasonably be achieved by the requirement. *See* Water Code sections 13263(a) and 13241; *City of Burbank, supra,* 35 Cal.4th 613. In addition, unless funded by the State, the retrofitting requirement could be considered to be an impermissible unfunded state mandate. *See, e.g., County of Los Angeles v. Commission on State Mandates, supra,* 150 Cal.App.4th 898.

The County therefore requests that the retrofitting requirement be significantly revised or deleted from the Tentative Order.

IV. Permittees Should be Provided Flexibility in Implementing Any Low Impact Development And/Or Hydromodification Management Plan Requirements

The County agrees that the concepts of Low Impact Development and reducing hydromodification may be effective tools in controlling the discharge of pollutants from the MS4. However, the County objects to the LID and hydromodification management plan (HMP) requirements in the Tentative Order because they go beyond the requirements of federal law and violate state law requirements.

Because nothing in the Clean Water Act or federal regulations requires that MS4 permits include LID or HMP requirements, as noted above, the Board can impose the requirements, if at all, only after it has considered certain factors, including economic considerations and the water

quality condition that could reasonably be achieved by the requirement. *See* Water Code sections 13263(a) and 13241; *City of Burbank, supra,* 35 Cal.4th 613. In addition, unless funded by the State, these programs could be considered to be impermissible unfunded state mandates. *See, e.g., County of Los Angeles v. Commission on State Mandates, supra,* 150 Cal.App.4th 898.

In addition, because the Board can require that permittees meet the MEP standard but cannot prescribe the manner in which they do so, the LID/HMP requirements violate Water Code section 13360(a).[17]

V. Stormwater Action Levels May Be a Useful Tool But Permittees Should Benefit From Their Use

The County appreciates the revisions that have been made to the Stormwater Action Levels (SALs) section of the Tentative Order. While we do not necessarily agree that the SAL provision, as currently crafted, is appropriate, we do agree that the concept of action levels may be a useful tool in addressing water quality impacts from the discharge of pollutants from the MS4. However, just as an exceedance of a SAL may give rise to a presumption that permittees are not meeting the MEP standard, to the extent permittees are meeting the SALs, there should be a presumption that they are meeting the MEP standard. That presumption would be lost if permittees do not implement other required elements of the permit.

The County suggests that Directive D.3. be revised accordingly.

Additional Legal Comments

I. Findings

Finding D.3.c. -- Urban Streams

The County has previously objected to the Board's characterization of urban streams as part of MS4. We point out now that, in addition to all of the other reasons why urban streams should not necessarily be considered to be part of the MS4, U.S. EPA has explicitly rejected this characterization. In the preamble to its proposed stormwater rule U.S. EPA states: "The Agency also wants to clarify that streams, wetlands and other water bodies that are waters of the United States are not storm sewers for the purpose of this rule." 55 Fed. Reg. 49415, 49442 (December 7, 1988).

II. Directives

Directive A.3.b -- Prohibitions and Receiving Water Limitations

As noted in the County's May 15, 2009 comments, Finding A.3 says the permit is consistent with the State Board's precedential Order 99-05. However, the language in Directive A.3.b (which requires permittees to continue the iterative process unless directed otherwise by the Executive Officer) is not consistent with Order 99-05 (which says permittees do not have to

[17] Finding D.2.c. asserts, without support, that LID BMPs are an acceptable means of meeting the MEP standard.

repeat the process unless directed otherwise by the E.O.). Accordingly, Section A.3.b should be revised consistent with State Board Order 99-05.

In their Response to Comments and June 18, 2009 errata, staff addressed this issue (albeit inadequately). The current draft of the Tentative Order does not address the concern at all.

Directive E.1 -- Legal Authority

This provision includes a statement that nothing in the permit "shall authorize a Co-Permittee or other discharger regulated under the terms of the order to divert, store or otherwise impound water if such action is reasonably anticipated to harm downstream water right holders in the exercise of their water rights." As noted in our technical comments (Attachment B), this statement points out the conflict that the permit's LID provisions have with common water rights law. Directive F.1.d(4)(d)(i) would require permittees to retain onsite all stormwater runoff. However, as apparently acknowledged by Directive E.1, this could harm the rights of downstream water rights holders.

To resolve this conflict, the County suggests simply changing "authorize" to "require" in the above quoted language in Directive E.1.

Directive F -- JRMP

Throughout this section of the Tentative Order, permittees are required to develop and implement programs meeting designated elements "and" to reduce discharges to the MEP standard, prevent discharges from causing or contributing to impairments, prevent illicit discharges, etc. *See, e.g.,* Directive F.1, Directive F.1.d, Directive F.3.a, Directive F.3.b, Directive F.3.c. The County previously pointed out, in the context of the retrofitting requirement (Directive F.3.d), that the requirement should be for permittees to develop and implement a program that meets the required elements. The goal of the program should be to meet the MEP standard, prevent illicit discharges, etc. Otherwise, permittees could meet the required elements of a program, but still face charges that they have not met MEP, etc.

Staff revised the retrofitting provision to clarify that permittees must meet the elements of the retrofitting program and that the goal of the program is to meet the MEP standard, etc. The County requests that the rest of Directive F be similarly clarified.

Directive F.1.d(6) -- Treatment Control BMP Requirements

This Directive appears to be a vestige from the current permit, when the consensus was that treatment control BMPs (not LID BMPs) were the best practicable means of meeting the MEP standard. The Tentative Order now requires that LID BMPs be implemented at all priority development projects (PDPs). However, it still also requires that treatment control BMPs be implemented at all PDPs. It attempts to reconcile these to inconsistent requirements by providing, in footnote 16, that certain LID BMPs are considered treatment control BMPs. However, it is not clear that LID BMPs can meet all of the elements required for treatment control BMPs. The County would ask that these two requirements be carefully reconciled before adoption.

Directives F.2.d(c) and F.2.e(c) -- BMP Implementation and Inspection of Construction Sites

The County would ask that "exceptional threat to water quality" in Directive F.2.d(c) and "significant threat to water quality" in Directive F.2.e(c) be reconciled.

ATTACHMENT B

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

INTRODUCTION

Attachment B contains the principal technical comments of the County of Orange (the "County") on Tentative Order No. R9-2009-0002 dated August 12, 2009 ("Tentative Order"). Although the supporting Fact Sheet/Technical Report dated August 12, 2009 (the "Fact Sheet") is referenced 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 principal 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.

GENERAL COMMENTS

Although we have a series of specific concerns with the August 12, 2009 version of the Tentative Order (R9-2009-0002), as discussed in later sections, the principal issues of concern are highlighted below:

- Non-Stormwater Numeric Effluent Limits (NELs) – The County's concerns with the imposition of non-stormwater NELs have been presented to your staff. However, the Tentative Order continues to make the case that the non-stormwater discharges are not subject to the maximum extent practicable standard and, therefore, subject to water quality based effluent limits. The application of the MEP standard to discharges from municipal storm drain systems is a fundamental tenet of the stormwater mandate and County strongly disagrees with the inclusion of NELs for a number of technical and legal reasons.

- Development Planning Component – Low Impact Development (LID), has become the defining issue of permit renewal for municipal stormwater programs in California. Reflective of the significance of this issue was the creation by the Santa Ana Regional Board of a stakeholder group to assist specifically with creating land development requirements for its municipal permit. As a result of the many stakeholder meetings and discussion at the adoption hearing, a framework was created for land development that is technically robust and is broadly supported. It is absolutely vital for Orange County that the land development standards for water quality protection be uniform on a countywide basis. Consequently, the County is providing revised language that would effect a cogent alignment of the land development requirements in the two permits.

- The Total Maximum Daily Loads – As more and more TMDLs are adopted and the resulting language and allocations incorporated into permits, it is critical that the

assumptions and requirements of the allocations are incorporated into the stormwater permits as they were intended. It is of concern to the County that the Tentative Order indicates that the Regional Board staff are interpreting the TMDL instead of incorporating the TMDL into the permit. In this regard the County is providing alternate language which is consistent with EPA guidance and has been successfully adopted into other municipal stormwater permits.

The County shares with the Board an interest in seeing a San Diego Region Municipal Stormwater Permit reasonably consistent with the Santa Ana Region Municipal Stormwater Permit (Order No. R8-2009-0030). This consistency is necessary to ensure that the Permittees who are regulated by both jurisdictions do not have conflicting and/or wholly different requirements to implement. Consistency between the permits will allow the Permittees to leverage their limited resources and increase the ability to convey consistent messages within the public education and outreach materials for the various program elements. Since, in spite of previous assurances and concerns, the August 12, 2009 Tentative Order is fundamentally different from the Santa Ana Region Municipal Stormwater Permit in many key programmatic areas, this is a critical issue identified within the technical comments presented below.

FINDINGS

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

The Tentative Order continues to persist in the inappropriate reference to data that exceed Water Quality Objectives (WQOs) as violations. In particular, 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).

Although there are other instances of this within the Findings[1], the most notable section of the permit where this language change occurred is Page 19, Permit Section A.3. In this section of the permit the term "violation" is not only inconsistent with Order R8-2009-0030, it is also inconsistent with language within SWRCB Order WQ 99-05. The iterative language in the receiving water limitations speaks to exceedances of water quality standards, not violations. Further, it is unclear why both the terms "violations" and "exceedances" would be used within Permit Section A.3. The use of both terms would implicitly indicate that there is a difference between the interpretation and follow up actions resulting from a "violation" versus and "exceedance".

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 geographic areas and pollutants, it is inappropriate to make this same comparison and determine that there is a "violation". The term "violation" connotates that the point of compliance is the actual comparison of the urban runoff data to the receiving water quality objective rather than the process and follow up actions as described within the receiving water limitations.
Urban runoff data should not be used, in itself, to indicate a violation of water quality standard since the standard consists of the beneficial use(s) and the water quality objective established

[1] Page 4, Finding C.9.; Page 6, Finding D.1.b.; Page 10, Finding D.3.d.; and Page 13, Finding E.1.

to protect that use. The exceedance of a water quality objective does not necessarily result in a violation of a water quality standard. Runoff data can be described as exceeding water quality objectives, but the assessment of whether or not water quality standards are violated is based upon samples and data from the receiving water and impacts or lack of impacts on beneficial uses.

The County requests that the term "violation" in the noted sections be modified to the term "exceedance" to more accurately reflect point of compliance as well and the assessment and follow up action(s) that are required.

DISCHARGE CHARACTERISTICS

- **Compliance with Water Quality Standards** (Finding C.2, Page 2)
  Finding C.2. seems to be establishing the fact that MS4s are responsible for all sources of pollutants and manner of discharges (see last sentence). The County would submit that municipalities are limited in their ability to control all sources of pollutants (e.g. air deposition) and, in fact, are not responsible for discharges outside of the jurisdiction/control of the Permittees as well as those non-stormwater discharges that are identified in Section B.2. unless they are found to be a source of pollutants.

  In fact, Order No. R8-2009-0030 recognizes this limitation within Findings C.8. and C.10. on pages 3 and 4, respectively.

  C.8. This order is intended to regulate the discharge of pollutants in urban storm water runoff from anthropogenic (generated from human activities) sources and/or activities within the jurisdiction and control of the permittees and is not intended to address background or naturally occurring pollutants or flows.

  C.10. The permittees may lack legal jurisdiction over urban runoff 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 by the Regional Board. The Regional Board recognizes that the permittees should not be held responsible for such facilities and/or discharges. Similarly, certain activities that generate pollutants present in urban runoff may be beyond the ability of the permittees to eliminate. 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.

  The County requests that this Finding be modified to recognize that the permittees lack legal jurisdiction over runoff into their systems from some facilities, utilities, special districts, agencies and other point and non-point source discharges otherwise permitted by the Regional Board and that some pollutants in urban runoff may be beyond the ability of the permittees to eliminate.

- **Water Quality Monitoring Data** (Finding C.9, Page 4)
  Finding C.9. states, in part, that the water quality monitoring data collected to date indicates that there are persistent violations[2] of Basin Plan objectives for a number of pollutants and that the data indicates that runoff discharges are a leading cause of such impairments. 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 runoff discharges are the leading cause of impairment in Orange County.

  The County requests that the last sentence of Finding C.9. 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 6)
  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 within the accompanying Fact Sheet.

  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 does not consider the thorough program analysis that the Permittees conducted as a part of their preparation of the ROWD and the deficiencies and program modifications that Permittees 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 8)
  Finding D.2.b. seems to be making the case that treatment control BMPs are ineffective and should not be used. This Finding overstates or incorrectly states the constraints of treatment control BMPs. It is fair to say that without a performance standard for treatment control BMPs then treatment control BMPs can suffer from the constraints noted. However, treatment control BMPs can be effective in removing pollutants for a wide range of storms and, when combined with source control BMPs, provide a comprehensive pollutant reduction strategy. This finding should be significantly modified

[2] For the reasons discussed above and to be consistent with the Fact Sheet (page 8), the term "violation" should be changed to "exceedances."

to support the statement that "using a combination of onsite source control and site design BMPs augmented with treatment control BMPS... is important."

NOTE: The previous comments on this issue made by the Permittees were not adequately addressed in the Regional Board's Response to Comments document dated July 1, 2009, and are therefore resubmitted. The Response to Comments document dated July 1, 2009 identifies that "The Finding simply points out the difference between on-site source control / site design BMPs and end-of-pipe BMPs.", however the finding goes further to identify that "end of pipe BMPs are often incapable of capturing and treating a wide-range of pollutants", and that end-of pipe BMPs are more effective when used as polishing BMPs". These statements are incorrect and should be deleted from the finding as many treatment control BMPs are very effective at removing pollutants and should not just be considered as a polishing BMP.

Given the insufficient technical basis for these statements the County requests that Finding D.2.b *be deleted from the Tentative Order.*

- **Hydromodification** (Finding D.2.g, Page 9)
Finding D.2.g. identifies that hydromodification measures for discharges to hardened channels are needed for future restoration of the hardened channels to their natural state, thereby restoring the chemical, physical, and biological integrity and Beneficial Uses of local receiving waters. The Response to Comments document dated July 1, 2009 identifies that "The goal of hydromodification requirements are to prevent or further prevent hydromodification impacts on downstream watercourses and eventually restore natural flow regimes.", however if the downstream watercourses are designed (i.e hardened channels) to accept flows from upstream development then no hydromodification impacts would occur. The goal of eventually restoring natural flow regimes is not feasible in most parts of urbanized Orange County as the hardened channels in most cases are designed as a flood control features to prevent flooding and damage to the surrounding urbanized area. Removal of hardened channels in these areas would result in an unacceptable significant danger to life and property due to flooding and/or erosion and so removal and restoration of natural flow regimes is simply not feasible.

  The concept of 'restoring' channels to a 'natural' state has been examined by the researchers at SCCWRP, they note that restoration is not feasible in watersheds with a total impervious area greater than about 10% (SCCWRP, 2005)[3]. This is due to the fact that the channel cross section, grade, and sediment supply have also been changed in the watershed. Simply restoring pre-development flows will not allow restoration of the channel to pre-development conditions and this reality should be acknowledged in the Finding.

  Furthermore, the Santa Ana Regional Water Quality Control Board has identified in Order NO. R8-2009-0030 (MS4 Permit for Orange County) that a Hydrologic Condition of Concern does not exist if "All downstream conveyance channels that will receive runoff from the project are engineered, hardened and regularly maintained to ensure design flow capacity, and no sensitive stream habitat areas will be affected." Finding

[3] "Effect of Increases in Peak Flows and Imperviousness on the Morphology of Southern California Streams", Technical Report 450, April 2005, Southern California Coastal Water Research Project

D.2.g should be revised to be consistent with the Santa Ana Regional Board Order NO. R8-2009-0030.

The County requests that Finding D.2.g be modified as follows:

The increased volume, velocity, frequency and discharge duration of storm water runoff from developed areas has the potential to accelerate downstream erosion in natural drainages, impair stream habitat in natural drainages, and negatively impact beneficial uses. Development and urbanization increase pollutant loads in stormwater ~~storm water runoff~~ and ~~the~~ volume of stormwater runoff. Impervious surfaces can neither absorb water nor remove pollutants and thus lose the purification and infiltration provided by naturally vegetated soil. Some channels that are either engineered and maintained, or hardened may not be susceptible to the impacts of hydromodification. ~~Hydromodification measures for discharges to hardened channels are needed for the future restoration of the hardened channels to their natural state, thereby restoring the chemical, physical, and biological integrity and Beneficial Uses of local receiving waters.~~

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 stormwater treatment BMPs. The Fact Sheet refers to USEPA Guidance from 1992, which refers to locating structural controls in a natural wetland and not waters of the U.S. Furthermore in the Regional Board Response to Comments dated December 12, 2007 the Regional Board states "The Regional Board agrees that there is not a federal prohibition on placing pollution control practices within waters of the U.S." We wish to comment here on the implications it has for watershed restoration activities.

  This concern has been discussed in detail in comments on previous versions of the Tentative Order (see, e,g,, **Attachment A** (Pages 1-7) to the County's April 4, 2007 comment letter). 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 Permittees 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 Existing Development Component Section 3.a.(4) Page 51 of the Tentative Order, which requires the Permittees 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 County requests that Finding E.7 *be deleted from the Tentative Order.*

- **TMDLs** (Finding E.11, Page 16-17)
This finding indicates that it is the intention of the Regional Board to incorporate MS4 WLAs as end-of-the-pipe numeric Water Quality Based Effluent Limitations for adopted TMDLs. US EPA's 2002 guidance memorandum[4] on establishing stormwater permit requirements to implement WLAs stated that EPA expected that most WQBELs for NPDES-regulated municipal ... will be in the form of BMPs and that numeric limits will be used only in rare instances [emphasis added]. This reference was specifically cited in the Beaches and Creeks TMDL Technical Report and reflects the intent of the Regional Board staff and the understanding of the Stakeholder Advisory Group as to how the TMDL would be incorporated into the NPDES permit. This approach to incorporating WLAs into stormwater permits is maintained in the draft handbook *TMDLs to Stormwater Permit*, in which Chapter 6 identifies methods of coordinating TMDLs and stormwater permits. Six options are put forward as methods for permit writers to incorporate TMDLs in a stormwater permit, the last of which is to consider numeric effluent limitations. Furthermore, the County would also note that as required by 40 C.F.R. § 122.44(d)(1)(vii)(B), the Permit must be "consistent with the assumptions and requirements of available WLAs".

The Regional Board should follow the guidance in the 2002 Memorandum and the Draft Handbook and the intent of the Regional Board TMDL staff and express the WLAs in the Tentative Order as being implemented through the BMPs. This is especially true in California where an implementation plan is required for TMDLs and which in turn may be incorporated into the Permit consistent with EPA guidance.

In addition, it is of concern to the County that the Finding indicates that the Regional Board staff are interpreting the TMDL instead of incorporating the TMDL into the permit. The County submits that it is inappropriate for the Board staff to be interpreting the TMDL and, instead, that they should only be establishing in the permit effluent limitations consistent with the WLAs from any adopted TMDL

[4] Wayland, R.H., and J.A. Hanlon. 2002. *Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs.* Memorandum from Robert H. Wayland, III, Director, Office of Wetlands, Oceans and Watersheds, and James A. Hanlon, Director, Office of Wastewater Management, U.S. Environmental Protection Agency, Washington, DC.

In order to provide the greatest amount of flexibility and to be consistent with the adopted TMDL, the County requests that the Board replace the existing language with the following language from the recently adopted Ventura County MS4 Stormwater Permit (R4-09-0057 Pages 12 and 14):

> *This order incorporates applicable WLAs that have been adopted by the Regional Water Board and have been approved by the Office of Administrative Law and the U.S. EPA. The TMDL WLAs in the Order are expressed as water quality-based effluent limits in a manner consistent with the assumptions and requirements of the TMDL from which they are derived.*
>
> *Collectively, the restrictions contained in the TMDL Provisions for Storm Water and Non-Storm water Discharges of this Order on individual pollutants are no more stringent than required to implement the provisions of the TMDL, which have been adopted and approved in a manner that is consistent with the CWA. Where a TMDL has been approved, NPDES permits must contain effluent limits and conditions consistent with the assumptions and requirements of the available WLAs in TMDLs (40 C.F.R. 122.44(d)(1)(vii)(B)).*

PERMIT PROVISIONS

PROHIBITIONS AND RECEIVING WATER LIMITATIONS

- **Prohibitions and Receiving Water Limitations** (Section A, Page 19)
  Despite the fact that this issue was raised during the last comment period, the Regional Board have further modified the permit to inherently make it inconsistent and counter to State Water Board WQ Order 99-05. The Response to Comments IV (comment #57 and #74) state "The Tentative Order has been modified to clarify that through the adoption of this Tentative Order, the Executive Officer issues a standing order that the Copermittees must repeat the process until directed otherwise." In addition, this modification also sets up an inconsistency between the Tentative Order and the Fact Sheet for Finding A.3. which states "This Order is consistent with the following precedential Orders adopted by the State Board addressing municipal storm water NPDES Permits:.....Order 99-05". In fact, this language is inconsistent with Order 99-05 as well as Order No. R8-2009-0030.

  In section A.3.b., the Regional Board has modified the standard state-wide receiving water limitations language to require the Permittees to repeat the assessment process for exceedances of the same water quality standard. In the previous permit, and in permits throughout the state, including the permit recently issued by the Regional Board to MS4 dischargers to the watersheds draining San Diego County, this provision of the RWL language is set up such that the process is only repeated once unless otherwise directed. The original language recognizes the length of time it can take for new BMP programs to be developed, deployed, and fully implemented before a change in water quality may be observed and avoids pointless reassessments of the same pollutant. Even in cases where there has been a significant reduction of the source of a pollutant, it typically takes several years for monitoring programs to see the change in the receiving water. In cases where the pollutant is persistent in the environment, it can take decades to detect changes in water quality or indicator monitoring.

The County requests that the Regional Board reinstate the original language from WQ Order 99-05 (see below) regarding iterations of the assessment process for exceedances of the same water quality standard.

> *So long as the Copermittee has complied with the procedures set forth above and is implementing the revised Jurisdictional Urban Runoff Management Program, the Copermittee does not have to repeat the same procedure or continuing or recurring exceedances of the same receiving water limitations unless directed by the Regional Board to do so.*

NON-STORMWATER DISCHARGES

- **Conditionally Exempt Non-Stormwater Discharges** (Section B, Page 20-21)
  The Regional Board has modified the list of conditionally exempt non-stormwater discharges so that it no longer includes landscape irrigation, irrigation water, and lawn watering. We would contend that a prohibition on these discharges is potentially problematic from the perspective of fostering and sustaining public support for the Program and that the approach should be focused more on collaborative public education and water conservation in conjunction with the water agencies.

  The Orange County DAMP contains a variety of BMPs and efforts to reduce pollutants in discharges associated landscape irrigation. These practices include public outreach on the use of landscape chemicals (fertilizers and pesticides) and overwatering, implementation of integrated pest management (IPM) practices within municipal programs, and water conservation measures that mandate the use of efficient irrigation systems, as well as other programs that general control pollutant sources which reduce the pollutants that might be conveyed into the MS4s by excess irrigation flows. The use of BMPs to reduce pollutants associated with runoff is a preferable and more practical approach.

  Additionally, the Permittees have sought grant funding to assist with the implementation of programs to reduce irrigation-related urban runoff. Grant programs frequently prohibit the award of grants to meet requirements of NPDES permits requirements. The inclusion of the prohibition may limit the types of grants the Permittees might otherwise be eligible for to help address this discharge since it will be a permit requirement.

  Finally, a prohibition of irrigation-related runoff may be in conflict with other permits that allow such discharges including the industrial general permit and the construction general permit. In particular, the construction permit authorizes such discharges if they are necessary for the completion of construction (and are identified in the SWPPP with appropriate BMPs). The final phase of construction includes the installation and establishment of landscaping (also known as vegetative stabilization). The establishment of new plantings to ensure long-term survival typically requires higher than normal levels of irrigation to ensure good root growth and vegetative cover prior to the onset of the rainy season to reduce erosion and sediment transport from the project site. The complete prohibition of irrigation related runoff may impede the ability of the Permittees to establish erosion resistant vegetative covering.

  The County requests that Section B. Non-Storm Water Discharges be modified to include landscape irrigation, irrigation water, and lawn watering in Section B.2.

NON-STORM WATER DRY WEATHER NUMERIC EFFLUENT LIMITATIONS (Section C, pages 22-24)

The August 12, 2009 Tentative Order continues to make the case that non-stormwater discharges are not subject to the maximum extent practicable standard and therefore subject to water quality based effluent limits. The County disagrees with this assessment for a number of technical and legal reasons which are discussed in the following paragraphs and in **Attachment A** respectively.

The technology based effluent limitation of "effectively prohibit" should continued to be the compliance standard for non-stormwater.

CWA section 402(p) (3) (B) (ii) reads as follows:

> *(B) Municipal Discharge – Permits for discharges from municipal storm sewers –*
> *(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewer;*

The corresponding regulations associated with the CWA section is 40 CFR 122.26.(d)(2)(iv)(B)(1) which clarified "effectively prohibit" by acknowledging that discharge exemptions are allowed if determined not to be sources of pollutants. Thus the CWA section and corresponding regulations may be read that a permit shall "effectively prohibit non-stormwater discharges" but may exempt certain discharges that are not sources of pollutants (i.e. de minimis discharges) from the prohibition. The CWA section does not require a full prohibition but rather an effective prohibition. The more correct finding for the Orange County permit is that non-stormwater discharges are effectively prohibited (per 402 (p) (3) (B) (ii)). However discharges that are not sources of pollutants are exempted from the prohibition.

The County would submit that the technology based standard for non-stormwater discharges into the MS4 is "effectively prohibit" just as "maximum extent practicable" is the technology based standard for all pollutants from the MS4. Furthermore, the County would submit that this technology based limit is in fact protective of water quality and compliance with water quality standards. The County has an extensive dry weather monitoring program to identify problematic discharges, including illegal discharges, which support the protection of water quality standards. It is unclear to the County how the Board has determined that these efforts are in fact inadequate to necessitate the development of water quality based effluent limits. Furthermore the TMDL program as noted in Finding E.10 and E.11 provide the appropriate regulatory vehicle to address discharges from the MS4 (both stormwater and non-stormwater discharges) that are causing and contributing to an exceedance of a water quality standard in impaired waters.

Moreover, not only are the proposed numeric WQBELs not technically or legally appropriate, they may put the permittees in constant non-compliance and subject to more draconian enforcement action (i.e. mandatory minimum penalties –see discussion below).

The San Diego draft permit for Orange County is inconsistent with the Santa Ana adopted permit for Orange County

The Santa Ana issued permit for Orange County mirrors the approach noted above, that being non-stormwater discharges are subject to the "effectively prohibit" standard. The findings and

provisions relevant to non-stormwater discharges in the Santa Ana issued permit are provided below:

> Findings:
>
> C.10. The permittees may lack legal jurisdiction over urban runoff 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 by the Regional Board. The Regional Board recognizes that the permittees should not be held responsible for such facilities and/or discharges. Similarly, certain activities that generate pollutants present in urban runoff may be beyond the ability of the permittees to eliminate. 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.
>
> C. 11. This order regulates storm water runoff and certain types of de-minimus discharges specifically authorized under Section III of this order (collectively referred to as urban runoff) from areas under the jurisdiction of the permittees. For purposes of this order, urban runoff includes storm water and authorized non-storm water (see Section III) discharges from residential, commercial, industrial and construction areas within the permitted area and excludes discharges from feedlots, dairies, and farms. Urban runoff consists of surface runoff generated from various land uses in all the hydrologic drainage areas that discharge into waters of the US. The quality of these discharges varies considerably and is affected by land use activities, basin hydrology and geology, season, the frequency and duration of storm events, and the presence of illicit discharge6 practices and illicit connections.
>
> M. 68. The MS4s generally contain non-storm water flows such as irrigation runoff, runoff from non-commercial car washes, runoff from miscellaneous washing and cleaning operations, and other nuisance flows generally referred to as de-minimus discharges. Federal regulations, 40 CFR Part 122.26(d)(2)(i)(B), prohibit the discharge of non-storm water containing pollutants into the MS4s and to waters of the U.S. unless they are regulated under a separate NPDES permit, or are exempt, as indicated in Discharge Prohibitions, Section III.3 of this order. The Regional Board adopted a number of NPDES permits to address de-minimus type of pollutant discharges. ....
>
> Provision
>
> III. 3. The permittees shall effectively prohibit the discharge of non-storm water into the MS4s, unless such discharges are authorized by a separate NPDES permit or as otherwise specified in this provision. ....

The County's approach is consistent with Federal and State law and regulations. The significantly different approach being proposed by San Diego Board will lead to considerable costs not commensurate with the water quality benefits and unhelpfully redirect Program resources from baseline program implementation to special studies.

Numeric effluent limits were developed primarily based on Basin Plan water quality objectives and not all the constituents with NELs are relevant to water quality issues in southern Orange County.

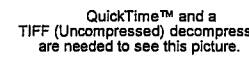
Notwithstanding the argument that water quality based effluent limits are inappropriate and not justified, the Board, if it determines that technology based limits are insufficient to meet water quality standards, is obligated to stipulate additional requirements consistent with 40 CFR 122.44. In this context the Regional Board must determine whether the discharge has a "reasonable potential" to cause or contribute to an excursion of the applicable water quality standard. (40 CFR 122.44 (d)(1)(i-iii). If determined to "cause or contribute" then effluent limits (either narrative or numeric) must be developed for the discharge. Furthermore, if numeric effluent limits are developed then they must be consistent with 40 CFR 122.45. However upon closer review there appears to be some inconsistencies between Table 4 and Finding E. 10. In Table 4 the Board has established numeric effluent limits for a list of some 17 constituent. This table would imply that the Board has determined reasonable potential for each of these constituents. However, in Finding E.10 the Board acknowledges that only four pollutants have been shown to have reasonable potential, indicator bacteria, phosphorus, toxicity, and turbidity. Furthermore Finding E.10 does not differentiate between non-stormwater and stormwater thus it's difficult to determine which pollutant is associated with the different types of discharges.

Preliminary compliance assessment of outfall data showed frequent and ongoing exceedances of numeric limits which equates to ongoing investigation

Of primary importance to the County is that the Regional Water Board adopt a permit that protects water quality in a reasonable and feasible manner. As currently drafted, the Permittees are exposed to significant risk to comply with the NELs for dry weather discharges. We have completed a comparison of existing dry weather discharges with the selected NELs noted in Table 4. The results of that comparison are shown below:

Constituent	Percentage of time > NELs
Turbidity	4.9
Surfactants	5.7
Dissolved Oxygen	5.4 below 5 ppm
Total Phosphorus@	93.6 Orthophosphate Fraction
Nitrate + Nitrite	>93.8 – NEL changed to Total N
Fecal coliform	90.0
Enterrococcus	97.3
Nickel (dissolved)	>5.0
Copper (dissolved)	>3.0
Cadmium (dissolved)	>16.0

Clear from this analysis is that for certain constituents, notably nutrients and bacteria, the entire drainage system will very rarely be found to be meeting the NELs. An analysis of data from Orange County stream reference sites, i.e. sites removed from urban influence, shows the same patterns of NEL exceedance.



Current language still exposes Municipalities to Mandatory Minimum Penalties for not complying with the numeric limits.

As demonstrated above, the County/Permittees will face enforcement action for not complying with all the NELs. Where there is exceedance, the Permittees will be faced with financial liability under several different enforcement regimes. First, the NELs, as proposed in the Revised Tentative Order, would clearly constitute numeric effluent limitations. Violation of effluent limitations in an NPDES permit subjects the Permittees to potential mandatory minimum penalties (MMPs). (See Water Code §§ 13385(h) and 13385.1). In addition, non-compliance with the NELs may subject the Permittees to additional enforcement actions imposed by the Regional Water Board and through third party actions under the citizen suit provisions of the CWA. Although the Tentative Order is structured to clarify that compliance with Non-Stormwater Dry Weather Numeric Effluent Limits Section C is met by one of three follow-up actions, the structure appears in conflict with the options available under §13385 to avoid MMPs. Once a numeric limits is established then there are limited options[5] available to avoid

[5] The CWC does provide exemptions to the MMPs but these exemptions are primarily limited to violations caused by an act of war, an unanticipated natural disaster, an intentional act of a third party, or start up for a new wastewater plant (Section 13385(j)(1) or when the discharger is in compliance with either a cease and desist order or a time schedule order (Section 13385(j)(2)).

MMPs. As a case in point during the 09/02/09 State Water Board hearing regarding the subject of MMPs resulting from non-compliance with proposed numeric effluent limits in the Construction General Permit, the State Board chair was seeking flexibility in implementing the numeric effluent limits without subjecting the discharger to MMPs. He suggested a phase in period. When this question was posed to Board legal counsel she said that such an approach was not legally valid and that MMPs would apply immediately. Thus it would appear that even though the San Diego Board staff may have intentions to provide flexibility to the Permittees to conduct the iterative process and follow up investigation efforts to avoid MMPs, the California Water Code does not provide such flexibility and the Permittees would be subject to MMP should they violate the NELs.

Derivation of numeric effluent limits are based on numerous assumptions and puts the Permittees in a position of endless monitoring and investigation.

Not withstanding our comments above regarding the inappropriateness of WQBELs the County reviewed the derivation of the NELs and found a number of assumptions that will need to be verified to support modification of the NELs[6]. We have highlighted some of the major assumptions below:

- No dilution was available for inland surface water bodies and bays and harbors. Such an approach assumes a worst case situation and essentially results in the dischargers having to meet water quality objectives at the point of discharge.
- Reasonable potential was not conducted on individual outfalls but rather on the overall drainage system, resulting in a single set of effluent limits for all outfalls to a specified water body. If, however, reasonable potential is done on an outfall by outfall basis the number of constituents and magnitude of the effluent limitations will be different.
- With the exception of chromium VI, freshwater water quality criteria were not used in determining effluent limitations. The Water Board calculated all effluent limitations using saltwater water quality criteria, which are not hardness-dependent. This approach essentially assumes that the receiving waters are all saltwater which is inappropriate for discharges to inland surface waters. The Tentative Order does allow adjustment in site-specific hardness for determining the applicable water quality criteria when calculating effluent limitations. However, the use of the hardness-based water quality criteria equations needs to be clarified as to whether they apply to the receiving water and used in effluent limitation calculations or if they are the actual effluent limitations. In addition, all hardness-based water quality criteria equations should include an appropriate compliance period.
- Default conversion factors were used to convert dissolved metal water quality criteria to total metal water quality criteria. Again this assumption has typically been shown to be a worst case assumption and more appropriate conversion factors are available.

The overall effect of these assumptions is that reasonable potential was determined for a number of constituents for all outfalls. Given the exposure and liability of NELs the Permittees would be well served to conduct numerous special studies (e.g. dilution studies, translator studies) to validate the assumptions and develop site specific objectives for individual outfalls. Such an effort, although prudent from the Permittees perspective, seems misplaced and not the best use of our limited resources.

[6] The County's review also included a review of the calculations used to determine the NELs. This review will be provided to the Board once it has been validated.

Closing

In closing, the County would submit that the use of NELs for non-stormwater discharges is inappropriate and premature at best. The TMDL program provides the safety net for ensuring that our water bodies are protected in the most reasonable and effective manner. The direct translation of water quality objectives into numeric effluent limits bypasses the TMDL process. Some of our non-stormwater discharges will exceed the NEL but have no effect on the receiving water quality or beneficial uses. But under the proposed Order the Permittees would be obligated to expend considerable investigative resources without a reciprocal water quality benefit. This requirement will prove to be poor public policy and use of public funds.

The establishment of NELs for non-stormwater discharges is fundamentally flawed from a technical and legal perspective. The current TBEL of "effectively prohibit" for non-stormwater discharges from the MS4 when implemented fully, coupled with the MEP standard for discharges of all pollutants from the MS4, will lead to compliance with water quality standards, negating the need for WQBELs. If, on the other hand, they are proposed as water quality based numeric limits then their derivation must also follow Federal and state regulations (primarily the State Implementation Plan). The County has suggested and continues to suggest that the values be used as "Non Stormwater Action Levels", similar to the approach taken with stormwater (see discussion that follows). Furthermore, the technical feasibility of complying with these numeric limits is questionable especially since our drinking water supply would not be able to comply with the limits.

STORM WATER ACTION LEVELS (Section D, Pages 25-26)

The County appreciates the Regional Board staff efforts to address our many concerns with the earlier draft Orders regarding municipal action levels. The County believes that the current structure for storm water action levels (SWALs) is consistent with the approach proposed by the State Water Resources Control Board's "Blue Ribbon Panel of Experts," as expressed in the June 2006 Blue Ribbon Panel Report ("BRP Report"). This approach would also meet the Regional Water Board's desire to include performance measures in a municipal stormwater program for Orange County.

To achieve these goals, we support an approach that "would set "an 'upset' value, which is clearly above the normal observed variability, which would allow bad actor catchments to receive additional attention" (see BRP Report at p. 8.). The BRP Report further clarified that upset value as "...an Action Level because the water quality discharge from such locations are enough of a concern that most all could agree that some action should be taken..." (Id.) In general, the August 12, 2009 Tentative Order accomplishes this goal.

However, the SWAL would be even more relevant and constructive to our Program by considering the following:

- Not all constituents for which action levels were developed are identified as pollutants of concern by the Program;
- Considerable resources are required to address this requirement without relief from other monitoring efforts; and
- No 'safe harbor' provision - thus municipalities may be in a never ending iterative process.

The County submits that Table 5 should be modified to reflect the Program constituents of concern (COCs). As such, SWALs should only include turbidity, nitrogen forms, total phosphorus, copper, lead and zinc. By focusing our limited resources on our COCs we will be better able to address water quality issues relevant to our discharges. In addition, some of our constituents of concern may serve as surrogates for a generic class of pollutants. Thus, by addressing one constituent, the program will receive the benefit of addressing the entire generic class (e.g. by addressing copper we will likely address lead, nickel and zinc).

More importantly, the Tentative Order represents a quantum leap in program costs associated with monitoring and follow-up investigations. Given our limited to non-existent ability to raise revenues to support our program and the general state of the economy, we respectfully request that the constituents subject to SWAL be limited to the constituents of concern noted above. Furthermore, we request that the Board develop a "program cost neutral" permit, meaning that the new Order will reflect the costs currently encumbered. SWAL monitoring for 2 outfalls in each hydrologic sub-area would require an immediate investment of an additional $217,000 - $224,000 in monitoring equipment and a significant subsequent commitment of staff and analytical resources.

The County requests that the SWALs only include turbidity, nitrogen forms, total phosphorus, copper, lead and zinc and that an opportunity to validate the utility of wet weather outfall monitoring using a no more than 7 outfalls be provided prior to possible system-wide application of this approach to benchmarking.

LEGAL AUTHORITY

- **Effectiveness of BMPs** (Section E.1.j, Page 27)
  The Tentative Order continues to include a new provision that requires the Permittees to demonstrate that they have the legal authority to require documentation on the effectiveness of BMPs. In fact, the County is unaware of any other MS4 permit within the State of California with this requirement. The County has concerns about this provision for the following reasons:

  - As it is currently written, this provision broadly applies to any aspect of the stormwater program where BMPs have been implemented – the result is that this provision sets up a process for the establishment of multiple third party monitoring programs and expenditure of a significant amount of funds to monitor the effectiveness of BMPs. If the desire is to document the effectiveness of certain types of BMPs, it would be much more effective and scientifically sound to establish special studies by entities qualified to conduct such sampling instead of requiring potentially hundreds of third parties to conduct a monitoring program for every BMP that is implemented.

  - This provision is redundant with other requirements in the permit in that it ignores the fact that the New Development/Significant Redevelopment section of the DAMP (Section 7.0) establishes a process for the selection, design, and long-term maintenance of permanent BMPs for new development and significant redevelopment projects and requires developers to select BMPs that have been demonstrated as effective for their project category. By going through a thorough process, the Permittees have determined what BMPs would be effective for a

particular project – thus eliminating the need to establish a monitoring program for every BMP implemented.

- This provision ignores the fact that the Permittees have already established legal authority for their development standards so that project proponents have to incorporate and implement the required BMPs.

- In the Response to Comments IV, Regional Board staff state, as a part of their justification for this requirement, that USEPA identified that the MS4s need to have the authority to enter, sample, review, inspect, and require regular reports (in addition to some other aspects). However, while USEPA identified that they want the MS4s to establish basic legal authority – the legal authority did not, in fact, specifically extend to the monitoring of all BMPs implemented by third parties. In addition, this section of the guidance speaks to the municipalities legal authority to control the discharge of pollutants, which the County has pursuant to the codes and ordinances that have been adopted and the guidance documents that have been developed.

The County requests that this provision be deleted from the Order.

- **Water Rights Issue** (Section E.1. Page 26 and Section F.1.d.(4)(d) Page 35-36)
The Tentative Order appears to have conflicting objectives regarding water rights. The conflict arises in the following permit sections (the conflicting language is underlined below).

  E.1. Each Copermittee must establish, maintain, and enforce adequate legal authority to control pollutant discharges into and from its MS4 through ordinance, statute, permit, contract or similar means. Nothing herein shall authorize a Co-Permittee or other discharger regulated under the terms of this order to divert, store or otherwise impound water if such action is reasonably anticipated to harm downstream water right holders in the exercise of their water rights. [emphasis added]

  F.1.d.(4)(d) LID BMPs sizing criteria
  (i) LID BMPs shall be sized and designed to ensure onsite retention without runoff, of the volume of runoff produced from a 24-hour 85thpercentile storm event, as determined from the County of Orange's 85th Percentile Precipitation Map15 ("design capture volume"); [emphasis added]

  The LID BMP criterion clearly changes the natural water balance[7] and may be construed to harm the downstream water rights holders. The effort to determine whether downstream water rights users are harmed from upstream development that changes the water balance will be a challenge and may ultimately lead to legal action. Given the uncertainty of downstream water rights, the Tentative Order should provide flexibility with the LID standard to allow runoff when conditions limit on-site retention. Whether these conditions are technical or legal in nature it is important to have flexibility in the permit to accommodate either or both conditions.

[7] To accommodate the natural water balance, the runoff volume from a developed site would be equal to the runoff from a predevelopment site.

Since the framework for addressing new development and significant redevelopment must be as flexible in order to address the variety of issues that will arise during the course of the permit implementation, the County strongly recommends that the Development Planning Component be modified as necessary for greater consistency with Order R8-2009-0030 (Water Quality Management Plan for Urban Runoff) which provides for flexibility.

JURISDICTIONAL URBAN RUNOFF MANAGEMENT PROGRAM

Development Planning Component

- **LID BMPs** (Section F.1.c.(2), Page 29)
  Provision F.1.c.2 identifies that the LID BMPs listed in the provision shall be implemented at all Development Projects where applicable and feasible, however no definition of "applicable and feasible" is identified in the provision or within the fact sheet. The determination of feasibility of implementing the LID BMPs identified in the provision should be the responsibility of the Permittees.

  NOTE: The previous comments on this issue made by the Permittees were not adequately addressed in the Regional Board's Response to Comments document dated July 1, 2009, and are therefore resubmitted. The Response to Comments document dated July 1, 2009 identifies that the LID requirements have been substantially modified and that more robust criteria is expected in the Copermittee's updated SUSMP document. The updated SUSMP document is the responsibility of the co-permittees which will include a definition of applicable and feasible for LID BMPs so ultimately it will be the determination by the permittee of where LID BMPs are applicable and feasible.

  The County requests that the Provision be modified as follows:

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

- **Infiltration and Groundwater Protection** (Section F.1.c.(6), Page 29-30)
  The Regional Board Response to Comments dated July 1, 2009 identifies that the criteria set forth in this section are the minimum requirements for infiltration and that there is flexibility in the Tentative Order for the Copermittees to develop criteria for infiltration treatment devices. We have a number of concerns with this provision. First is the apparent free pass onsite infiltration BMPs receive even in areas with high groundwater and/or brown fields with legacy contamination issues. Such environmental conditions should be acknowledged and addressed. Second the "minimum requirements" identified in the Tentative Order are not minimum but are very prescriptive and no current technical basis is provided for these provisions in the Fact Sheet or in the Response to Comments dated July 1, 2009.

  The document *U.S. Environmental Protection Agency. 1994. Potential Groundwater Contamination from Intentional and Nonintentional Stormwater Infiltration. EPA 600 SR-94 051* that is referenced as guidance for infiltration of stormwater in the Order No. R9-2002-0001 Fact Sheet and in the Response to Comments dated July 1, 2009 is more than 15 years old and does not provide an adequate technical basis for the requirements related to infiltration of stormwater, except for provision F.1.c.(6) g.. And even for

provision F.1.c.(6)g, a closer review of this document will show that the study evaluated the impact of industrial stormwater discharges into local groundwater. However, the site soil conditions had a poorly defined soil structure and included gravel. Thus stormwater from the industrial site was discharged in an almost direct conduit to the groundwater. The County would submit that the Tentative Order should require the Permittees to develop criteria for the use of infiltration BMPs (both on site and centralized BMPs) that consider land use, runoff quality, groundwater depth, site soil conditions and other information relevant to groundwater protection.

Since the Fact Sheet, and the Regional Board Response to Comments dated July 1, 2009 does not provide adequate technical basis for the requirements, the County requests that Section F.1.c.(6) should be deleted and replaced with the following language:

The Copermittees shall, within 2 years of the adoption of this order, develop criteria for the use of infiltration BMPs that consider land use, runoff quality, groundwater depth and quality, site soil conditions and other information relevant to groundwater protection.

Notwithstanding our comment and recommendation above we have specific concerns regarding the restrictions being specified in the draft Order.

- First, the requirement in Section F.1.c.(6)(a) to implement pretreatment prior to infiltration is excessive. It may be appropriate to require pretreatment for sites with certain pollutant generating activities but to have a broad brush requirement for pretreatment for all land uses make little sense and is not technically supported.

- In Section F.1.c.(6)(b) the requirement that infiltration BMPs cannot be used for dry weather flows containing significant pollutant loads is impractical and does not reflect the performance of the soil. The soil mantel is an effective treatment media and the blanket prohibition of the use of infiltration BMPs for dry weather flows eliminate an effective BMP from the permittees tool box.

- Section F.1.c.(6)(g) restricts the use of infiltration treatment control BMPs in areas of industrial or light industrial activity and areas subject to high vehicular traffic. High vehicular traffic is defined as 25,000 or greater average daily traffic on main roadway or 15,000 or more average daily traffic on any intersecting roadway. The Regional Board Response to Comments dated July 1, 2009 identifies that "The restriction on areas with high vehicular traffic is included on the recommendation of the USEPA guidance that the commenter (County of Orange) cited." The USEPA guidance that was cited is the *U.S. Environmental Protection Agency. 1994. Potential Groundwater Contamination from Intentional and Nonintentional Stormwater Infiltration. EPA 600 SR-94 051*, which contains no recommendation regarding vehicular traffic and infiltration devices and therefore doe not provide a specific technical basis for this restriction. As such, prescriptive requirements should not be included in the Tentative Order unless there is a strong technical basis. Moreover, we are not aware of any demonstrated relationship between traffic counts and frequency of materials deposited on the street, nor are such restrictions placed on the California