Regional Board Meeting
January 24, 2007

Item 11

Supporting Document # 1

Written Comments from Copermittees and Interested Parties

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Written Comments from Copermittees and Interested Parties

A. San Diego Copermittees' Technical Comments

(submitted by County of San Diego)

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C. City of Chula Vista (dated January 2, 2007)

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G. CCWHE, BIASDC, CBIA, CICWQ, BILD, CBPA, NAIOP, ICSC (submitted by Foley & Lardner LLP)

H. Natural Resources Defense Council (dated January 2, 2007)

I. Natural Resources Defense Council (dated December 11, 2006)

J. San Diego Unified School District

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A. San Diego Copermittees' Technical Comments (submitted by County of San Diego)

County of San Diego

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1600 PACIFIC HIGHWAY, STE. 209, SAN DIEGO, CA 92101-2472

January 2, 2007

Mr. John Robertus
Executive Officer
California Regional Water Quality Control Board
San Diego Region 9
9174 Sky Park Court, Ste. 100
San Diego, CA 92123-4340

COPERMITTEE COMMENTS ON TENTATIVE ORDER NO. R9-2006-0011

Dear Mr. ~~Robertus~~ John:

On behalf of itself and the 20 additional Copermittees subject to NPDES Order No. 2001-01 (San Diego Municipal Stormwater Permit), the County of San Diego is pleased to submit the following comments on the December 13, 2006 draft of Tentative Order No. R9-2006-0011.

The Copermittees appreciate the opportunity to provide preliminary input on the revised draft Order, but we are concerned that the time in which any interested person, including the Copermittees, may submit written comments is inadequate. The Request for Public Comments was issued on December 15, 2006 and it states all written comments should be received no later than 5:00 p.m., January 2, 2007. The Copermittees respectfully request the Regional Board provide additional time for public comment for the following reasons: the short amount of time between the issue date of the Request and the date responses are due, the inclusion of two legal holidays within that time, and that given the time of year, the likelihood that many interested persons had previously scheduled vacations during this time and were therefore unavailable to provide well reasoned and timely responses.

The Copermittees also raise a concern regarding the apparent notification of a Regional Board meeting to consider the Tentative Order. This notification is included in the Request for Public Comment and states the "Tentative Order is *tentatively* scheduled to be considered for adoption by the Regional Board at a meeting to be held on January 24, 2007." (Emphasis added). It is our understanding that at their November 2006 meeting, the Regional Board scheduled their regular meetings for the coming year (2007). A January 2007 meeting was not included. Therefore, it is our request that the public receive adequate notice of a properly scheduled meeting in accordance with

Water Code sections 13204, 13384 and the applicable provisions of the California Code of Regulations.

Because of the short time frame provided, the comments below are intended only to summarize our existing concerns. The Copermittees are also working to develop specific textual edits that we believe would resolve these concerns, but we will require additional time for internal review and discussion, and we will require time to receive input from other parties, including the building and environmental communities. We therefore intend to submit additional detailed comments separately within the next few weeks. We would welcome the opportunity to discuss our comments with your staff prior to the January 24 RWQCB meeting.

1. Definition of Priority Development Project

Section D.1.d.(1)(b) requires that Copermittees include all projects that "are equal to one acre in size or greater" as Priority Development Projects within three years of adoption of the Order. To avoid potential ambiguity, we request this language be modified to provide a more specific criterion for inclusion. Since other stormwater permits in the state have already incorporated such provisions, the Copermittees recommend that similar or identical language be used. In particular, the San Mateo Countywide NPDES Municipal Stormwater Permit (Order No. R2-2003-0023) includes projects that "create one acre or more of new impervious surface."

2. Low Impact Development (LID) Requirements

The Copermittees' comments on LID address Tentative Order section D.1.d. in general and other specific sections and subsections as referenced. Although we are not commenting on other portions of the Tentative Order at this time, sections D.5 (Education), J.3 (Annual Reports), and Attachment C (Definitions), will also likely require minor modifications in accordance with other suggested changes.

The Copermittees' primary concern at this time relates to the way in which LID requirements are incorporated in the draft. In short, the draft relies primarily on textual edits without the corresponding structural modifications. As an example, the term "LID" has been inserted as a modifier to "site design BMPs" in numerous instances (see sections D.1.c(2), D.1.d(4), etc.). While these changes appear to be aimed at increasing LID content in Copermittee programs, they instead limit the application of LID principles to site design BMPs. In fact, LID concepts should first be addressed during site planning and then be reflected through the appropriate selection of site design, source control, and treatment control BMPs. A similar problem is presented in section D.1.d(4)(b), where site planning practices (conserve natural areas, minimize impervious footprint, etc.) are incorrectly presented as "site design BMPs".

Clearly LID is an important component of efforts to manage the future quality of runoff from development in this region. However, the imposition of edits on top of existing text will not provide the well-reasoned and internally consistent approach necessary to achieve that objective and may instead produce critical errors in the development of these requirements. Potential oversights are also a concern. For example, the relationship of existing numeric sizing criteria standard (section D.1.d.(6)) to the implementation of additional site design and source control BMPs is unclear. Such

issues as how the numeric sizing criteria would apply once higher level of site design and source control BMPs are implemented need to be addressed.

Another important area of Copermittee concern is the general lack of a collaborative process provided for developing key program content. For example, section D.1.d(4)(b) requires that Copermittees develop and then require project applicants to use specific criteria for determining the applicability and feasibility of BMPs within one year of permit adoption. This is problematic because the short time frame does not provide Copermittees sufficient opportunity to work together in developing the criteria. It also undercuts public participation because interested parties such as the building and environmental communities will find it difficult to review and comment on 21 versions of the criteria. Finally, it all but assures that different criteria will be developed and implemented in each Copermittee's jurisdiction.

The Copermittees believe a collaborative approach, similar to that used to develop the Model Standard Urban Stormwater Mitigation Plan (SUSMP), should instead be pursued. Requiring the Copermittees to work together to update the Model SUSMP to include LID concepts is likely to create a much better product than tasking them with individually developing and implementing significant new content in a single year. In addition to increasing public participation, it would have the added benefit of providing necessary RWQCB review and approval into the process. It should be noted that the modified "LID Site Design BMP Substitution Program" contained in section D.1.d(7) would not effectively serve that purpose. Since that program is completely voluntary, it is unlikely to result in its stated objective of the substitution of a "high level of LID site design BMPs for implementation of some or all treatment control BMPs." Given the lengthy list of requirements contained in that section, Copermittees would simply have no reason to look beyond the detailed first year requirements of sections D.1.d(4) (LID Site Design BMP Requirements) and D.1.d(5) (Source Control BMP Requirements).

We hope this submittal is helpful in finalizing the Tentative Order, and we look forward to continued dialogue with you and your staff. As noted, we intend to submit more detailed comments separately within the next few weeks. If you have any questions, please contact Jon Van Rhyn at (858) 495-5133.

Sincerely,

Kathleen A. Flannery for

CHANDRA L. WALLAR
Deputy Chief Administrative Officer
Land Use and Environment Group

JVR/elz

cc: Municipal Stormwater Copermittees
Phil Hammer

B. San Diego Copermittees' Legal Comments (submitted by McDougal, Love, Eckis, Smith, Boehmer & Foley)

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OF COUNSEL:
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January 2, 2007

Board of Directors
California Regional Water Quality Control Board
San Diego – Region 9
9174 Sky Park Court
San Diego, CA 92123

Re: NPDES Permit No. CAS 0108758 (Tentative Order No. R9-2006-0011)

Honorable Board Members:

This correspondence and accompanying materials is submitted on behalf of the Co-permittees for the continued Board hearing regarding re-issuance of the San Diego County Storm Water Permit. Currently, the matter is set for January 24, 2007. The purpose of this correspondence is to supply the Regional Board with information from other jurisdictions regarding the issue of state versus federal mandates. In the Regional Board's staff "Responses to Comments II," there was a lack of specifics as to the Co-permittees' comments related to the state mandates contained within the permit. On page 34 of the Responses to Comments II, the Regional Board's staff merely stated that no state mandates appeared anywhere in the proposed permit. On Page 43, the staff cited cases that pre-date the passage of Proposition 1A to defend its position regarding the funding of state mandates. Nowhere in the document entitled "Responses to Comments II" are there any specifics regarding the legal justification for the claims of Regional Board staff.

Once again, the Co-permittees do not contest any specific permit condition as part of this argument. However, the question ultimately becomes who pays for the state mandated costs found within the proposed permit. In the only court case to date, a trial court decision in the Los Angeles Superior Court indicates that constitutional requirements of Proposition 1A are applicable to a Regional Water Quality Control Board permit.

To assist the Regional Board on this issue, this correspondence has a series of attachments that came from the U.S. EPA website or links to the Federal website. The attached permits from around the country are referenced on the EPA storm water website and provide guidance on this state versus federal mandate issue. Each permit is the most current for the jurisdiction in question as listed on the website or the applicable links. These NPDES permits for similar-sized jurisdictions are as follows:

Exhibit A:	Eugene, Oregon
Exhibit B:	Portland, Oregon
Exhibit C:	Oklahoma City, Oklahoma
Exhibit D:	Tulsa, Oklahoma
Exhibit E:	Corpus Christie, Texas
Exhibit F:	Sarasota County, Florida

The permits in question, while in varying formats, are consistent in several respects. First, they reference programs that do not list specific implementation measures over and above Federal requirements. None contain effluent limits, and only require regulation to MEP standards. In the case of Portland, Oregon, state law specifically allows regulations to be based on effluent limits. However, the regulators have determined that the MEP standard, under Federal law, meets the intent of the Oregon state law. Another common feature of the permits is the lack of specificity in frequency of maintenance and other routine obligations. Finally, none of the permits specifically require legislative amendments to General Plans or environmental procedures, but stick to the Federal requirements of the establishment of general programs to meet the goals and objectives of EPA regulations.

It is requested that these permits be incorporated into the Administrative Record and reviewed and compared to the proposed permit. Such a comparison will validate the concerns raised by the Co-permittees that many of the permit conditions go beyond Federal mandates.

Yours very truly,

James P. Lough, Chair
Co-permittee City Attorney Committee

JPL:kld

Cc: Gary Brown

Attachments to the San Diego Copermittees' Legal Comments have been provided to the Regional Board members. They are available upon request.

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C. City of Chula Vista (dated January 2, 2007)

CITY OF
CHULA VISTA

DEPARTMENT OF PUBLIC WORKS OPERATIONS

January 2, 2007
File # 0780-85-KY181

Regional Water Quality Control Board
San Diego Region
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4340
Attention: Mr. John Robertus, Executive Officer

SUBJECT: COMMENTS ON THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES) TENTATIVE ORDER NO. R9-2006-0011, REVISED DECEMBER 13, 2006
RWQCB REFERENCE: WPS: 10-5000.02:HAMMP

The City of Chula Vista appreciates this opportunity to provide comments on the modifications to the Revised Tentative Order No. R9-2006-0011 dated December 13, 2006. While the issue of unfunded state mandates is still outstanding and may be commented on under separate cover by the City Attorney's Office, comments on the technical aspects of the modifications to the Tentative Order are provided below.

The majority of technical comments provided in this letter pertain to revised language in Section D of the Tentative Order. While the intent of the requirements in this section have been discussed in supporting documentation provided with previous drafts of the Tentative Order, very limited rationale or justification has been provided for many of the significant changes made within Section D of the December 4, 2006 revision to the Tentative Order. Specifically, the Fact Sheet/Technical Report minimally explains these revisions.

The latest revision to the Tentative Order includes changes throughout Section D that minimize the discretion of Copermittees in the determination of applicability and feasibility of Low Impact Development (LID) site design BMPs. In view of the broad spectrum of development projects, the Copermittees must have adequate flexibility to decide when specific requirements are not applicable or feasible. Limiting the Copermittees' discretion and land use authority will shift the focus from water quality improvement to regulatory compliance, which is not the intent of the Tentative Order. More specific comments on the latest revision of the Tentative Order are provided below:

1. Section D.1.d.(1)(b) on Page 17 – The rationale for the addition of "all development projects equal to one acre in size or greater" to the list of Priority Development

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Phone (619) 397-6000

Project Categories is not apparent. This additional category may include single-family homes, community parks, or other similar land uses that may by themselves be considered to be Best Management Practices. Imposing stringent requirements on non-polluting or self sustaining land uses will divert focus from polluting land uses and result in less efficient program implementation. The City of Chula Vista requests removal of the subject category from the list of Priority Development Project Categories.

2. Section D.1.d(4)(a) on Page 19 – This section requires all Priority Development Projects to implement LID site design BMPs irrespective of feasibility and practicality. Under Sub-Paragraphs i and ii consideration has been given to development projects with landscaped areas, while projects without landscaped areas, or with landscaped areas unsuitable for drainage (i.e. close to structures, or up-slope of impervious areas) have not been anticipated. The City of Chula Vista requests inclusion of exemptions for projects where compliance with these requirements is infeasible. Also, it must be clarified whether or not these requirements apply to re-development projects. Redevelopment projects have much more challenging site constraints than new development projects.

   Again, the Copermittees must retain flexibility in making land use decisions and selecting BMPs that meet the intent of the Standard Urban Storm Water Mitigation Plan (SUSMP) requirements.

3. Section D.1.d(4)(a)i on Page 19 – It is stated, "The size of the impervious areas that are to drain to pervious areas shall correspond with the total size of the project's pervious areas, taking into consideration the pervious areas' soil conditions, slope, and other pertinent factors." This language is vague and ambiguous and its intent is not evident. Please revise.

4. Section D.1.d(4)(b) on Page 19 – It is stated, "The following LID site design BMPs listed below shall be implemented at all Priority Development Projects where applicable and feasible." The first and second parts of this sentence are contradictory. While the first part makes it mandatory for all Priority Development Projects to implement LID site design BMPs, the second part includes consideration for applicability and feasibility. Please clarify the requirement.

5. Section D.1.d(4)(b).v on Page 20 requires projects to "Minimize disturbances to natural drainages (e.g., natural swales, topographic depressions, etc.). This requirement basically precludes all grading activities since all grading activities require some form of disturbance of existing topography. It is requested that this requirement be deleted from the Tentative Order.

   In addition, this requirement, if narrowly interpreted and applied, could potentially constitute a "take" of private property by prohibiting grading in areas in which natural, ephemeral drainages of little or no environmental significance exist. Further, the California Environmental Quality Act (CEQA) includes provisions for the

protection of significant environmental resources and this requirement may significantly exceed CEQA.

6. Section D.1.d.(13) on Page 24 – This section requires Copermittees to update the BMPs listed in their local SUSMPs and remove obsolete or ineffective BMPs. While the use of higher efficiency BMPs should be encouraged, the City of Chula Vista does not recommend removing lower efficiency BMPs as viable options. In some projects, a combination of low efficiency BMPs, designed to operate as a treatment train, is the only feasible option, and meets medium to high efficiency treatment requirements.

   Some of the new LID requirements in the December 4, 2006 revision to the Tentative Order have the potential to severely and unnecessarily impinge upon the Copermittees' land use authority and discretion. Further, the December 4, 2006 revision removes the term "as determined by the Copermittee" with respect to the determination of applicability and feasibility of specific LID site design BMPs for individual projects. Any lessening of the Copermittees' land use authorities is unacceptable and the requirements within the current version of the Tentative Order, if not revised, could result in the vesting of significant authority to the Regional Board and its staff over local land use decisions.

7. Section D.3.a.(2)(d) on Page 32 – The definition of flood control devices is not evident in this section. If by "existing flood control devices" it is intended to refer to all components of existing drainage systems, the task is impossible. Additionally, most of the flood control devices are within receiving waters, and according to the Regional Board implementation of treatment control BMPs within receiving waters is not permitted.

We trust that the Regional Board will give full consideration to the above comments and recommendations in order to facilitate continued compliance by the Copermittees and to improve effectiveness of the Municipal Permit program.

Should you have any questions or if you need further information, please call Kirk Ammerman, Principal Civil Engineer, at (619) 397-6121. Thank you.

Sincerely,

DAVE BYERS
DIRECTOR OF PUBLIC WORKS OPERATIONS

Cc: Jim Thomson, Interim City Manager
Dana Smith, Assistant City Manager
Sharon Marshall, Senior Assistant City Attorney
Rick Hopkins, Assistant Director of Public Works Operations
Kirk Ammerman, Principal Civil Engineer

K:\Public Works Operations\NPDES\New Permit\Comments on the Dec. 13, 2006 Tentative Order.doc

January 24, 2007 Regional Board Meeting
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D. City of Chula Vista (dated December 11, 2006)

CITY OF
CHULA VISTA

OFFICE OF THE CITY MANAGER

December 11, 2006
File # 0780-85-KY181

Regional Water Quality Control Board
San Diego Region
9174 Sky Park Court, Suite 100
San Diego, CA 92123

Attention: Mr. John Robertus, Executive Officer

SUBJECT: TENTATIVE ORDER NO. R9-2006-0011, SAN DIEGO COUNTY MUNICIPAL STORM WATER PERMIT

Dear Mr. Robertus:

Since the first draft of the Tentative Order was circulated for public review and comment on March 10, 2006, City of Chula Vista staff has been heavily involved in the public review and comment process and has, both individually and jointly with Co-Permittees of the San Diego County Municipal Permit, provided comments. Most of the technical comments have been addressed in the subsequent amendments to the Tentative Order. However, significant issues remain that need to be addressed by the Regional Board if effective program implementation and water quality improvements are expected. The City of Chula Vista's major concerns at this time are as follows:

1. In our previous comments, we brought to your attention and we believe that many of the requirements in the Tentative Order are unfunded state mandates. The City of Chula Vista does not have any objection to those requirements, provided that the State Legislature commits to reimbursing the Co-Permittees under Article XIII B, Section 6 of the California Constitution.

2. The final revision of the Tentative Order was issued on December 4, 2006. New requirements have been added to the Tentative Order regarding Priority Development Projects and Low Impact Development that include vague and ambiguous language and may have significant impact on the Co-Permittees and developers. In view of the fact that the Regional Board intends to adopt the Tentative Order on December 13, 2006, and opportunity for public comment has neither been provided nor allowed by the Regional Board for this newly added language, there is a potential for future conflict with regard to interpretation and eventual failure of the intent. Further, the following excerpt from the "Executive Officer's Summary Report" for Agenda Item

10 (consideration of the Tentative Order by the Regional Board) fails to disclose revisions made to the Tentative Order after August 30, 2006.

PUBLIC NOTICE:	A public hearing on the Tentative Order was held June 21, 2006. A revised Tentative Order, with supporting documents and a Notice of Availability, was issued to interested parties on August 30, 2006. Notification of the issuance of the revised Tentative Order was also posted on the Regional Board's webpage on August 30, 2006 and in the San Diego Union Tribune on September 8, 2006. The notification indicated the Regional Board's intent to consider adoption of the Tentative Order at the December 13, 2006 Regional Board meeting. The December 13, 2006 Regional Board meeting Agenda notified interested parties that adoption of the Tentative Order would be considered.

Based on the above, the City of Chula Vista requests that the adoption of the Tentative Order be postponed until such time that the Regional Board and the Co-Permittees' staffs resolve the issue of unfunded state mandates and the Co-Permittees have any opportunity to provide comments on the newly added permit language.

Sincerely,

JIM THOMSON
INTERIM CITY MANAGER

cc: Mayor and City Council
Dana Smith, Assistant City Manager
Dave Byers, Director of Public Works Operations
Sharon Marshall, Senior Assistant City Attorney
Mr. Phil Hammer, Environmental Scientist, Regional Water Quality Control Board, 9174 Sky Park Court, Suite 100, San Diego, CA 92123

E. City of San Diego

THE CITY OF SAN DIEGO

January 2, 2007

Mr. John Robertus
Executive Officer
San Diego Regional Water Quality Control Board
9174 Sky Park Court, Suite 100
San Diego, CA 92123

Subject: Review of Tentative Order No. R9-2006-0011

Dear Mr. Robertus:

Thank you for the opportunity to comment on the Regional Water Quality Control Board's Draft San Diego County Municipal Storm Water Permit (Tentative Order No. R9-2006-0011, hereinafter referred to as "Draft Permit") dated December 13, 2006. The City remains committed to protecting and improving water quality in our region, and we also agree with and support the intent of the Draft Permit. Simultaneously, the City recognizes our obligation to our citizens to maximize water quality efforts in the most efficient manner possible. To that end, the City remains committed to continuing work with the Regional Board to improve the efficiency and effectiveness of the Draft Permit. Therefore, the City's comments provided with this letter focus principally on identifying more efficient, cost effective ways to achieve the regulatory intent of various Draft Permit programs.

Receiving Water and Urban Runoff Monitoring and Reporting Program No. R9-2006-001 Section II.B.3; Page 10

The City of San Diego supports in concept the proposal by Regional Board staff to provide two options for the development of the Dry Weather Monitoring site selection criteria. The first option proposed is to select a site within every "cell" created by overlaying a ¼ mile grid across the city. For the City of San Diego, this would result in 4,500 dry weather monitoring sites. The second option allows the City to non-randomly select sites provided adequate coverage of the entire MS4 system is ensured and that the selection of stations meets, exceeds, or provides equivalent coverage to the grid alternative.

The City recommends that the permit include a maximum cap of stations that are expected to be selected under the Dry Weather Monitoring Program and suggests that the permit

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provide guidance consistent with 40 CFR Section 122.26 (d)(1)(iv)(D)(6) and 40 CFR Section 122.26 (d)(1)(iv)(D)(7) to set this cap at 500 sites.

Receiving Water and Urban Runoff Monitoring and Reporting Program No. R9-2006-001 Section II.B.3; Page 13

This component of the program requires that the revised Dry Weather Monitoring Program commence by May 1, 2007. This date has not changed since the permit was originally scheduled for adoption in June, 2006 and thus originally allowed eleven months for development of the program. The City recommends that the commencement date for the new Dry Weather Monitoring Program be changed to reflect its original intent which was eleven months after adoption of the permit.

We appreciate this opportunity to share our comments, and look forward to continued open discussions with your Board Members and staff in finding ways to improve and protect water quality. If you have any questions please contact me at (619) 525-8647, or Storm Water Specialist Ruth Kolb at (619) 525-8636.

Sincerely,

Chris Zirkle
Deputy Director

CZ:rk

cc: File
Drew Kleis
Ruth Kolb

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F. City of San Marcos
(submitted by Lounsbery, Ferguson, Altona & Peak LLP)

LOUNSBERY FERGUSON ALTONA & PEAK LLP

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2 January 2007

John Robertus, Executive Officer
San Diego Regional Water Quality Control Board
9174 Sky Park Court, Suite 100
San Diego, CA 92123

RE: Revised Draft Tentative Order R9-2006-0011

Dear Mr. Robertus:

This comment letter is submitted on behalf of the City of San Marcos ("City") with respect to the 13 December 2006 version of the San Diego County Municipal Storm Water Permit, Tentative Order No. R9-2006-0011 ("Revised Permit"). As the question of whether state offices would be open on 2 January 2006 had not been answered prior to our discussion on 29 December 2006, and as it was not clear whether mail delivery would reach your office timely, you graciously noted that if state offices were closed on 2 January comments would be considered if they were delivered by 3 January 2006. This courtesy is much appreciated.

The City has previously participated in the legal and technical comments submitted on behalf of the Copermittees, and appreciates the efforts expended by staff for the San Diego Regional Water Quality Control Board ("Regional Board") in considering and responding to these and other comments submitted on the Revised Permit. In addition to its overarching concerns regarding the unfunded state mandates issue, which remain following the issuance of the Revised Permit, the City has the following requests for clarification and comments regarding the changes in the Revised Permit from its August 20 to its December 13 iteration.

In the Development Planning provisions of the Revised Permit, Section D.1.d.(4)(a), page 19, Copermittees are mandated to implement certain modified Low Impact Development ("LID") site design Best Management Practices ("BMPs") "which will collectively minimize directly connected impervious areas and promote infiltration at Priority Development projects." BMP (i) provides that "the size of impervious areas that are to drain to pervious areas shall correspond with the total size of the project's pervious areas, taking into consideration the pervious areas' soil conditions, slope and other pertinent factors." From the use of the term "correspond," rather

than "correlate," it appears that it is intended that Copermittees focus attention on the physical size of pervious and impervious areas rather than the flow rate of water to or from such areas and/or the drainage infrastructure that may be installed as part of the project. This appears to be a new requirement. Additionally, except for generalized requirements for impervious areas to drain to pervious areas, it is not clear how the BMP will of necessity result in minimizing directly connected impervious areas, and why the BMPs that are set forth in (a) are mandatory while those set forth in (b) are to be imposed "where applicable and feasible."

In the Existing Development Component, Section D.3.a.(2)(d), on page 32, the requirement to "evaluate the feasibility of retrofitting existing structural flood control devices and retrofit where needed" has been revised to the evaluation of such devices to determine if retrofitting to provide "additional pollutant removal from urban runoff is feasible." The requirement to evaluate whether additional pollutant removal is feasible and the subsequent requirement to incorporate permanent pollutant removal measures into their flood control device retrofit projects "where feasible" represents a significantly greater evaluative and financial burden to Copermittees than to "retrofit where needed." This requirement appears to constitute an unfunded state mandate.

Staff has responded to certain of the concerns previously expressed by Copermittees regarding the new Hydromodification Management Plan requirement by extending the deadline dates as requested by Copermittees. While this is a more realistic schedule, because this process will involve comprehensive data gathering and the development of new management practices and modeling relating to several watersheds, even the extended deadlines may not be sufficient to develop an adequate management plan. We trust that the Regional Board will follow this effort and those of other Counties with interest, and will continue to evaluate the schedule as the upcoming submission dates occur.

The City appreciates the diligent attention paid to Copermittee concerns by the Regional Board and staff members during this process, and the consideration of the questions raised herein.

Please contact me should you have any questions regarding the foregoing.

Sincerely,

HELEN HOLMES PEAK

cc: Paul Malone, City Manager, City of San Marcos
Michael D. Mercereau, Public Works Director, City of San Marcos
Mike Edwards, City Engineer, City of San Marcos.

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G. CCWHE, BIASDC, CBIA, CICWQ, BILD, CBPA, NAIOP, ICSC (submitted by Foley & Lardner LLP)

FOLEY

FOLEY & LARDNER LLP

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January 2, 2007

CLIENT/MATTER NUMBER
059556-0101
054423-0103

VIA HAND DELIVERY AND ELECTRONIC MAIL

John Robertus
Executive Officer
California Regional Water Quality Control Board
San Diego Region
9174 Sky Park Court, Suite 100
San Diego, CA 92123

Re: **Public Comments Regarding Tentative Order No. R9-2006-0011, NPDES No. CAS0108758, dated December 13, 2006 ("Second Revised Tentative Order")**

Dear Mr. Robertus:

The written comments below regarding the Second Revised Tentative Order were prepared jointly by Foley & Lardner LLP and Nossaman Guthner Knox & Elliott LLP, and are submitted to the California Regional Water Quality Control Board, San Diego Region ("Regional Board"), on behalf of the following parties:

- The Coalition for Clean Water and a Healthy Economy ("Coalition"). The Coalition includes the following members: the San Diego Regional Chamber of Commerce, the Carlsbad Chamber of Commerce, the San Diego Economic Development Corporation and the San Diego North Economic Development Council.

- The Building Industry Association of San Diego County ("BIASD"). The BIASD is a non-profit trade association that represents legislative and business interests of 1,450 member companies, and their 165,000 employees, who are active in the San Diego regional building industry.

- The California Building Industry Association ("CBIA"). CBIA is a non-profit trade association comprised of more than 6,700 member companies that employ more than 500,000 people engaged in all aspects of planning, designing, financing, constructing and selling approximately 70% of all new homes built in California each year.

- The Construction Industry Coalition on Water Quality ("CICWQ"). The Construction Industry Coalition on Water Quality ("CICWQ") is comprised of the four major construction and building industry trade associations in Southern California: the Associated General Contractors of California ("AGC"), the Building

Industry Association of Southern California ("BIA/SC"), the Engineering Contractors Association ("ECA") and the Southern California Contractors Association ("SCCA"). The membership of CICWQ, which is comprised of construction contractors, labor unions, landowners, developers, and homebuilders throughout the region, work collectively to provide the necessary infrastructure and support for the region's business and residential needs.

- The Building Industry Legal Defense Foundation ("BILD"). BILD is a non-profit mutual benefit corporation and wholly-controlled affiliate of the Building Industry Association of Southern California ("BIA/SC"). BIA/SC is a nonprofit trade association representing more than 2,050 member companies with more than 200,000 employees. The mission of BIA/SC is to promote and protect the building industry to ensure its members' success in providing homes for all Southern Californians. BILD's purposes are to monitor legal developments and to improve the business climate for the construction industry in Southern California. BILD's mission is to defend the legal rights of current and prospective home and property owners, and to accomplish this mission BILD participates in and supports litigation necessary for the protection of such rights. BILD promotes and supports important legal cases to secure favorable court decisions for private property owners and developers. BILD focuses on cases with a regional or statewide significance to its mission.

- The California Business Properties Association ("CBPA"). CBPA is the designated legislative advocate for the International Council of Shopping Centers (ICSC), the California chapters of National Association of Industrial and Office Parks (NAIOP), the Associated Builders & Contractors of California (ABC), Commercial Real Estate Women (CREW) and the Institute of Real Estate Management (IREM). These affiliations make CBPA the acknowledged voice of the commercial real estate industry in California, representing the largest commercial real estate consortium with over 10,000 members. Members are property owners, tenants, developers, retailers, contractors, lawyers, brokers and other service professionals in the industry.

- The National Association of Industrial and Office Parks of Southern California ("NAIOP"). NAIOP is the nation's leading trade association dedicated to representing the interests of developers, owners, investors, asset managers and other professionals involved in industrial, office and mixed-use commercial real estate. Founded in 1967, NAIOP has more than 13,000 members in 52 chapters throughout the United States and Canada. The NAIOP SoCal Chapter encompasses more than 900 members in Orange County and Los Angeles County. It is one of the largest NAIOP chapters in the United States and is the largest commercial real estate trade organization in Southern California.

- California Business Properties Association ("CBPA") is the recognized voice of all aspects of the commercial retail industrial real estate industry in California -

representing the largest commercial real estate consortium with almost 10,000 industry members.

- International Council of Shopping Centers ("ICSC"). Founded in 1957, the International Council of Shopping Centers (ICSC) is the global trade association of the shopping center industry. Its 65,000 members in the U.S., Canada and more than 80 other countries include shopping center owners, developers, managers, marketing specialists, investors, lenders, retailers and other professionals as well as academics and public officials. There are almost 10,000 members in California. As the global industry trade association, ICSC links with more than 25 national and regional shopping center councils throughout the world. The principal aims of ICSC are to advance the development of the shopping center industry and to establish the individual shopping center as a major institution in the community.

In its Second Revised Tentative Order, the Regional Board, without adequate provision of public notice and comment, without appropriately responding to previous comments on prior draft tentative orders, and without complying with the substantive and procedural provisions of the federal Clean Water Act, the Code of Federal Regulations, the California Water Code, the California Government Code and the California Code of Regulations, significantly amended the previous version of the Tentative Order to include additional requirements and mandates, including new requirements related to Low Impact Development ("LID") BMPs. These new provisions have not been adequately considered by the Regional Board, the cities within the Region, or the other members of the regulated community. Despite these substantial changes in the Second Revised Tentative Order, initially no comment period was provided, and subsequently, on December 15, the Regional Board notified the public that comments would be taken, but only until 5:00 p.m. on January 2, despite the holiday period. In addition to these shortcomings, prior comments have not been adequately addressed in the Second Revised Tentative Order, or in responses to comments.

These failings deprive the public of a meaningful opportunity to review, comment upon, and participate in the NPDES permitting process. Therefore, the parties submitting this letter must reserve their right to submit additional comments at or before the Regional Board hearing on this matter, and/or in response to any additional executive officer reports, responses to comments and/or revised drafts of the tentative order that may be issued prior to the Regional Board hearing on this matter. Further, the inclusion at this late date in the process of new provisions in the Second Revised Tentative Order, including LID provisions, and the failure to adequately respond to prior comments raise significant procedural and legal issues that should be addressed before the Regional Board adopts the Second Revised Tentative Order or any further order.

1. THE NOTICED WRITTEN COMMENT PERIOD MUST BE EXTENDED FOR A MINIMUM OF NINE ADDITIONAL DAYS.

The public notice of the Second Revised Tentative Order must allow at least 30 days for public comment. See 40 C.F.R. §§ 124.10(b) & 124.11. At most, the written comment period provided here is 21 days. The Second Revised Tentative Order is dated December 13, 2006. The request for public comments on the Second Revised Tentative Order is dated December 15, 2006. See Exhibit A. The request provides, in pertinent part, "all written comments should be received by the Regional Board no later than 5:00 p.m. on Tuesday, January 2, 2006 [sic]." The detail provided in written comments is difficult, if not often impossible, to convey by oral presentation under the time pressures of the public hearing. The written comment period must be extended for a minimum of nine additional days.

Additionally, it is our understanding that a new board member, Mr. David King, has been appointed to the Regional Board. Assuming that Mr. King will be voting on the adoption of the Second Revised Tentative Order, it is unclear if the present date for the public hearing will allow him sufficient time to adequately review the entire record related to the re-issuance of the San Diego Municipal Storm Water Permit.

2. THE SECOND REVISED TENTATIVE ORDER UNLAWFULLY USURPS THE LAND USE AUTHORITY OF LOCAL JURISDICTIONS.

Under federal Clean Water Act Section 402(p)(5) and (6), Congress directed the implementation of a comprehensive program to regulate storm water discharges to protect water quality in consultation with state and local officials. 33 USC §§ 1342 (p)(5)(6). Federal law further specifies that "permits for discharges from municipal storm sewers shall require *controls* to reduce the discharge of pollutants to the maximum extent practicable (MEP), including management practices, control techniques and systems, design and engineering methods..." 33 U.S.C. 1342(p)(3) *[emphasis added]*. The state and regional boards are vested with the primary responsibility for controlling water quality. Cal. Water Code §13001; *County of Los Angeles v. State Water Resources Control Bd.* (2006) 143 Cal.App.4th 985, 1003.

At the same time, authority to determine appropriate land use and planning decisions rests in the local jurisdictions. Cal. Const. art. XI, section 7. The California Supreme Court has stated, "Under the police power granted by the Constitution, counties and cities have plenary authority to govern... ." *Candid Enters., Inc. v. Grossmont Union High School Dist.* (1985) 39 Cal.3d 878, 885 (1985). Thus, the local jurisdictions, not the Regional Board, have plenary authority over local land use decisions.

It is important to respect the different roles that regulatory agencies play in decisions regarding development, specifically with regard to land use decisions and environmental regulation. A Supreme Court case involving the California Coastal Commission notes these important distinctions between land use planning and environmental regulation by stating: "Land use planning

in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits. Congress has indicated its understanding of land use planning and environmental regulation as distinct activities." *Cal. Coastal Com v. Granite Rock Co.* (1987) 480 U.S. 572. Further, "The CWA is not a land-use code; it is a paradigm of environmental regulation." *Solid Waste Agency v. United States Army Corps of Engineers* (2001) 531 U.S. 159 dissent by Justice Stevens. The Porter Cologne Water Quality Control Act respects the authority of state and regional boards, on the one hand, and local jurisdictions, on the other. For example, California Water Code § 13360(a) expressly precludes regional boards orders and waste discharge requirements from specifying the particular design location, type of construction or particular manner in which compliance with water quality standards must be achieved. In short, the Regional Board has the job of enforcing the Clean Water Act and the Porter-Cologne Water Quality Control Act, but it does not have the job of making land use decisions. When the Regional Board very specifically mandates certain planning and design activities to local jurisdictions the Regional Board is unlawfully usurping the authority of the local jurisdictions whose job it is to make decisions with respect to land use planning and development.

In considering the current MS4 Permit previously adopted by the San Diego Regional Board, the State Water Resources Control Board ("SWRCB") recognized the importance of respecting the very different roles of local agencies and regional boards in the issuance of MS4 Permits. In reviewing the current MS4 Permit, the SWRCB found that the best management practices ("BMPs") specified as controls to reduce the discharge of pollutant to the MEP consisted of "programmatic and planning requirements for the permitees...similar to those in other MS4 Permits" and designed to control pollutants in storm water. State Water Resources Control Board Water Quality Order 2001-15, p. 2. The SWRCB concluded that it was appropriate to include *programmatic* requirements in MS4 Permits to control pollutants to the MEP, including numeric design criteria for certain treatment control BMPs. State Water Resources Control Board Water Quality Order 2001-15.

The Second Revised Tentative Order goes too far in mandating certain development planning approaches BMPs, and therefore unlawfully exercises land use authority in violation of the separation of powers doctrine and unnecessarily contrary to California Water Code §13360. Instead of programmatically identifying a menu of BMPs, technologies and controls that local jurisdictions can implement in the context of their planning and land use decisions, and specifying the performance standards for these controls, the new requirements, and particularly those of Section D.1.d.(4) of the Second Revised Tentative Order, go far beyond the programmatic specification of available storm water quality controls and technologies. Instead of identifying a menu of land use related BMPs and design standards for those BMPs that are necessary to protect water quality, the proposed requirements of the Second Revised Tentative Order mandate certain planning and design decisions, and thereby impinge upon the exercise of discretion by the local agencies with planning and land use jurisdiction. For example, Copermittees are mandated to require high priority developments to conserve existing trees, construct streets and sidewalks to minimum widths, minimize the impervious footprint of the project, and minimize soil compaction, unless the project

proponent can demonstrate that such mandates are infeasible. Importantly, no regulatory guidance exists with respect to the requirements for demonstrating infeasibility. As a result, the Regional Board's approach to site design BMPs, including the LID requirements set forth in the Second Revised Tentative Order comprise an unlawful usurpation of the Constitutionally-derived land use authority of local jurisdictions.

This unlawful usurpation is even more apparent when one interprets the provisions of the Second Revised Tentative Order in the context of regulatory advice recently issued by California Regional Water Quality Control Board, Los Angeles Region (LARWQCB). In the form of a "clarification letter" dated December 15, 2006, the LARWQCB provided guidance to the County of Los Angeles Department of Public Works regarding its interpretation of Part 4.D. Development Planning Program of the existing Los Angeles County Municipal Storm Water Permit, Order No. 01-182, NPDES Permit No. CAS004001 (the "Clarification Letter"; see Exhibit B.) The Clarification Letter establishes certain very specific interpretations of general permit provisions regarding storm water runoff water quality, flow and duration control. This regulatory guidance essentially declares that provisions requiring storm water runoff volume control and Low Impact Development practices such as those proposed in the Second Revised Tentative Order require lot-by-lot hydrologic controls. In addition, this recently issued guidance interprets the general requirement to consider storm water quality control in the planning stages of development as a requirement that every project that is subject to Standard Urban Stormwater Mitigation Plan ("SUSMP") requirements (which is a general term referring to source and treatment control standards) must prepare a complete EIR. Lot-by-lot design decisions and decisions regarding the type of environmental analysis and document necessary for a project are clearly decisions within the land use and planning purview of the local jurisdictions and should not be mandated by a regional board. Doing so is an unlawful usurpation of the land use authority of the local jurisdictions. The provisions of the Second Revised Tentative Order clearly go beyond the Regional Board's mandate of implementing and enforcing environmental regulation, and improperly move into land use planning.

3. THE REQUIREMENTS OF THE SECOND REVISED TENTATIVE ORDER NULLIFY VESTED RIGHTS.

It appears that existing projects with vesting tentative maps, final maps and development agreements will be subject to the new requirements for hydromodification and Low Impact Development announced in the Second Revised Tentative Order and further explained in the Clarification Letter regardless of the project's completion status.

For example, as currently written, within twelve months, a project that has an approved map and grading permits but has not yet requested building permits, would be required to stop work and redesign its streets, lots and storm water conveyance systems to comply with the Hydromodification requirements of the Second Revised Tentative Order, whether or not compliance is technically or economically feasible.

As a further example, within one year of the adoption of this permit, each Copermittee is required to mandate the use of specific LID requirements at Priority Projects. The permit provides no waiver, other than infeasibility, for projects that have already been reviewed and approved as part of the Copermittee's existing development requirements. Thus, a project that is nearing completion will be required to redesign its streets, sidewalks, and storm drain systems or demonstrate the infeasibility of doing so to the Copermittee, who in turn, risks an enforcement action by the Regional Board if Regional Board staff does not agree with the Copermittees' conclusion of infeasibility.

Tentative maps, final maps and development agreements are intended to provide protections allowing the developer to proceed with development in substantial compliance with the ordinances, policies and standards in effect on the date on which the subdivider's application was deemed complete. See, e.g., Cal. Gov. Code, §66498.1(b). However, the statutes also provide an exception to this protection where failure to condition or deny a permit, approval, extension or entitlement would pose a danger to the health or safety of the residents or the subdivision or community, or the condition or denial is required in order to comply with federal or state law. See Cal. Gov. Code §66498.1(c).

Because the Second Revised Tentative Order does not contain a grandfathering provision, it is likely that vested protections will be eliminated as necessary to avoid a conflict with the Order. Thus, projects with vested maps that are already financed, and even upon which work may have begun, may have to implement revised hydromodification and LID plans regardless of engineering feasibility or cost.

4. IF THE SAN DIEGO REGIONAL BOARD CONCURS WITH THE INTERPRETATIONS SET FORTH IN THE LOS ANGELES REGIONAL BOARD'S CLARIFICATION LETTER, THE RESULT WOULD BE HARMFUL TO THE JURISDICTIONS, THE BUILDING INDUSTRY AND THE COMMUNITIES WITHIN THE SAN DIEGO REGION.

As discussed above, the Clarification Letter sets forth certain very specific interpretations of the previously general and mostly directive MS4 Permit provisions regarding storm water runoff water quality, flow and duration control. In order to evaluate similar requirements in the Second Revised Tentative Order, it is important that the Regional Board indicate whether or not it concurs with the interpretation of such requirements in the Clarification Letter.

For reasons including those outlined above and below, we believe that if the Regional Board concurs with the interpretation of MS4 Permit set forth in the Clarification Letter, the result would be harmful to the local authority and exercise of independent discretion by local permittee jurisdictions, and to the building industry and the communities within the San Diego region.

a. If the Interpretations Set Forth in the Clarification Letter Are Similarly Applied to the Second Revised Tentative Order, All Development Projects Equal To One Acre In Size Or Greater Will Require Environmental Impact Reports.

Section D.1.d.(1)(b) of the Second Revised Tentative Order has been revised to provide that, within three years of its adoption, Priority Development Projects shall also include all Development Projects that are equal to one acre in size or greater. If the interpretations set forth in the Clarification Letter are applied to the Second Revised Tentative Order, such smaller projects will be subject to unwarranted additional costs and delays, including the mandatory preparation of an Environmental Impact Report ("EIR").

By law, it is the lead agency that determines the scope of the environmental impact analysis required by a project for which the agency will be making a discretionary decision. The Clarification Letter usurps this authority in violation of CEQA §15367 ("Lead Agency" means the public agency which has the principal responsibility for carrying out or approving the project). The lead agency will decide whether an EIR or negative declaration will be required for the project and will cause the document to be prepared. See also Cal. Public Resources Code §§21083, 21087 and 21165.

Specifically, the Clarification Letter requires that to fulfill the MS4 Permit requirement to consider water quality controls during the planning stages for priority developments, the permittees "must direct land developers to review and mitigate the adverse storm water quality impacts in the *Environmental Impact Report (EIR)*, and to ensure that adequate post-construction control measures are incorporated during the development of the project's site planning and design phases." See Exhibit B, p. 5 (emphasis added). This language suggests that every project that is subject to SUSMP requirements would have no choice but to prepare a full blown EIR.

The Second Revised Tentative Order would, within three years of adoption, require projects as small as one acre to be subject to the equivalent of SUSMP requirements, including (under the requirements as explained in the Clarification Letter) the mandatory preparation of an EIR. As we know from experience, the preparation and approval of an EIR takes at least eighteen months and costs a minimum of tens of thousands of dollars. We believe that it is likely that these additional costs and time delays will make most small urban renewal or urban infill projects economically infeasible, thereby defeating the goal of reducing urban sprawl and affordable housing in California. For these reasons, the requirements as explained in the Clarification Letter, insofar as they would require the mandatory preparation of an EIR for each and every Priority Development Project, should not be applied to the Second Revised Tentative Order.

b. The Clarification Letter Sets Forth Maximum Impervious Surface Conditions and Mandates the Range of Storms To Be Utilized in the Development of Hydromodification Management Plans Which Are Likely Infeasible or Technically Inappropriate For Local Climate And Soils Conditions.

The Clarification Letter requires that projects be designed such that "the post-construction discharge rates and *duration* match the ranges from 10 percent of the pre-development 2-year 24 hour peak flow up to the pre-development 10-year 24 hour peak flow, unless an alternative criterion can be demonstrated as equally protective using hydrodynamic modeling." Emphasis added; see Exhibit B, p. 4.

The Clarification Letter further *limits any volumetric increase* in post-construction runoff to that which would be equivalent to an increase in impervious surface equal to only 5% of the pre--construction site. Any additional runoff created by the construction of roads, sidewalks, parking lots or other structures or impervious surfaces that exceeds 5% of the pre-construction condition must be infiltrated or otherwise precluded from running off. Unfortunately, the ability to infiltrate runoff in San Diego County is severely limited by soil morphology, particularly at many urban infill sites.

The Second Revised Tentative Order requires that, starting 365 days after adoption of the Order and until the final Hydromodification Management Plan ("HMP") standard and criteria are implemented, each Copermittee shall require Priority Development Projects disturbing 50 acres or more to implement hydrologic controls to manage post-project runoff flow rates and durations as required by the Interim Hydromodification Criteria. See Second Revised Tentative Order, section D.1.g.(6). It also requires that 180 days after approval of the HMP by the Regional Board, each Copermittee must incorporate into its local SUSMP and implement the HMP for all applicable Priority Development Projects. See Second Revised Tentative Order, section D.1.g.(5).

Assuming the Copermittees adopt the criterion set forth in the Clarification Letter, there is no basis nor region specific soils, precipitation or climate studies indicating that these design standards can be met for all Priority Development Projects, particularly in light of highly variable soils infiltration characteristics and rainfall patterns even within the region. Nor are any programmatic technologies specified in the Second Revised Tentative Order or the Clarification Letter that could achieve these standards while still allowing site development. As a result, these standards are "technology forcing" and exceed the federal MEP standard and could constitute a building moratorium. Further, without any "grandfathering provision," these design standards appear to apply to projects that are already underway. As a result, and as described below, the Second Revised Tentative Order usurps any vested rights that developers may have negotiated as part of the subdivision process.

5. THE PROVISIONS OF THE SECOND REVISED TENTATIVE ORDER EXCEED FEDERAL REQUIREMENTS, AND THEREFORE MUST BE ANALYZED UNDER CAL. WATER CODE SECTION 13241.

As discussed above, provisions of the Second Revised Tentative Order exceed the scope of the Clean Water Act. In addition, to extent that the Second Revised Tentative Order contains mandates with respect to site design BMPs, LID requirements, and volume control and infiltration that are infeasible to meet currently, and thereby are technology forcing, those provisions also exceed the federal MEP storm water quality control standard. Therefore, pursuant to the California Supreme Court's decision in the City of Burbank case, analysis under Cal. Water Code section 13241 is required. *City of Burbank v. State Water Resources Control Board* (2005) 35 Cal.4th 613 (2005). Cal. Water Code section 13241 requires that the Regional Board consider a number of factors in its adoption of water quality standards, including economic impacts, environmental characteristics of the region, the need for housing within the region, and the need to develop and use recycled water. Nowhere in the Second Revised Tentative Order or administrative record is it provided that the Regional Board has considered these factors.

Further, because this comment letter, our prior comment letter, and the previously submitted matrix of comparing federal law requirements with provisions of the proposed tentative order all constitute specific evidence in the record with respect to the manner in which federal law requirements are exceeded, case law requires that all the requirements must be considered and balanced under California Water Code Section 13241. *City of Rancho Cucamonga v. Regional Water Quality Control Board* (2006) 135 Cal.App.4th 1377. The responses to comments do not indicate such analysis, and there is no cost information that has been made available to the public with respect to the new site design BMPs, LID requirements or volume control and infiltration requirements so as to satisfy these requirements. The Regional Board is required to engage in this analysis prior to adopting the Second Revised Tentative Order.

Lastly, Section 13263 combines with Section 13241 (especially subsection n(b), (d) and (e)) to indicate the need for a reasonable degree of resolution when imposing "requirements as to the nature of any proposed discharge...." For example, Section 13241(b) requires balance of the "[e]nvironmental characteristics of *the hydrographic unit under consideration*...." The Second Revised Tentative Permit fails to strike balances with an appropriate degree of resolution. Instead, the Second Revised Tentative Permit reflects sweeping, across-the-board, one-size-fits-all mandates for the entire region. This deficiency serves to underscore the fact that, concerning questions of land use, appropriate balances are best left ultimately to the local permitting authority, as the Legislature intended.

In conclusion, given the legal and technical problems with the Second Revised Tentative Order, and the need to adequately analyze and consider the provisions of the tentative order under Cal. Water Code Section 13241, combined with the need to provide for adequate review, comment and participation in the permitting process by the regulated community, we respectfully suggest that the hearing of the Regional Board to consider renewal of the MS4 Permit must be postponed to

allow the Regional Board to sufficiently address the deficiencies in public process and the legal issues affecting the Second Revised Tentative Order as described above. In addition, adequate responses to these comments and those previously submitted need to be prepared and/or implemented, and shared with the regulated community prior to action on the Second Revised Tentative Order.

Very truly yours,

S. Wayne Rosenbaum

SWR: aao
Attachments

cc: Phil Hammer

EXHIBIT A

REQUEST FOR PUBLIC COMMENTS
CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION

The San Diego Regional Water Quality Control Board (Regional Board) was scheduled to consider adoption of Tentative Order No. R9-2006-0011 (the San Diego County Municipal Storm Water Permit) at its regularly scheduled meeting on December 13, 2006. The meeting was canceled due to the lack of a quorum. In light of this cancellation, the Regional Board would like to take the opportunity to request additional comments from interested parties on specific sections of the Tentative Order. The Regional Board is requesting comments only on those sections which include the most recent modifications made to the Tentative Order. These modifications are found in underline/strikeout format in the most recent version of the Tentative Order dated December 13, 2006. Specifically, **the Regional Board is only soliciting comments on the modifications found in the following sections of the December 13, 2006 Tentative Order:**

- Section D.1.d.(1)(b) on page 17
- Section D.1.d.(4) on page 19
- Section D.1.d.(6)(d) on page 21
- Section D.1.d.(8) on page 22
- Section D.1.d.(13) on page 24
- Section D.3.a.(2)(d) on page 32
- Section D.5.b.(1)(a)iii on page 45
- Attachment C definition of "Low Impact Development" on page C-4
- Attachment C definition of "Third Party Inspectors" on page C-8
- Attachment D, row of table addressing Principal Permittee submittal of descriptions of various monitoring program components, on page D-2
- Receiving Waters and Urban Runoff Monitoring and Reporting Program No. R9-2006-0011 section II.B.3.a on page 10
- Receiving Waters and Urban Runoff Monitoring and Reporting Program No. R9-2006-0011 section III.A.3 on page 18
- Receiving Waters and Urban Runoff Monitoring and Reporting Program No. R9-2006-0011 section III.B on page 19

The December 13, 2006 version of the Tentative Order is available at:

http://www.waterboards.ca.gov/sandiego/programs/sd_stormwater.html.

Repetition of comments previously made on the sections listed above should not be submitted because those comments have already been considered and responded to during previous rounds of comments and responses. Likewise, comments on other sections of the Tentative Order should not be submitted because of the extensive comment and response process already conducted for those sections. A public hearing was conducted on June 21, 2006 to address all aspects of the Tentative Order. Comments requested at this time are expected

to only address the modifications listed above. Each comment submitted should reference the Tentative Order section number listed above to which it pertains. Comments may result in modifications to the Tentative Order where warranted.

In order for written comments to be considered and responded to in writing prior to consideration of adoption of the Tentative Order by the Regional Board, **all written comments should be received by the Regional Board no later than 5:00 PM on Tuesday, January 2, 2006.** Written comments should be submitted to the following address:

California Regional Water Quality Control Board
San Diego Region
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4340
Attn: Phil Hammer

The Tentative Order is tentatively scheduled to be considered for adoption by the Regional Board at a meeting to be held on January 24, 2007. The meeting is scheduled to begin at 9:00 AM at the Regional Board offices located at the address listed above. At the meeting, oral comments will be accepted on modifications to the Tentative Order that have been made following the June 21, 2006 public hearing on the Tentative Order. Time allotted for oral comments may be limited at the discretion of the Regional Board.

Please contact Phil Hammer at phammer@waterboards.ca.gov or 858-627-3988 if you have any questions.

JOHN H. ROBERTUS
Executive Officer
December 15, 2006

EXHIBIT B

California Regional Water Quality Control Board

Los Angeles Region

Recipient of the 2001 *Environmental Leadership Award* from Keep California Beautiful

Linda S. Adams
Agency Secretary

320 W. 4th Street, Suite 200, Los Angeles, California 90013
Phone (213) 576-6600 FAX (213) 576-6640 - Internet Address: http://www.waterboards.ca.gov/losangeles

Arnold Schwarzenegger
Governor

December 15, 2006

Mark Pestrella, Assistant Deputy Director
Department of Public Works
County of Los Angeles
700 South Fremont Ave.
Alhambra, CA 91803

Directors, Department of Public Works and
Directors, Department of Planning
Municipal Permittees within County of Los Angeles

CLARIFICATION TO PART 4.D. DEVELOPMENT PLANNING PROGRAM, THE LOS ANGELES COUNTY MUNICIPAL STORM WATER PERMIT, ORDER No. 01-182, NPDES PERMIT No. CAS004001

Dear Mr. Pestrella and Municipal Directors:

Thank you for requesting clarification on the Development Planning requirements of the Los Angeles County Municipal Storm Water Permit (L.A. County MS4 Permit).

This letter restates the compliance expectation of the California Regional Water Quality Control Board, Los Angeles Region (L.A. Water Board), when it adopted the requirements in 'Part 4 §D, Development Planning' of the L.A. County MS4 Permit. Part 4.D contains specific provisions that are fully enforceable, and which were also contained in the Development Planning Model Program submitted by the L.A. County Permitees, and which was approved in 2000.

Our evaluation of the implementation of the Development Planning and Standard Urban Stormwater Mitigation Plan (SUSMP) requirements on land development projects in Los Angeles County has revealed that many Permittees' planning and public works departments and their associated staff, including architects, planners and engineers have failed to integrate SUSMP implementation adequately with other storm water quality management strategies required in the L.A. County MS4 permit. The L.A. Water Board has identified several instances of inadequate or uncoordinated implementation by Permitttes for 'Part 4.D Development Planning'.

U.S. EPA Guidance

In areas undergoing new development or redevelopment, the most effective method of controlling impacts from storm water discharges is to limit the amount of rainfall that is converted to runoff. By utilizing design techniques that incorporate on-site storage and infiltration, and minimizing the amount of directly connected impervious surfaces, the amount of runoff generated from the site can be significantly reduced (*Preliminary Data Summary of Urban Storm Water Best Management Practices*, EPA 821-R-99-012, August 1999).

The three provisions in Part 4.D are consistent with guidance in Chapter 5 of *Preliminary Data Summary of Urban Storm Water Best Management Practices.* The U.S. EPA guidance states that in order to meet the goals of post-development peak discharge rate, volume and pollutant loading to receiving waters being the same as pre-development values, BMPs should be implemented to achieve three main objectives: flow control, pollutant removal and pollutant source reduction.

California BMP Manual

Similarly, Section 2.4 of the California Stormwater Quality Association (CASQA) BMP Handbook for Development and Redevelopment (2003), in its discussion on planning and design principles, reiterates the provisions in Part 4.D. These principles promote three basic strategies in the following order of preference based on effectiveness and costs: (1) reduce or eliminate post-project runoff; (2) control sources of pollutants; and (3) treat contaminated storm water runoff before discharging it to natural water bodies.

Groundwater Quality Protection Concern

Some Permittees have expressed a concern that infiltration of storm water may present risks to groundwater aquifers. Generally, the common pollutants in storm water are filtered or adsorbed by soil, and unlike hydrophobic solvents and salts, do not cause groundwater contamination. In any case, infiltration of 1-2 inches of rainfall in semi-arid areas like Southern California where there is a high rate of evapo-transpiration, presents minimal risks.

The Water Augmentation Study conducted by the Los Angeles and San Gabriel Rivers Watershed Council, in partnership with several agencies including water districts, municipalities, and the U.S. Bureau of Reclamation, indicates that the infiltration of storm water, with appropriate pretreatment, does not adversely impact groundwater quality (*Los Angeles Basin Water Augmentation Study, August 2005*). You may view the study at www.lasgrwc.org/WAS.htm

Infiltration of storm water discharges from heavy industrial areas is seldom appropriate. Where there is a real concern on the risk of groundwater contamination from preexisting soil contamination or heavy vehicular traffic when installing infiltration systems such as extended detention basins, the L.A. Water Board and the California Department of Transportation (Caltrans) developed guidance to ensure an adequate analysis for proper

siting. See, *Infiltration Basin -Site Selection Study, Volumes I, II, and III* June 2003, CTSW-RT-03-025, http://www.dot.ca.gov/hq/env/stormwater/special/newsetup/index.htm

Caltrans research indicates that infiltration basins and biofiltration BMPs are technically feasible if site site-specific considerations are taken into account (Caltrans CTSW-RT-01-050, *BMP Retrofit Pilot Program, January 2004*).

Background of MS4 Development Planning Requirements

Standard Urban Storm Water Mitigation Plan

On March 8, 2000, the L.A. Water Board adopted the SUSMP, and required that municipalities incorporate into the planning and design phases post-construction storm water mitigation controls for specified development and redevelopment projects. Although the SUSMP action was petitioned by some municipalities to the State Water Resources Control Board (State Water Board), the State Water Board directed in Water Quality Order 2000-11 that, *"the Permittees shall amend codes, if necessary, not later than **January 15, 2001**, to give legal effect to the SUSMP requirements. The SUSMP requirements shall take effect not later than **February 15, 2001**."*

On November 7, 2003, the L.A. Water Board transmitted the Development Planning Program Review Report after auditing four Permittee Programs (the Planning Review Report). The Planning Review Report presented and described discernible permit violations, deficiencies, and notable elements observed during the audit. Notably, the MS4 Development Planning program contained in Board Order No. 01-182 is built upon programs already established in previous Board Orders (90-079 and 96-054), after undergoing a very long process of public hearings and meetings before permit adoption.

Nearly six years later after the SUSMP was adopted, most Permittees' implementation of SUSMPs is deficient, because Permittees have not focused nor emphasized water quality pollution mitigation to protect the beneficial uses of receiving waters.

Consequently, the L.A. Water Board provides the following clarification consistent with the L.A. Water Board's mission of protecting water quality and preserving water resources:

A. Essential Post Construction Control Requirements

1. The three provisions in Part 4.D are the essential requirements for compliance with the Development Planning requirements of the L.A. County MS4 Permit. The three provisions are to: (1) maximize the percentage of pervious surfaces to allow percolation of storm water into the ground; (2) minimize the quantity of storm water directed to impervious surfaces and the MS4; and (3) minimize pollution emanating from parking lots through the use of appropriate treatment control BMPs and good housekeeping practices.

The basic site design planning considerations for post-construction storm water BMP implementation are to:

a. Preserve the natural drainage system, protect slopes and provide controls for stream protection. These controls are achieved through the basic control measures that include infiltration, retention/detention, bioretention and biofilters;

b. Integrate fully the opportunities to maximize the percentage of pervious surfaces and minimize the volume of storm water runoff;

c. Utilize a BMP treatment-train that (i) captures and infiltrates using infiltration basins, infiltration trenches, retention and/or detention BMPs; and/or (ii) provide flow through treatment in the order of preference for the prescribed storm water quality runoff volume ($\mathbf{Q_{wv}}$) based on the numerical mitigation criteria in Part 4.D;

d. Identify the combination of BMP treatment trains that are to be sized, designed and constructed based on $\mathbf{Q_{wv}}$ required for water quality. Using $\mathbf{Q_P}$ from 10, 20, or 50-year return-period for flood management is inappropriate for water quality purposes and not cost effective. Capturing and treating a larger percentage of the annual storm water runoff volume greater than $\mathbf{Q_{wv}}$ provides only a small increase in additional removal of pollutants and considerably increases the sizing and cost of the structural and treatment storm water controls; and

e. Establish in addition, for downstream channel protection, instead of $\mathbf{Q_P}$ a flow control criteria (Q_{HMC}) which takes into consideration flow volume, duration, and frequency to maintain the predevelopment distribution of in-stream flows above the critical flow for streambed erosion, thus preserving the pre-development capacity to transport sediment, while not accelerating down stream erosion. An appropriate hydromodification flow duration control criteria might be to set the Q_{HMC} such that the post-construction discharge rates and duration match the ranges from 10 percent of the pre-development 2-year 24 hour peak flow up to the pre-development 10 year 24 hour peak flow, unless an alternative criterion can be demonstrated as equally protective using hydrodynamic modeling.

2. Measures and Approaches for Minimizing Impervious Surface Area

a. Permittees must minimize the percentage of impervious surfaces to support the percolation and infiltration of storm water into the ground and/or minimize pollutants emanating from impervious surfaces by reducing the percentage of effective impervious area to a generally accepted standard of 5 percent or less of total project area.

The U.S. EPA storm water technology fact sheet for bioretention recommends that sizing criterion should be 5 to 7 percent of the drainage area multiplied by the rational method runoff coefficient "C" determined for the site (*Storm Water Technology Fact Sheet, Bioretention*, U.S. EPA Document No. EPA 832-F-99-012, September 1999). However, a lower sizing criterion may be more appropriate for

Southern California. A recent study determined that physical degradation of stream channels in semi-arid climates such as in Southern California may be detectable with watershed impervious cover between 3 and 5 percent (*Effects of Increases in Peak Flows and Imperviousness on the Morphology of Southern California Stream,* SCCWRP, April 2005).

b. Permittees must also control pollution emanating from impervious surfaces such as roof-tops, parking lots, and roadways through the use of appropriate source controls such as the use of low impact development (LID) and integrated water resources management strategies that:

   1. Emphasize conservation and the use of on-site natural features;
   2. Integrate engineered small-scale hydrologic controls to more closely reflect pre-development hydrologic functions. Small-scale hydrologic controls are BMPs that create green infrastructure and spaces such as park-like open space, rainwater collection barrels, planter boxes, and garden-like areas that promote community awareness and improve storm water quality; and
   3. Implement primarily a source control and minimize the need for large sub-regional and regional treatment control BMPs.

B. Plan Preparation/ Review Procedures and Guidelines

1. Permittees must possess clear and adequate legal authority in municipal storm water ordinances to address post-construction requirements in the L.A. County MS4 Permit. The legal authority must direct land developers to review and mitigate the adverse storm water quality impacts in the Environmental Impact Report (EIR), and to ensure that adequate post-construction control measures are incorporated during the development project's site planning and design phases. In addition, clear instructions should be provided on how to illustrate on plans the BMPs selected, adequate sizing, and BMP siting;

2. The selection of the treatment train of BMPs must be conducted through a methodical selection process that matches the type of BMP with the type and nature of pollutants that are expected to be generated from the site. For example, vortex separation devices installed in high commerce areas for removing trash and gross solids are not suitable for removing pollutants in dissolved state or smaller size/lighter weight fractions from vehicular traffic areas;

3. Permittees should also prescribe guidelines for the submittal of standard final SUSMP plans so that relevant storm water BMP locations and specifications in design sheets are clearly identified. Separate SUSMP detail plan sheets will facilitate technical review.

   Delineation of drainage area and/or sub-areas, natural drainage systems, storm drains, and other relevant parameters at pre-development and post-development water flow paths, outfall (drainage) locations, BMP detail plans, and other relevant information should be presented. Simply inserting post-development plans within the grading plans, storm drain plans, or civil plans with unrelated detail drawings, numbers, and

construction notes makes it difficult to review and evaluate. Small-scale controls may be combined with the landscaping plans;

4. Plan view and sectional plans for small-scale hydrologic controls for a lot size and sub-drainage area of the sites should be prescribed; and

5. BMP design specifications must be incorporated in the SUSMP report together with hydrologic calculations for sizing BMPs. This report should support and show how criteria were adequately utilized in sizing BMPs (e.g., infiltration, retention/detention BMPs, bioretention facilities, etc.);

If you have any questions, please call Dr. Xavier Swamikannu at (213) 620-2094 or Carlos D. Santos at (213) 620-2093.

Sincerely,

Original Signed

Jonathan Bishop, P.E.
Executive Officer

cc: Michael Levy, Office of the Chief Counsel, State Water Board
Darrin Polhemus, Division of Water Quality, State Water Board
Bruce Fujimoto, Division of Water Quality, State Water Board

H. Natural Resources Defense Council (dated January 2, 2007)

NRDC
THE EARTH'S BEST DEFENSE

NATURAL RESOURCES DEFENSE COUNCIL

January 2, 2007

Via Electronic Mail

Executive Officer and Members of the Board
California Regional Water Quality Control Board, San Diego Region
9174 Sky Park Court, Suite 100
San Diego, CA 92123

Re: Revised Tentative Order No. R9-2006-0011

Dear Mr. Robertus and Members of the Board:

We submit this letter in response to the Board's December 15 request for additional comments on Tentative Order 2006-0011. Our comments relate to the latest revisions to language in Section D.1.d concerning the use of low impact development strategies ("LID") in new and redevelopment projects. Our comments can be summarized as follows:

1. The most recent revisions to the proposed permit's LID program would improve the Permit, but these revisions include open-ended provisions that undermine the program's goals;
2. The Board should revise Section D.1.d to ensure the LID program's effectiveness, and can do so using simple and straightforward language that is consistent with staff's intent, set forth in Attachment 1 as red-line edits to the initial draft permit and summarized below; and
3. LID methods can be implemented in the San Diego region without further study; it is essential that this program move forward.

1. The permit's LID program is extremely important to the success of the permit, but the current language hinders the program's goals. LID represents a toolkit of the best-performing stormwater BMPs that address the root cause of stormwater runoff—present patterns of urbanization. In addition, low-impact development techniques offer valuable and unique additional benefits, including financial benefits associated with the reuse of retained or infiltrated water, more attractive development, and lower infrastructure costs.

In light of the San Diego region's persistent water quality problems, the low impact development program for new and redevelopment projects is a critical element of the new permit. But currently, the proposed permit's LID program contains ambiguous language that might make implementation and subsequent enforcement of LID implementation difficult. Experience shows that anything short of clear-cut performance-based requirements gives copermittees and project

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proponents too little guidance, inviting huge variations in interpretation and implementation.

For example, the permit would require using permeable materials in low-traffic areas and draining surface water to vegetated areas. But it only requires an unspecified "portion" of the project area to comply with those requirements. Also, whether and to what extent projects employ certain other LID techniques is left to a determination of applicability and feasibility by the project proponent and the copermittee. Similar "where feasible" language was largely ignored with respect to site design BMPs over the past permit cycle. Thus it is unlikely that a program that continues to rely on hundreds if not thousands of feasibility determinations will achieve broad application of LID techniques—despite the clear goal of the permit to do so. This approach is not adequate, but fortunately is easily addressed, as discussed below.

2. **Important but simple changes to the proposed language will ensure the LID program's effectiveness.** In order to achieve the permit's goal of maximizing the stormwater control benefits of LID methods, we urge the Board to revise the proposed permit to reflect the changes set forth in red-line text in Attachment 1 to this letter. These revisions serve to clarify currently open-ended, ambiguous language regarding LID requirements. Essentially, the changes we urge Board to adopt will facilitate an adequate and more successful LID program by addressing current weaknesses in the draft language:

- **Direct project proponents to meet existing numeric treatment and control requirements using LID practices.** By providing a transparent requirement for LID implementation, this ensures that project proponents know what is required, and facilitates enforcement.
- **Eliminate requirements to use specific BMPs.** This provides greater flexibility to project proponents to meet the numeric requirements using whatever low impact development methods they choose.

Importantly, these simple changes do not overhaul the basic approach of the program as it is currently constructed. Indeed, the changes are consistent with the proposed permit's major goals, including establishing a catch-all category for priority development projects; directing implementation of LID strategies; and recognizing that it is appropriate to supplement LID methods with conventional BMPs where site conditions preclude effective use of LID practices.

But the changes we ask the Board to adopt are important because they avoid ambiguity and provide copermittees and project proponents with clear, understandable requirements for LID implementation while providing flexibility with respect to how those requirements are met. In this way, this approach is a superior method of achieving the core goals of the permit's LID program—maximizing the water quality benefits of low impact development for the San Diego region.

3. **The Board should not defer including a LID program in the permit to a later date for further study.** As we discussed in detail in prior comments, low impact development techniques have been thoroughly studied, their effectiveness documented, and put into practice around the country. As a result, high-performing LID techniques represent the MEP standard

required for this permit by the Clean Water Act. Moreover, in adopting the proposed permit, the Board is poised to make findings that can only be true if the permit includes a robust, enforceable LID program.[1]

As described above, the flaws in the current proposed program are easily addressed at this stage at the Board level. The revisions we propose are consistent with the elements and goals of the current program as it has appeared in the proposed permit first released over eight months ago. Moreover, specific changes we urge the Board to adopt have been part of the public record and available for review since June. Thus, no further deliberation or public process is needed to adopt the language we have submitted. Moreover, neither the Copermittees nor other interested parties have disputed the LID program's goals or approach since the first draft of the tentative order was released. For instance, Project Clean Water (a collaboration headed by the County of San Diego) has posted on its website literature supporting low impact development practices that NRDC submitted as part of our earlier comments on this permit.[2] And a recent press release by the National Association of Home Builders (an affiliate organization of BIA/SC) reiterates that LID is practical, mainstream, cost-effective, and environmentally-friendly.[3] This echoes the central message from industry reports and technical manuals that NRDC included in our earlier comments.

The bottom line is that there is essentially no dispute—either around the country or with regard to the reissuance of this permit—about the importance, effectiveness, and availability of low impact development methods. With the Board's support, this program can be a central driver of real and measurable long-term water quality protection and improvement in San Diego County. And low impact development practices can deliver these results in a manner that bestows multiple additional financial and community-wide benefits in the process.

We therefore urge the Board to adopt simple but important revisions to Section D.1.d to realize the maximum benefit of LID in the San Diego region.

Sincerely,

David Beckman

David Beckman
Senior Attorney

Enclosures

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[1] Proposed Permit at pp. 2,5.

[2] http://www.projectcleanwater.org/html/wq_permit.html (citing R. Horner, *Investigation of the Feasibility and Benefits of Low Impact Development for the San Diego Region* (2006), and NRDC, *Rooftops to Rivers – Green Strategies for Controlling Stormwater and Combined Sewer Overflows* (2006)).

[3] National Association of Home Builders, "Green Building: Not as Complicated as You Think, Says NAHB" (Dec. 13, 2006), http://www.nahb.org/news_details.aspx?newsID=3765&print=true (Attachment 2).

d. STANDARD URBAN STORM WATER MITIGATION PLANS (SUSMPS) – APPROVAL PROCESS CRITERIA AND REQUIREMENTS FOR PRIORITY DEVELOPMENT PROJECTS

Each Copermittee shall implement an updated local SUSMP which meets the requirements of section D.1.d of this Order and (1) reduces the discharge of pollutants from Development Projects to the MEP, (2) ensures urban runoff discharges from Development Projects do not cause or contribute to a violation of water quality standards, and (3) controls urban runoff discharges from Development Projects that have the potential to cause increased erosion of stream beds and banks, silt pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force. These objectives shall be met by incorporating low impact site design BMPs into the design of Priority Development Projects so as to comply with the volumetric requirements of subsection D.1.(d)(6)(c). If low impact site design BMPs alone are not sufficient to meet these objectives, other structural source control and treatment control BMPs shall be incorporated into the design so as to meet the requirements of subsection D.1.(d)(6)(c).

(1) Definition of Priority Development Project

Priority Development Projects are: a) all new Development Projects, and b) those redevelopment projects that create, add or replace at least 5,000 square feet of impervious surfaces on an already developed site, that fall under the project categories or locations listed in section D.1.d.(2). Where redevelopment results in an increase of less than fifty percent of the impervious surfaces of a previously existing development and not more than one-quarter acre of new impervious surface, and the existing development was not subject to SUSMP requirements, the numeric sizing criteria discussed in section D.1.d.(6)(c) applies only to the addition, and not to the entire development. Where redevelopment results in an increase of more than fifty percent of the impervious surfaces of a previously existing development, or where the relative increase is less than 50% but greater than 11,000 square feet of new impervious surface, the numeric sizing criteria applies to the entire development. Where a project feature, such as a parking lot, falls into a Priority Development Project Category, the entire project footprint is subject to SUSMP requirements.

(2) Priority Development Project Categories

(a) Any development project that takes place on five thousand (5000) square feet or greater, or that otherwise disturbs more than five thousand square feet of land. This category applies without respect to the type of development and is in addition to the type-specific categories set forth in subsections (b) through (l) below. Where a development does not meet the requirements subsections (b) through (l), but does meet this requirement, it is a Priority Project.

(b) Housing subdivisions of 10 or more dwelling units. This category includes single-family homes, multi-family homes, condominiums, and apartments.

(c) Commercial developments greater than 100,000 square feet. This category is defined as any development on private land that is not for heavy industrial or residential uses where the land area for development is greater than 100,000 square feet. The category includes, but is not limited to: hospitals; laboratories and other medical facilities; educational institutions; recreational facilities; municipal facilities; commercial nurseries; multi-apartment buildings; car wash facilities; mini-malls and other business complexes; shopping malls; hotels; office buildings; public warehouses; automotive dealerships; airfields; and other light industrial facilities.

(d) Heavy industrial developments greater than five thousand (5000) square feet. This category includes, but is not limited to: manufacturing plants, food processing plants, metal working facilities, printing plants, fleet storage areas (bus, truck, etc.), railroad yards, and nurseries

(e) -Municipal and state developments greater than five thousand (5000) square feet. This category is defined as any development on publicly owned municipal or state- land.

~~(e)~~(f) Automotive repair shops. This category is defined as a facility that is categorized in any one of the following Standard Industrial Classification (SIC) codes: 5013, 5014, 5541, 7532-7534, or 7536-7539.

~~(d)~~(g) Restaurants. This category is defined as a facility that sells prepared foods and drinks for consumption, including stationary lunch counters and refreshment stands selling prepared foods and drinks for immediate consumption (SIC code 5812), where the land area for development is greater than 5,000 square feet. Restaurants where land development is less than 5,000 square feet shall meet all SUSMP requirements except for structural treatment BMP and numeric sizing criteria requirement D.1.d.(6)(c) and hydromodification requirement D.1.d.(14).

~~(e)~~(h) All hillside development greater than 5,000 square feet. This category is defined as any development which creates 5,000 square feet of impervious surface which is located in an area with known erosive soil conditions, where the development will grade on any natural slope that is twenty-five percent or greater.

~~(f)~~(i) Environmentally Sensitive Areas (ESAs). All development located within or directly adjacent to or discharging directly to an ESA (where discharges from the development or redevelopment will enter receiving waters within the ESA), which either creates 2,500 square feet of impervious surface on a proposed project site or increases the area of imperviousness of a proposed project site to 10% or more of its naturally occurring condition. "Directly adjacent" means situated within 200 feet of the ESA. "Discharging directly to" means outflow from a drainage conveyance system that is composed entirely of flows from the subject development or redevelopment site, and not commingled with flows from adjacent lands.

~~(g)~~(j) Parking lots 5,000 square feet or more or with 15 or more parking spaces and potentially exposed to urban runoff. Parking lot is defined as a land area or facility for the temporary parking or storage of motor vehicles used personally, for business, or for commerce.

~~(h)~~(k) Street, roads, highways, and freeways. This category includes any paved surface that is 5,000 square feet or greater used for the transportation of automobiles, trucks, motorcycles, and other vehicles.

~~(i)~~(l) Retail Gasoline Outlets (RGOs). This category includes RGOs that meet the following criteria: (a) 5,000 square feet or more or (b) a projected Average Daily Traffic (ADT) of 100 or more vehicles per day.

(3) Pollutants of Concern

As part of its local SUSMP, each Copermittee shall develop and implement a procedure for pollutants of concern to be identified for each Priority Development Project. The procedure shall address, at a minimum: (1) Receiving water quality (including pollutants for which receiving waters are listed as impaired under CWA section 303(d)); (2) Land use type of the Development Project and pollutants associated with that land use type; and (3) Pollutants expected to be present on site.

(4) Low Impact Site Design BMP Requirements

Each Copermittee shall require each Priority Development Project to ~~meet the following~~implement low impact site design BMPs sufficient in scope to retain, reuse and/or infiltrate a volume of water no less than specified in subsection D.1.(d)(6)(c)(i) or (ii) below. ~~BMP requirements:~~ The low impact site design BMPs to be required shall:

(a) Require all applicable source control BMPs listed in section D.1.d(5) to be implemented.

~~(a) Implement at least one site design BMP from the following list (Priority Development Projects with no landscaping or low traffic areas can be exempt from this requirement):~~

~~i. Drain a portion of rooftops into pervious areas prior to discharge to the MS4.~~

~~ii. Drain a portion of impervious sidewalks, walkways, trails, or patios into pervious areas prior to discharge to the MS4.~~

~~iii. Construct a portion of walkways, trails, overflow parking lots, alleys, or other low traffic areas with permeable surfaces, such as pervious concrete, porous asphalt, unit pavers, and granular materials.~~

~~(b) Implement at least one site design BMP from the following list:~~

~~i. Conserve natural areas.~~

~~ii. Construct streets, sidewalks, or parking lot aisles to the minimum widths necessary, provided that public safety and a walkable environment for pedestrians are not compromised.~~

~~iii. Minimize the impervious footprint of the project.~~

~~(c)~~(b) Conserve natural areas including ~~Preserve~~ existing trees, other vegetation, and soils. ~~Implement all site design BMPs from the above lists in sections D.1.d.(4)(a) and D.1.d.(4)(b) where determined to be applicable and~~

~~feasible by the Copermittee.~~

(c) Minimize~~Minimize~~ soil excavation and compaction and vegetation disturbance.

(d) Minimize impervious rooftops and building footprints.

(e) Construct streets, driveways, sidewalks, and parking lot aisles to the minimum widths necessary, provided that public safety and a walkable environment for pedestrians are not compromised.

(f) Construct low-traffic areas with permeable surfaces such as porous asphalt, open-graded Portland cement concrete, coarse granular materials, concrete or plastic unit pavers, and plastic grid systems. Areas that should be considered for permeable surfaces include, but are not limited to, driveways, patio slabs, walkways and sidewalks, trails, alleys, and overflow or otherwise lightly-used parking lots.

(g) Drain runoff from roofs and other impervious areas into one or more of the following natural drainage systems before discharge to the MS4:
   i. Bioretention area, also known as a rain garden (with compost-amended soils as needed)
   ii. Vegetated swale (with compost-amended soils as needed)
   iii. Vegetated filter strip (with compost-amended soils as needed)
   iv. Infiltration trench
   v. Roof rainwater collection cistern
   vi. Vegetated roof

(h) Maintain natural drainage patterns(e.g., depressions, natural swales) as much as possible, and design drainage paths to increase the time before runoff leaves the site by:
   i. Emphasizing sheet instead of concentrated flow;
   ii. Increasing the number and lengths of flow paths;
   iii. Maximizing non-hardened drainage conveyances; and
   iv. Maximizing vegetation in areas that generate and convey runoff.

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NATIONAL ASSOCIATION OF HOME BUILDERS

GREEN BUILDING: NOT AS COMPLICATED AS YOU THINK, SAYS NAHB

Normal View

December 13, 2006 - Is it hard to build green? Is it a lot more expensive? Do I have to live in a straw-bale cottage or some other strange building to say I'm a green home owner? No, no, and most decidedly no, according to the National Association of Home Builders.

NAHB's Model Green Home Building Guidelines are about to celebrate their second birthday. Designed to help bring residential green building into the mainstream, the Guidelines also demystify the process and debunk the myths of green building for consumers – and for home builders.

Using the Guidelines, local home building associations are creating regionally appropriate green building programs for interested builders, and that interest is growing rapidly. Twelve state and local associations have launched voluntary green building programs, with another dozen on the way. "The Guidelines include an easy-to-follow checklist to make sure the builder is incorporating all aspects of green building into each project. That makes it easier to build green – and that's the beauty of the voluntary Guidelines," said NAHB President David Pressly, a home builder in Statesville, N.C.

Is it more expensive to build green? Experienced builders say it doesn't have to be. Guidelines-based programs award points for resource efficiency, and if you're using fewer materials, you're saving money, they point out. And some green building ideas – like positioning a home's windows to best take advantage of natural light – don't cost any more than conventional building – and save money for the homeowner.

Nor does green building consist of neighborhoods filled with yurts, underground bunkers or geodesic domes, Pressly noted. "When a house is green but looks like other houses in the neighborhood – and can be replicated by large-scale building companies – then we know green is mainstream. We're seeing that happen right now," he said.

There are more green building products than ever. Easier to use insulation, chemically neutral paints and flooring and natural landscaping products are no longer difficult to find. Most home-improvement stores carry a full line of compact fluorescent bulbs, which use 70 percent less energy, and advances in solar roof panels and shingles, wind turbines, and efficient appliances make green technology less expensive than even a few years ago.

But there are scattered gray clouds on a mostly green horizon, Pressly said. Efforts to mandate green building are the perfect example of good intentions gone awry. "Green building needs to stay voluntary to continue to allow for market innovation and to make sure that the additional money spent to build 'green' goes to building improvements, not excessive certification fees," he said. "NAHB discourages efforts to dictate and legislate what constitutes acceptable green building practices because the building science in this area is still evolving. We don't want to see this dynamic process frozen in place."

In 2007, builders will learn more by attending educational seminars at the International Builders' Show in Orlando, Fla., Feb. 7-10 and the ninth annual NAHB National Green Building Conference in St. Louis March 25-27. Homebuyers don't have to wait that long to learn more: download a free guide at **www.nahb.com/greeninnovation** – or contact your local home builders association to find a green builder near you.

Related Meetings:

The International Builders' Show®(IBS)
2/7/2007 - 2/10/2007
Orange County Convention Center
Orlando, FL

National Green Building Conference
3/25/2007 - 3/27/2007
Adam's Mark Hotel
St. Louis, MO

I. Natural Resources Defense Council (dated December 11, 2006)

NRDC
THE EARTH'S BEST DEFENSE

NATURAL RESOURCES DEFENSE COUNCIL

December 11, 2006

Via E-mail

Executive Officer and Members of the Board
California Regional Water Quality Control Board, San Diego Region
9174 Sky Park Court, Suite 100
San Diego, CA 92123

Re: Responses to Comments and Revised Tentative Order No. R9-2006-0011

Dear Mr. Robertus and Members of the Board:

We respectfully submit the enclosed letter from Dr. Richard Horner responding to the Responses to Comments (December 13, 2006) for your consideration in advance of the public hearing on Revised Tentative Order No. R9-2006-0011. In the course of the public comment periods on this proposed stormwater permit for the San Diego Region Copermittees, the Natural Resources Defense Council ("NRDC") submitted detailed comments and suggestions as well as dozens of reference materials, including a study conducted by Dr. Horner evaluating the effectiveness of Low Impact Development methods in the San Diego Region.

Dr. Horner's letter contains information relevant to certain technical misunderstandings reflected in Board Staff's most recent response to comments. While we recognize that the period for public comment submittal is closed, we only became aware of the apparent misunderstandings when the responses to comments were released on Monday, December 4, 2006. Because of its limited nature, and because we could not have clarified these matters before we were aware of them, we believe that the document should be considered under applicable legal standards.

We respectfully request that the Board accept Dr. Horner's letter into the record so that the Board can consider the issues before it based on accurate factual information. Thank you for your consideration.

Sincerely,

David Beckman

David Beckman
Senior Attorney

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December 11, 2006

John Robertus, Executive Officer
San Diego Regional Water Quality Control Board
9174 Sky Park Court, Suite 100
San Diego, CA 92123

Dear Mr. Robertus:

I wish to reply to several points in Responses to Comments II on Revised Tentative Order No. R9-2006-0011, dated December 13, 2006, where I believe there are misinterpretations of comments by the Natural Resources Defense Council. These points are all on page 66.

"The commenter contends that implementation [of] LID site design BMPS for runoff treatment purposes is the only way to meet the MEP standard and protect water quality."

> The effect of our recommended permit modification was to interchange the order of considering LID and conventional BMPs, requiring, first, management of stormwater using the full range of LID-based site design BMPs. Then, conventional treatment BMPs would be applied to any site areas that could not be managed in this way, or where LID strategies could not be sized to manage the full 24-hour 85th percentile storm event volume or 85th percentile hourly rainfall intensity. While maintaining that these methods are the best way, we also anticipated that conventional approaches would in certain circumstances replace or supplement LID. In particular, media filters would be highly appropriate in confined spaces, because they need not take surface space and are relatively effective.

"USEPA reports that sand and other media filters can be more effective than grassed swales or vegetated filter strips in removing some pollutants from runoff (USEPA, 1999)."

> It is presumed that the USEPA (1999) reference is Preliminary Data Summary of Urban Stormwater Best Management Practices, EPA-821-R-99-012. Table 5-7 in that document indeed does indicate the greater effectiveness of media filters compared to vegetated swales and filter strips, at least for some pollutants. However, the swale and filter strip data tabulated there came from BMPs in conventional form, not from swales and filter strips designed and constructed on LID principles. Page 5-76 of the USEPA report presents a small amount of performance data available in 1999 for bioretention, a true LID practice, showing it to be superior to media filters, conventional vegetated swales and filter strips, and other standard BMPs.

Since 1999, much more LID performance information has become available. Over the past seven years the City of Seattle has been rebuilding street-side drainage systems according to LID concepts, chiefly by amending soils with compost and establishing diverse vegetation stands. Seattle has two fundamental natural drainage system (NDS) designs, both a series of bioretention cells but one divided by low berms for relatively flat streets and the other by stepped weirs for more sloping streets. The first type is generally applied on a block scale and the latter one on a larger scale lower in the drainage gradient. Both are intended to control storm runoff quantity and reduce pollutant mass loadings by converting surface flow to infiltration and evapotranspiration. They also decrease pollutant concentrations by sedimentation, vegetative filtration, and physicochemical mechanisms mediated by the soil, further boosting pollutant loading reductions.

Monitoring of a Seattle NDS of the first type demonstrated it to prevent surface discharge in 90 percent of the rainfall events in its first two years of operation (Horner et al. 2002, 2004). In contrast, the pre-existing drainage system discharged in all 35 events monitored. In the new system less than 2 percent of the hydrologic input became surface runoff. After two years it ceased to discharge at all, probably because of maturing of the vegetation, despite the largest 24-hour rainfall in Seattle history in October 2003 and the greatest single monthly precipitation quantity ever in November 2006. Of course, with no discharge pollutant reductions are 100 percent.

A Seattle NDS of the second type was monitored over the last two years for both flow and water quality (Chapman 2006). Because of the higher velocity on the sloping street and larger water volume characteristic of this type, it did not attenuate as much runoff as the first type but still prevented the outflow of approximately 75 percent of the total influent. It reduced pollutant mass loadings by the following amounts:

Total suspended solids—84%;
Total phosphorus and total nitrogen—63%;
Total copper, lead, and zinc—76-90%;
Dissolved copper and zinc—55-67% (dissolved lead was usually below detection);
Motor oil—92%.

Comparing these numbers with the pollutant mass loadings reported by Horner (2006, Table 5) for the San Marcos case studies shows overall higher reductions than with soil-based BMPs not constructed with LID methods. Loading decreases in the various land use case studies varied from about 50 to 80 percent for conventional extended-detention basins and biofiltration swales and filter strips, excepting a very few numbers outside this range. These performance data for a LID system are also overall higher than reported by USEPA (1999, Table 5-7) for media filters.

Discussion of this assertion of staff has focused, to this point, on water quality. Also a substantial benefit of LID practices is capturing storm runoff as a resource for groundwater recharge or other beneficial use (e.g., irrigation, toilet flushing). Media filters can recharge if not built with an impermeable bottom. However, even then, they are not constructed in the amended soils that advance infiltration. Horner (2006) demonstrated the substantial advantage in this respect of a full-fledged LID strategy (water harvesting as well as maximizing infiltration and evapotranspiration) compared to conventional soil-based extended-detention ponds and biofiltration swales and filter strips. Drawing from Tables 6 and 9 in Horner (2006), the following table shows that water savings that can be put to beneficial use is an estimated 2 to 4.5 times as great with a full LID strategy compared to using conventional stormwater best management practices.

Comparison of Water Savings for Beneficial Uses with Conventional BMPs versus a Full LID Approach

Annual Volume (acre-ft)	MFR[a]	Sm-SFR[a]	REST[a]	OFF[a]	Lg-SFR[a]	COMM[a]
Water savings with EDBs, swales, and filter strips[b]	1.89-3.14	0.28-0.64	0.10-0.17	0.18-0.29	17-28	1.16-1.94
Water savings with full LID[c]	6.29	1.28	0.35	0.58	56	3.88

[a] MFR—multi-family residential; Sm-SFR—small-scale single-family residential; REST—restaurant; OFF—office building; Lg-SFR—large-scale single-family residential; COMM—retail commercial; EDBs—extended-detention basins.
[b] Difference between groundwater recharge with and without BMPs.
[c] Water capture for which LID approaches are directly responsible (involving infiltration by design, supplemented by harvesting from roofs in the MFR, Lg-SFR, and COMM cases); the difference between capture with the full LID approach and without BMPs.

References:

Chapman, C. 2006. Performance Monitoring of an Urban Stormwater Treatment System. M.S.C.E. thesis, Department of Civil and Environmental Engineering, University of Washington, Seattle, WA.

Horner, R.R. 2006. Investigation of the Feasibility and Benefits of Low-Impact Site Design Practices ("LID") for the San Diego Region. (*Submitted to San Diego Regional Water Quality Control Board.*)

Horner, R.R., H. Lim, and S.J. Burges. 2002. Hydrologic Monitoring of the Seattle Ultra-Urban Stormwater Management Projects. Water Resources Series Technical Report No. 170, Department of Civil and Environmental Engineering, University of Washington, Seattle, WA.

Horner, R.R., H. Lim, and S.J. Burges. 2002. Hydrologic Monitoring of the Seattle Ultra-Urban Stormwater Management Projects, Summary of the 2002-2003 Water Years. Water Resources Series Technical Report No. 181, Department of Civil and Environmental Engineering, University of Washington, Seattle, WA.

"Caltrans also finds that various media filtration BMPs or treatment trains can be more effective than typical LID site design BMPs for some pollutants (Caltrans, 2004)."

It is presumed that the Caltrans (2004) reference is the BMP Retrofit Pilot Program Final Report, CTSW-RT-01-050. The project summarized herein monitored no LID-based BMPs, concentrating strictly on conventional stormwater practices. The biofiltration swales and filter strips and extended-detention basins constructed for this project used the existing soils and grass monocultures, in contrast to LID methods employing soil amendments and diverse vegetation. While the study concluded, like USEPA, that media filters can out-perform BMPs built in the earth, it is wrong to conclude anything about LID from this study.

"The majority of the treatment control BMPs with high or medium removal efficiencies, such as biofilters, detention basins, infiltration basins, and wet ponds, are 'soil-based' BMPs that incorporate LID techniques ... ."

Biofilters and basins have been and, mostly, still are being built without utilizing LID principles or methods. Sometimes, they are even lined to prevent infiltration. One major difference is that LID generally amends soils to improve their properties, with the objective of storing and infiltrating more water. LID also employs more diverse vegetation stands in order to intercept more precipitation and subsequently evaporate it, enhance infiltration through piping water along root structures into the ground, and transpire water from leaves to the atmosphere. Conventional biofilters and basins use whatever soils are present and usually have a grass monoculture. Therefore, in no way does selection of biofilters and basins in the general sense guarantee that LID methods will be put to work and their potential benefits realized.

"[T]he 'Horner study' ... does not refute this combined approach of LID site design BMP implementation supported by implementation of effective 'soil-based' treatment control BMPs which incorporated LID techniques."

In fact, the NRDC proposal promotes a combined approach, but one differing from the Board's. The NRDC proposal, and the Horner study, envision, first, going as far as possible in managing stormwater using the full range of LID-based site design BMPs. (The NRDC proposal proved that LID could be implemented in the range of representative land parcels in the San Diego region.) Then, conventional treatment BMPs would be applied to any site areas that could not be managed in this way, or where LID strategies could not be sized to manage the full 24-hour 85th percentile storm event volume or 85th percentile hourly rainfall intensity. The Board's approach does not embrace consideration of the full range of LID BMPs and using one or several of them to manage as much stormwater as possible, according to the sizing criteria. The Board's wording is not prescriptive enough in demanding that all LID options be exhausted and only then turning to conventional methods, which are likely to be less effective. The

Board's program improperly assumes that soil-based BMPs would use LID techniques if necessary to advance infiltration and evapotranspiration. All in all, it allows too many ways to escape full consideration of the best methods now available to us to meet the MEP standard and protect water quality.

I would be pleased to discuss my replies with you or your staff and invite your contact if you wish to do so.

Sincerely,

Richard R. Horner

Richard R. Horner

J. San Diego Unified School District

SD USD

San Diego Unified School District

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David Umstot, PE
Interim Chief Facilities Officer
Facilities Management/Prop MM

December 13, 2006

John Robertus, Executive Director
San Diego Regional Water Quality Control Board
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4340

Dear Mr. Robertus:

The San Diego Unified School District (District) has serious concerns about the unintended consequences of new requirements contained in the re-issuance of the San Diego Municipal Storm Water Permit. The proposed regulatory requirements will likely reduce the ability of the District to provide school facilities for its students and increase the demand on already scarce financial resources.

While the District desires to be a willing environmental steward, we encourage the Regional Board to consider reasonable and achievable standards. The current and proposed storm water regulations place no limits on the resources required to meet strict water quality standards regardless of whether these are achievable. Furthermore, it appears the regulations extend the jurisdiction of the Clean Water Act to include curbs, gutters, driveways and playgrounds. The new regulations seek to regulate hydrologic effects in addition to storm water quality. By regulating hydro-modification and preservation of riparian buffers, the proposed storm water permit will likely have significant unintended impacts. Requiring retention and advanced treatment of all storm water will increase the costs of building, improving and operating schools. While these best management practices may be appropriate in certain circumstances, they should not be universally required. The substantial costs imposed upon school districts and other public agencies in San Diego to comply with this requirement are significant and not funded.

Unlike commercial or municipal entities, public school districts do not have the ability to raise prices or increase fees to fund regulatory compliance activities. If the burden and fiscal cost of compliance increases, then scarce resources are diverted from our core mission to educate our school children. Every dollar the District spends to comply with the proposed storm water regulations will mean less money in the classroom and delayed repairs to aging school facilities. The teaching and learning environment will consequently suffer.

The District urges you to consider the far-reaching consequences of adopting the proposed permit requirements. We are as committed to educating children as the Regional Board is to protecting our natural resources. By better educating the next generation of citizens we will help them to be better stewards of the environment. We strongly advocate that the Regional Board work with all stakeholders to find a reasonable, achievable way to protect our waterways for all citizens of San Diego.

Respectfully,

David Umstot, PE
Interim Chief Facilities Officer

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