Responses to Comments III

on

Revised Tentative Order No. R9-2007-0001
(San Diego County Municipal Storm Water Permit)

San Diego Regional Water Quality Control Board

January 24, 2007

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LIST OF ABBREVIATIONS AND ACRONYMS

ADT - Average Daily Traffic
BAT - Best Available Technology
BIA - Building Industry Association of San Diego County
BIASC – Building Industry Association of Southern California
BIASDC - Building Industry Association of San Diego County
BILD – Building Industry Legal Defense Foundation
BMP - Best Management Practice
Basin Plan - Water Quality Control Plan for the San Diego Basin
CASQA - California Stormwater Quality Association
CBIA – California Building Industry Association
CCC - California Coastal Commission
CCWHE – Coalition for Clean Water and a Healthy Economy
CDFG - California Department of Fish and Game
CELSOC – Consulting Engineers and Land Surveyors of California
CEQA - California Environmental Quality Act
CFR - Code of Federal Regulations
CICWQ – Construction Industry Coalition on Water Quality
Copermittees - County of San Diego, the 18 incorporated cities within the County of San Diego, the San Diego Unified Port District, and the San Diego County Regional Airport Authority
CWA - Clean Water Act
CWC - California Water Code
CZARA - Coastal Zone Act Reauthorization Amendments of 1990
ESAs - Environmentally Sensitive Areas
FR - Federal Register
GIS - Geographic Information System
IC/ID - Illicit Connections and Illicit Discharges
IEA – Industrial Environmental Association
JURMP - Jurisdictional Urban Runoff Management Plan
LARWQCB - Los Angeles Regional Water Quality Control Board
MEP - Maximum Extent Practicable
MRP - Receiving Waters Monitoring and Reporting Program
MS4 - Municipal Separate Storm Sewer System
NOI - Notice of Intent
NPDES - National Pollutant Discharge Elimination System
NRDC - Natural Resources Defense Council
NURP - Nationwide Urban Runoff Program
Regional Board - San Diego Regional Water Quality Control Board
RGOs - Retail Gasoline Outlets
ROWD - San Diego County Copermittees' Report of Waste Discharge
RURMP - Regional Urban Runoff Management Plan
RWLs - Receiving Water Limitations
SANDAG - San Diego Association of Governments
SIC - Standard Industrial Classification Code

SUSMP - Standard Urban Storm Water Mitigation Plan
SWMP - Storm Water Management Plan
SWRCB - State Water Resources Control Board
SWPPP - Storm Water Pollution Prevention Plan
TAC - State Water Resources Control Board Urban Runoff Technical Advisory Committee
TIE - Toxicity Identification Evaluation
TMDL - Total Maximum Daily Load
USEPA - United States Environmental Protection Agency
WDRs - Waste Discharge Requirements
WLAs - Waste Load Allocation
WQC - Water Quality Criteria
WQBELs - Water Quality Based Effluent Limits
WSPA - Western States Petroleum Association
WURMP - Watershed Urban Runoff Management Plan

INTRODUCTION

The San Diego Regional Water Quality Control Board (Regional Board) was scheduled to consider adoption of Tentative Order No. R9-2006-0011 (now Tentative Order No. R9-2007-0001) 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 took the opportunity to request additional comments from interested parties on specific sections of the Tentative Order. The Regional Board requested comments on those sections which included the most recent modifications made to the Tentative Order. The modifications were found in underline/strikeout format in the version of the Tentative Order dated December 13, 2006. Since numerous opportunities to comment on the other sections of the Tentative Order were previously provided, comments on those sections were not requested.

The Regional Board received a total of approximately 39 written comments on the modified sections of Tentative Order No. R9-2006-0011 dated December 13, 2006 from approximately 7 different organizations and individuals. Each of these written comments is responded to in this document. A few of the comments received were equivalent to other comments received; these comments were grouped with other similar comments and responded to once in order to minimize redundancy in this document.

The overall organization of this document is consistent with the organization of the revised Tentative Order. Comments and responses are organized according to the Tentative Order section they address. Comments and responses on each Tentative Order section are then presented in the same sequence as the sections appear in the revised Tentative Order.

The Regional Board appreciates the efforts of all those who contributed by commenting on the revised Tentative Order No. R9-2006-0011 dated December 13, 2006. The comments are valuable and some have resulted in proposed permit language changes. To the extent that a revision to the permit language is proposed as a result of a particular comment, that fact is noted in the response to that comment.

The latest revised Tentative Order and Fact Sheet (dated January 24, 2007) are available in conjunction with this Responses to Comments III document at:

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

RESPONSES TO COMMENTS

Section: General **Sub-section:**

Commenter(s): CCWHE, BIASD, CBIA, CICWQ, BILD, CBPA, NAIOP, ICSC

Comment: 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.

Response: The changes found in the second revised Tentative Order were all made in direct response to comments received. As such, they were a logical outgrowth of the public process and were reasonably foreseeable. Therefore, no additional public comment period on the changes was necessary or required. However, in order to continue dialogue with interested parties and increase understanding of the changes in the second revised Tentative Order, the Regional Board has accepted additional comments on the changes. Even though this additional comment period is not required, it is in accordance with standard procedures for comment periods. The comment period for the changes found in the second revised Tentative Order exceeds 30 days. The request for comments was issued on December 15, 2006, and comments will be accepted up until the Regional Board meeting on January 24, 2007. Moreover, while nothing precludes the Regional Board from placing limits on the written comment period, the notice does not limit written comments to those received by January 2, 2007. The notice states that written comments should be received by that date "[i]n 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." Nowhere does the notice state that written comments will not be accepted after January 2, 2007. It is also worth noting that changes were only found in approximately 13 subsections of the Tentative Order, constituting approximately four pages of text. The amount of time that has been provided for review and comment on this limited text is more than adequate.

Section: General **Sub-section:**

Commenter(s): San Diego Copermittees

Comment: 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.

Response: Consideration of adoption of the Tentative Order was first noticed on Augsut 30, 2006 for the December 13, 2006 Regional Board meeting. This meeting had to be postponed until January 24, 2007 due to lack of a quorum. While the date of the meeting ultimately changed, the August 30, 2006 Notice of Availability provided the public with notice of the Regional Board's intent to consider adoption of the Tentative Order. The Regional Board then provided notice for the rescheduled January 24, 2007 meeting on December 15, 2006, more than 30 days prior to the meeting. The use of the word "tentatively" in this notice in reference to the January 24, 2007 meeting date does not negate the notice. In addition, the agenda for the January 24, 2007 meeting was issued on January 5, 2007. These efforts provided adequate notice of the January 24, 2007 Regional Board meeting and are in accordance with all applicable laws.

Section: General **Sub-section:**

Commenter(s): San Diego Copermittees

Comment: 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.

Response: The changes found in the second revised Tentative Order were all made in direct response to comments previously received. As such, they were a

logical outgrowth of the public process and were reasonably foreseeable. Therefore, no additional public comment period on the changes was necessary or required. The Regional Board accepted additional comments in order to continue dialogue with interested parties and increase understanding of the changes. In addition, the changes were only found in approximately 13 subsections of the Tentative Order, constituting only approximately four pages of text. For these reasons, the Regional Board's request to receive written comments by January 2, 2007 provided adequate time to interested parties to provide written comments on the limited changes found in the second revised Tentative Order. Moreover, interested parties are not precluded from providing written comments after January 2, 2007. The January 2, 2007 submittal date was only provided so that written comments can be "considered and responded to in writing prior to consideration of adoption of the Tentative Order by the Regional Board." The Regional Board will make every effort to respond to all comments received after January 2, 2007.

Even though this additional comment period is not required, it is in accordance with standard procedures for comment periods. The comment period for the changes found in the second revised Tentative Order exceeds 30 days. The request for comments was issued on December 15, 2006, and comments will be accepted up until the Regional Board meeting on January 24, 2007. Moreover, while nothing precludes the Regional Board from placing limits on the written comment period, the notice does not limit written comments to those received by January 2, 2007. The notice states that written comments should be received by that date "[i]n 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." Nowhere does the notice state that written comments will not be accepted after January 2, 2007. It is also worth noting that changes were only found in approximately 13 subsections of the Tentative Order, constituting approximately four pages of text. The amount of time that has been provided for review and comment on this limited text is more than adequate.

Section: Finding **Sub-section:** Finding D.2.f

Commenter(s): San Diego Copermittees

Comment: An all-out avoidance of standing water should not be the intent of properly designing BMPs. Focus should be on avoidance of vector control issues instead.

Response: We agree that vectors can be controlled by means other than avoidance of standing water. For this reason, the finding has been modified to reflect that other approaches for vector control exist.

Section: D **Sub-section:** D.1.d.(1)

Commenter(s): San Diego Copermittees

Comment: The Copermittees recommend the deletion of “or replace” from this definition. This change was only recently discovered by the Copermittees since it was never clearly identified in any of the drafts of the Tentative Order or discussed in any corresponding version of the Fact Sheet / Technical Report. Only a vague reference to it appears in the Summary of Modifications that accompanied the March draft of the Tentative Order. This is insufficient public process for a change of this significance.

Response: Replacement of impervious surface has been used as criteria for redevelopment to fall under the SUSMP categories since the Model SUSMP was approved in 2002. The definition of significant redevelopment in the Model SUSMP includes "replacement of a structure" and "replacement of an impervious surface." For this reason, the definition will not be changed.

Section: D **Sub-section:** D.1.d.(1)(b)

Commenter(s): San Diego Copermittees

Comment: 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.”

Response: The one acre threshold is necessary to maintain consistency with USEPA guidance and to meet the MEP standard. The Phase II NPDES storm water regulations require runoff from development projects greater than one acre to be addressed. The inclusion of all types of development in this category is appropriate, because USEPA's Nationwide Urban Runoff Program determined that there is not a consistent effect of land use type on the quality of urban runoff (USEPA, 1983). However, it is conceivable that there may be development projects which do not generate pollutants above background levels following completion of construction. For example, development of a trail system in a relatively flat nature preserve could result in negligible post-construction pollutant discharges. In the unlikely event that such a development takes place, language has been added to the Tentative Order so that the one acre threshold does not apply to development projects equal to or greater than one acre in size that do

not generate pollutants above background levels. It is important to note that this qualifier does not apply to develop projects already falling under the Priority Development Project categories of Tentative Order section D.1.d.(2), since such projects have already been determined to generate significant levels of pollutants.

Use of "one acre or more of new impervious surface" as the threshold is not appropriate because it does not meet USEPA guidance or the MEP standard. The San Francisco Bay Area Regional Water Quality Control Board is currently reissuing the San Mateo County storm water permit and is proposing a 5,000 square foot of impervious surface threshold.

Section: D **Sub-section:** D.1.d.(1)(b)

Commenter(s): City of Chula Vista

Comment: The rationale for the addition of "all development projects equal to one acre in size or greater" to the list of Priority Development 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.

Response: The one acre threshold is necessary to maintain consistency with USEPA guidance and to meet the MEP standard. The Phase II NPDES storm water regulations require runoff from development projects greater than one acre to be addressed. The inclusion of all types of development in this category is appropriate, because USEPA's Nationwide Urban Runoff Program determined that there is not a consistent effect of land use type on the quality of urban runoff (USEPA, 1983). However, it is conceivable that there may be development projects which do not generate pollutants above background levels following completion of construction. For example, development of a trail system in a relatively flat nature preserve could result in negligible post-construction pollutant discharges. In the unlikely event that such a development takes place, language has been added to the Tentative Order so that the one acre threshold does not apply to development projects equal to or greater than one acre in size that do not generate pollutants above background levels. It is important to note that this qualifier does not apply to develop projects already falling under the Priority Development Project categories of Tentative Order section D.1.d.(2), since such projects have already been determined to generate significant levels of pollutants.

Section: D **Sub-section:** D.1.d.(1)(b)

Commenter(s): CCWHE, BIASD, CBIA, CICWQ, BILD, CBPA, NAIOP, ICSC

Comment: 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.

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.

Response: The commenter refers to a "clarification letter" issued by the LARWQCB on December 15, 2006 regarding its own municipal storm water permit requirements in Los Angeles. Since the letter was issued by a different Regional Board about a different permit, interpretation of the letter is not necessary for adoption of the Tentative Order. The Tentative Order itself, along

with its associated supporting documentation numbering over 1,000 pages, provide all the clarification that is necessary for adoption of the Tentative Order to be considered. In any event, nothing in the Tentative Order dictates when an EIR must be conducted. Moreover, any interim hydromodification criteria developed under the Tentative Order is expected to be appropriate for San Diego County and based on adequate supporting information.

Section: D **Sub-section:** D.1.d.(4)

Commenter(s): City of Chula Vista

Comment: 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.

Response: The Tentative Order's requirements have been crafted in a manner that provides the Copermittees with adequate discretion in implementing the requirements. Many of the requirements are required where applicable and feasible. In such cases, the Copermittees are provided discretion in developing criteria for determining applicability and feasibility. In addition, where requirements are mandatory, the Copermittees are provided discretion as to the extent of implementation. For example, routing of runoff from impervious surfaces to pervious surfaces is mandatory, but the Copermittees determine how much runoff from impervious areas is routed to pervious areas, provided the amount of runoff and the pervious areas' capacity correspond. Moreover, the Tentative Order does not limit the Copermittees' land use authority. The Tentative Order contains no requirements dictating what type of land use occurs; it simply requires that pollutants in runoff from development be reduced to the MEP and do not cause or contribute to violations of water quality standards.

Section: D **Sub-section:** D.1.d.(4)

Commenter(s): City of Chula Vista

Comment: 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.

Response: The requirements of the Tentative Order do not impinge on the land use authority of the Copermittees. The Tentative Order does not contain requirements that specify particular uses for the land; rather, the Tentative Order only requires that, however the land is used, inappropriate impacts to water quality do not result.

Section: D **Sub-section:** D.1.d.(4)

Commenter(s): Natural Resources Defense Council

Comment: 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.

First, the County's proposal defers implementation of overdue storm water reduction actions for 2.5 years, by seeking 18 months to prepare a SUSMP update incorporating LID and by then seeking a full year to implement the program that they spend 18 months developing. LID is in place throughout the nation. This time frame is objectively unreasonable.

Moreover, the County has had the last five years to propose a new SUSMP and to propose a program that meets MEP. They simply chose not to do so, ignoring MEP-compliant options like LID until other stakeholders raised them, and only now seeking to prepare a program sometime during the middle of the permit cycle. This is not an adequate approach. Indeed, even after comments on the first public draft of the permit were submitted, the County has had more than 6 months to propose a program. Now, days before the delayed hearing on the Permit, it proposes...merely more delay.

Response: The Tentative Order requires implementation of a substantial LID program within the first year of adoption. Use of pervious areas as LID BMPs for infiltration or treatment purposes is required. The amount of runoff to be infiltrated or treated by a project's pervious areas must correspond to the pervious areas' capacity, thereby ensuring extensive use of pervious areas for infiltration or treatment. A portion of low-traffic areas at development projects

must also use permeable surfaces. Moreover, runoff that is not able to be infiltrated or treated by pervious areas is required to be treated by BMPs that will often incorporate LID techniques, since treatment BMPs must be effective and many effective BMPs are LID BMPs or are "natural-based." Moreover, additional LID BMPs are required where applicable and feasible. Combined, these requirements ensure a high level of LID BMP implementation within one year of adoption of the Tentative Order.

The Tentative Order provides the Copermittees with additional time beyond one year to develop important details of the LID program to ensure its effectiveness over the long-term. Specifically, the Copermittees are provided additional time to develop specific siting, design, and maintenance criteria for LID BMPs. This is appropriate, considering that such criteria have not yet been developed specifically for the San Diego area. The Tentative Order also provides additional time to develop criteria to aid in determining the applicability and feasibility of LID BMPs under various development project conditions. This is also appropriate, provided the vast array of development project conditions that must be considered. The additional time provided for development of these criteria is not meant to stall implementation of a LID program in San Diego County; rather, it is designed to provide the time necessary to develop and implement a thorough and effective program. During the time the criteria and other details are developed, the minimum LID requirements of the Tentative Order will ensure widespread implementation of LID BMPs at development projects within San Diego County.

Section: D **Sub-section:** D.1.d.(4)

Commenter(s): Natural Resources Defense Council

Comment: 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.

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. 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. This echoes the central message from industry reports and technical manuals that NRDC included in our earlier comments.

Response: The Tentative Order's approach is expected to result in similar LID BMP implementation to that proposed by the commenter. Use of pervious areas as LID BMPs for infiltration or treatment purposes is required. The amount of runoff to be infiltrated or treated by a project's pervious areas must correspond to the pervious areas' capacity, thereby ensuring extensive use of pervious areas for infiltration or treatment. Runoff that is not able to be infiltrated or treated by pervious areas is then required to be treated by other means. Treatment BMPs must be effective and must incorporate LID techniques where applicable. Since most effective BMPs are LID BMPs or are "natural-based" and can incorporate LID techniques, implementation rates of treatment BMPs which utilize LID techniques will be high. Combined, these requirements ensure a high level of LID BMP implementation, similar to the results that would be achieved by the approach proposed by the commenter.

The commenter's proposed approach also does not provide the level of flexibility professed. The commenter's proposal can require LID BMPs for treatment to the exclusion of other equally effective treatment BMPs. Moreover, the commenter's proposal requires mandatory implementation of various LID BMPs (such as

conservation of natural areas, maintain natural drainage patterns, etc.) for all Priority Development Projects, regardless of their applicability and feasibility. The Tentative Order takes a more flexible approach, requiring such LID BMPs where applicable and feasible, with the Copermittees developing criteria to be used to determine applicability and feasibility. This approach acknowledges the vast number of different types of development projects, while also ensuring that specific criteria for determining applicability and feasibility of LID BMPs be applied to Priority Development Projects.

Section: D **Sub-section:** D.1.d.(4)

Commenter(s): Natural Resources Defense Council

Comment: 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 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.

Response: Problems with implementation of LID BMPs under the current permit stem from the lack of development of criteria to guide the implementation, design, siting, and maintenance of the LID BMPs. The Tentative Order corrects this deficiency. For certain LID BMPs, such as the routing of runoff from impervious areas to pervious areas, criteria are incorporated into the Tentative Order's requirements. For other LID BMPs, the Copermittees are required to develop criteria for determining the applicability and feasibility of their implementation. As such, applicability and feasibility determinations will essentially occur during the development of the criteria, rather than during consideration of each project. Moreover, the Copermittees are required to develop design, siting, and maintenance criteria for the various LID BMPs to be implemented, ensuring the effectiveness of the LID BMPs. By requiring the

development of specific criteria for LID BMP implementation, the Tentative Order ensures consistent LID BMP implementation will occur, while providing adequate flexibility in determining how to apply LID BMP requirements to development projects. This flexibility is necessary due to the wide array of potential development projects and their individual restrictions.

Section: D **Sub-section:** D.1.d.(4)

Commenter(s): CCWHE, BIASD, CBIA, CICWQ, BILD, CBPA, NAIOP, ICSC

Comment: 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.

Response: As has been discussed on numerous occasions, the requirements of the Tentative Order do not exceed federal law (see Responses to Comments, p. 18-19, 55-56, 59-64, 65-67, Responses to Comments II, p. 23-24, 42-46, 104). Therefore, the Regional Board need not consider the factors listed in California Water Code section 13241 in adopting the Tentative Order. (City of Burbank v. State Water Resources Control Board (2005) 35 Cal.4th 613.) References to the federal law upon which each of the permit requirements is based are provided throughout the Fact Sheet/Technical Report.

Section: D **Sub-section:** D.1.d.(4)

Commenter(s): City of Chula Vista

Comment: 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.

Response: The rationale for changes included in the December 13, 2006 version of the Tentative Order is found in the Responses to Comments II document dated December 13, 2006. Since all changes to the Tentative Order were made in response to comments received, the rationale for the changes is found in the Regional Board's responses to comments. The Responses to Comments II document is incorporated into the Fact Sheet/Technical Report as Attachment D.

Section: D **Sub-section:** D.1.d.(4)

Commenter(s): San Diego Copermittees

Comment: 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". Since "LID" encompasses an array of site design, source control, and treatment control BMPs, it should not be narrowly construed as a modifier for site design BMPs only.

Response: The term LID has been added to the Tentative Order to clarify that the Tentative Order's site design BMP requirements are LID requirements. No use of the term LID in the Tentative Order places any limitation on the Copermittees' use of LID techniques. The Copermittees are free to go beyond the Tentative Order's minimum LID requirements. However, we agree that LID encompasses more than site design BMPs only. For this reason, the Tentative Order has been modified to require LID BMP implementation, rather than LID site design BMP implementation. LID site design BMPs are then one component of the overarching LID BMP requirements. The LID BMP requirements also include requirements for LID BMPs that might not be considered LID site design BMPs, such as planning practices.

Section: D **Sub-section:** D.1.d.(4)

Commenter(s): CCWHE, BIASD, CBIA, CICWQ, BILD, CBPA, NAIOP, ICSC

Comment: 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.

Response: The new SUSMP requirements (including hydromodification and LID requirements) apply to "new Development Projects" which fall into the SUSMP development project categories (section D.1.d.(1)(a)). Since SUSMP projects must be new, the Tentative Order's new SUSMP requirements need not apply to development projects that have already begun grading or construction at the time the new SUSMP requirements commence. Likewise, development projects that have received all necessary approvals to begin grading or construction, whereby it would be illegal for Copermittees to apply additional requirements to the development project, are also not new and need not meet the new SUSMP requirements at their start date. This is consistent with the approach of the current permit, Order No. 2001-01.

However, development projects that have not begun grading or construction and have not received all necessary approvals at the start date for the new SUSMP requirements are new development projects. These development projects must meet the new SUSMP requirements when the requirements commence. This is appropriate, because the majority of the new SUSMP requirements are already required in some form in Order No. 2001-01 or the Model SUSMP. The new SUSMP requirements generally provide clarification on old SUSMP requirements. For example, hydromodification controls are required by the old SUSMP requirement that states: "ensure that discharges from new development and significant redevelopment maintain or reduce pre-development downstream erosion and protect stream habitat" (section F.1.b.(2)(j)). Likewise, LID site design BMP provisions are included in the Model SUSMP, which requires minimization of impervious footprints, conservation of natural areas, construction of low traffic areas with permeable surfaces, construction of streets and sidewalks to minimum widths, maximization of canopy interception, utilization of natural drainage systems, and drainage of impervious surfaces into landscaping. As such, it is appropriate to apply the new SUSMP requirements to development projects which have not gained all necessary approvals to begin grading or construction at the time the new SUSMP requirements commence. Since the

new SUSMP requirements will not begin for one year or more, pending development projects should use this time period to prepare to meet the new SUSMP requirements.

Section: D **Sub-section:** D.1.d.(4)

Commenter(s): CCWHE, BIASD, CBIA, CICWQ, BILD, CBPA, NAIOP, ICSC

Comment: 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.

Response: The requirements of the Tentative Order do not impinge on the land use authority of the Copermittees. The Tentative Order does not contain requirements that specify particular uses for the land; rather, the Tentative Order only requires that, however the land is used, inappropriate impacts to water quality do not result. In ensuring that development and land use decisions do not inappropriately impact water quality, the Tentative Order is not contrary to California Water Code section 13360. The Tentative Order does not specify the design, location, type of construction, or particular manner that BMPs are to be implemented at development projects. For example, while some runoff from impervious areas is required to be routed to pervious areas in order to promote infiltration and reduce pollutant discharges, how this is to be achieved in terms of design, location, construction, or manner is to be determined by the Copermittees and the project proponents. Other LID site design BMP

requirements in the Tentative Order (such as conservation of existing trees, minimization of street and sidewalk widths, etc.), incorporate the same approach. Moreover, the Copermittees are provided with discretion in developing criteria for determining the feasibility of implementation of these types of LID site design BMPs at particular development projects. It is also worth noting that implementation of many of these LID site design BMPs is already required by the current permit (Order No. 2001-01) at many development projects. The Model SUSMP developed under Order No. 2001-01 currently requires implementation of minimization of impervious footprints, conservation of natural areas, construction of low traffic areas with permeable surfaces, construction of streets and sidewalks to minimum widths, maximization of canopy interception, utilization of natural drainage systems, and drainage of impervious surfaces into landscaping.

Section: D **Sub-section:** D.1.d.(4)

Commenter(s): Natural Resources Defense Council

Comment: The County seeks to remove numerous references to "LID" where they currently appear in the draft permit, which would reduce their obligations to meet LID standards and approaches in the 18 month SUSMP update process they seek.

Response: References to LID are important to ensure that effective LID approaches are implemented. For this reason, references to LID have not been removed from the Tentative Order.

Section: D **Sub-section:** D.1.d.(4)

Commenter(s): Natural Resources Defense Council

Comment: The Copermittees also seek to strip the permit draft of existing substantive LID requirements which, although not sufficient in our view, are beneficial compared to the County's proposal. While it might appear the County seeks to merely defer these requirements pending an 18 month stakeholder process, we believe they propose to largely denude the permit draft of substantive LID requirements. This would reduce their clear obligations during and after the 18 month proposed process and would mean that what comes out of this process is uncertain at best.

Response: While the Copermittees have been provided additional time to develop some of the specific criteria regarding application of LID BMP requirements to development projects, the minimum LID BMP requirements of the Tentative Order remain and have not been altered.

Section: D **Sub-section:** D.1.d.(4)

Commenter(s): Natural Resources Defense Council

Comment: In addition, we believe that any development program permit language ultimately adopted by the Board should have some very basic intent language regarding LID. We propose language such as the following for your consideration:

The permittees shall maximize the use of Low Impact Development management practices and principles as a means of reducing storm water runoff.

This language could be used in any version of the permit, including the County's proposal that we do not support (for example, it could be used where the County provides language that requires them to undertake an update of the SUSMP program within 18 months).

Response: Such language is not necessary, because the Tentative Order ensures a high level LID BMP implementation. For example, directly connected impervious surfaces must be minimized and infiltration must be promoted. Pervious areas must be used for infiltration or treatment up to their capacity for such functions. All applicable projects must construct a portion of their low traffic areas as permeable surfaces. Other LID BMPs must be implemented wherever applicable and feasible, based on specific criteria to be used for applicability and feasibility determinations. Moreover, treatment control BMPs must incorporate LID approaches where possible. Combined, these requirements will result in a high level of LID BMP implementation at development projects.

Section: D **Sub-section:** D.1.d.(4)

Commenter(s): San Diego Copermittees

Comment: As previously stated in our January 2 letter, we believe that accompanying minor modifications are also needed in the education and reporting sections, but we haven't had time to make them.

Response: Modifications to the LID requirements are also reflected in the education and reporting requirements.

Section: D **Sub-section:** D.1.d.(4)(a)

Commenter(s): City of Chula Vista

Comment: 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 redevelopment 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.

Response: Paragraphs i and ii only apply to projects with landscaped or other pervious areas. Projects without landscaped or other pervious areas are not required to meet these requirements. Projects with landscaped areas that are unsuitable for infiltration are addressed in paragraph i, which allows for the "pervious areas' soil conditions, slope, and other pertinent factors" to be taken into consideration in determining the amount of runoff from impervious areas that must be routed to pervious areas. The LID site design BMP requirements apply to all Priority Development Projects, including redevelopment projects. The characteristics of paragraphs i and ii which make them suitable for all pertinent development projects also make them suitable for all pertinent redevelopment projects.

It is worth noting that proximity of structures to a potential infiltration area is not necessarily a critical factor in determining the suitability of infiltration at a location. The majority of structures are located adjacent to regularly irrigated landscaping. The infrequent infiltration of rainwater is likely to have less of an impact on a structure than frequent infiltration of irrigation water for landscaping.

Section: D **Sub-section:** D.1.d.(4)(a)

Commenter(s): City of San Marcos

Comment: 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."

Response: The intent of requirement "i" is not to dictate the size of the pervious and impervious areas of a development project. Rather, the purpose of the requirement is to ensure that the amount of runoff routed from impervious areas to pervious areas corresponds with the pervious areas' capacity to receive and infiltrate/treat runoff. In other words, a pervious area with a large capacity for runoff must receive a correspondingly large amount of runoff, rather than small amount of runoff. This will help ensure that the opportunity for infiltration/ treatment of runoff presented by pervious areas is fully taken advantage of. The Tentative Order has been modified to clarify this intent.

Directly connected impervious area refers to hydrologic connection of impervious areas. By routing runoff from impervious areas to pervious areas, direct hydrologic connections of impervious areas are reduced. The BMPs set forth in section (a) are mandatory because they are objective BMPs that have been exhibited to be feasible for all projects with pervious areas (see Responses to Comments II, p. 60-61). The flexibility incorporated into the language of the requirement ensures this feasibility. The BMPs found in section (b) are more subjective BMPs, making determination of applicability and feasibility for all projects more difficult. The Copermittees are required to develop criteria to aid in determining the applicability and feasibility of these BMPs.

Section: D **Sub-section:** D.1.d.(4)(a)i

Commenter(s): City of Chula Vista

Comment: 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.

Response: The purpose of the requirement is to ensure that the amount of runoff routed from impervious areas to pervious areas corresponds with the pervious areas' capacity to receive and infiltrate/treat runoff. In other words, a pervious area with a large capacity for runoff must receive a correspondingly large amount of runoff, rather than small amount of runoff. This will help ensure that the opportunity for infiltration/ treatment of runoff presented by pervious

areas is fully taken advantage of. The Tentative Order has been modified to clarify this intent.

Section: D **Sub-section:** D.1.d.(4)(b)

Commenter(s): City of Chula Vista

Comment: 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.

Response: The second part of the sentence modifies the first part of the sentence. Implementation of a LID site design BMP is mandatory when such implementation is applicable and feasible for a given project.

Section: D **Sub-section:** D.1.d.(4)(b)

Commenter(s): San Diego Copermittees

Comment: In our proposal, Best Planning Practices are established as a separate section. They were previously presented as a subset of site design BMPs. The purpose of this requirement is to establish planning practices in Copermittee programs during the first year. Specific criteria for requiring their use will be established in the Model SUSMP update (section D.1.d.(8)).

Response: We agree that LID encompasses more than site design BMPs, such as planning practices. For this reason, the Tentative Order has been modified to require LID BMP implementation, rather than LID site design BMP implementation. LID site design BMPs are then one component of the overarching LID BMP requirements. The LID BMP requirements also include requirements for LID BMPs that might not be considered LID site design BMPs, such as planning practices. In this respect, planning practices fall under the LID BMP requirements, rather than LID site design BMP requirements.

Section: D **Sub-section:** D.1.d.(4)(b)

Commenter(s): San Diego Copermittees

Comment: 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).

Response: We agree that a collaborative Copermittee process for development of LID criteria is preferable to the development of different criteria by each of the 21 individual Copermittees. Different criteria for different Copermittee jurisdictions could lead to confusion during implementation by developers. For this reason, a process has been added to the Tentative Order for the update of the Model SUSMP to incorporate LID BMP criteria. This will ensure a collaborative effort by the Copermittees. The timeframe for the update of the Model SUSMP, and the corresponding updates of the local SUSMPs, provides the time necessary to develop and implement a thorough and effective program.

Section: D **Sub-section:** D.1.d.(4)(b)v

Commenter(s): City of Chula Vista

Comment: 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.

Response: The requirement only applies to natural drainages such as swales or topographic depressions that collect and transport water. As such, the requirement places no limitations on disturbances of other areas, and therefore does not preclude all, or even most, grading activities. Moreover, the requirement does not prohibit disturbances to natural drainages; rather, it only requires that they be minimized so that only the truly necessary disturbances occur. This requirement does not constitute a "take," because such drainages are already protected by federal and state law. Projects which will result in impacts to waters of the U.S. must receive Clean Water Act section 401/404 permits, while projects which will result in impacts to waters of the state (including ephemeral drainages) must receive coverage under the State Water Resources Control Board's general waste discharge requirements for discharges to waters outside of federal jurisdiction. Finally, it is worth noting that the requirement is similar to a current requirement in the Model SUSMP, which requires "use of natural drainage systems to the maximum extent practicable."

Section: D **Sub-section:** D.1.d.(6)

Commenter(s): San Diego Copermittees

Comment: 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.

Response: The numeric sizing criteria standard requires that the runoff generated by the 85th percentile storm event be infiltrated, filtered, or treated. To the extent that site design BMPs serve this function, they can be used to comply with the numeric sizing criteria standard. A footnote has been added to the Tentative Order to clarify that site design BMPs that are correctly designed and effective can be considered treatment control BMPs in order to meet the numeric sizing criteria standard.

Section: D **Sub-section:** D.1.d.(8)(a)

Commenter(s): San Diego Copermittees

Comment: We propose the addition of development of a LID approach through an update of the Model SUSMP.

Response: We agree that a collaborative Copermittee process for development of LID criteria is preferable to the development of different criteria by the 21 individual Copermittees. Different criteria for different Copermittees could lead to confusion during implementation by developers. For this reason, a process has been added to the Tentative Order for the update of the Model SUSMP to incorporate LID BMP criteria. This will ensure a collaborative effort by the Copermittees. The timeframe for the update of the Model SUSMP, and the corresponding updates of the local SUSMPs, provides the time necessary to develop and implement a thorough and effective program.

Section: D **Sub-section:** D.1.d.(8)(b)

Commenter(s): San Diego Copermittees

Comment: We include what we think is a flexible requirement for RWQCB review and approval of the Model SUSMP Update. The Copermittees need some certainty that RWQCB input and direction will not be received after they've implemented these provisions locally. This suggested language provides RWQCB staff with a wide range of options.

Response: The proposal allows for review and comment by the Regional Board on the updated Model SUSMP, but also provides the Copermittees assurances that Regional Board review and comment will not occur after the Copermittees have proceeded to implement the update. This is reasonable, in that it provides the Regional Board with options for review of the updated Model SUSMP, while also addressing the Copermittees' concerns. For this reason, the proposal has largely been incorporated into the Tentative Order.

Section: D **Sub-section:** D.1.d.(8)(c)

Commenter(s): San Diego Copermittees

Comment: An additional year will be necessary to develop and adopt ordinance changes, develop supporting guidance, train staff and project proponents, and implement final changes.

Response: When the Model SUSMP and local SUSMPs were originally developed in 2002, the Copermittees performed similar tasks in a timeframe of six months. Since all that is required now is an update to the local SUSMPs, rather than development of the entire local SUSMPs themselves, the previous timeframe of six months is sufficient. The Copermittees can use the 18 months provided for update of the Model SUSMP to prepare for the update of the local SUSMPs.

Section: D **Sub-section:** D.1.d.(13)

Commenter(s): City of Chula Vista

Comment: 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.

Response: Use of ineffective BMPs, without augmentation with more effective BMPs, must be removed from the local SUSMPs as an option. Too many effective BMPs are available to validate use of ineffective BMPs. However, to the extent that less effective BMPs are used as part of a treatment train with an overall high effectiveness, the less effective BMPs may be a viable partial option. In such cases, the local SUSMPs should be updated to be clear that the less effective BMPs are only options as a part of a treatment train, and are not options when they are the sole BMP to be utilized. The language of the Tentative Order is flexible enough to allow for such an approach.

Section: D **Sub-section:** D.1.g

Commenter(s): City of San Marcos

Comment: The extended deadlines may not be sufficient to develop an adequate Hydromodification 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.

Response: The Regional Board intends to review the schedule for development of the Hydromodification Management Plan as the project and other similar projects in southern California develop.

Section: D **Sub-section:** D.3.a.(2)(d)

Commenter(s): City of Chula Vista

Comment: 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.

Response: The term flood control device is used in the Tentative Order as it is found in the federal NPDES regulations (40 CFR 122.26(d)(2)(iv)(A)(4)). USEPA guidance for the NPDES regulation discusses lined channels and detention basins as examples of flood control devices (USEPA, 1992). As such, the term flood control devices should be interpreted to include the significant structures in a flood control system. One practical method for meeting this requirement would be to identify and evaluate all significant flood control devices which have the potential to be retrofitted over the permit term. It is worth noting that the prohibition on construction of treatment control BMPs in receiving waters refers to new treatment control BMPs constructed for the purpose meeting the SUSMP requirements. It does not refer to the retrofit of existing structures already constructed in a receiving water, where the retrofit of the structure can improve the pollutant removal capabilities of the structure or the assimilative capacity of the receiving water. However, all construction of structures in receiving waters is subject to the Clean Water Act section 401/404 permitting process and/or state waste discharge requirements.

Section: D **Sub-section:** D.3.a.(2)(d)

Commenter(s): City of San Marcos

Comment: 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 "retrofit where needed." This requirement appears to constitute an unfunded state mandate.

Response: As stated in the Responses to Comments II document (p. 79), this requirement has been modified to make it consistent with federal NPDES regulation 40 CFR 122.26(d)(2)(iv)(A)(4) and USEPA guidance. The

modifications do not create a new requirement, but rather clarify an existing requirement in response to comments received. Since the requirement is a federal NPDES requirement, it is not an unfunded state mandate.

Section: Monitoring **Sub-section:** Monitoring II.B.3

Commenter(s): City of San Diego

Comment: 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.

Response: The Regional Board believes that the time allowed will be sufficient to commence the updated Dry Weather Field Screening and Analytical Monitoring by May 1, 2007. Most of the sites for the Dry Weather Monitoring Program are already identified under the Order No. 2001-01. We understand that new sites need to be selected, but monitoring at the new sites does not need be conducted at the beginning of the dry weather period. Already existing stations can be sampled at the beginning of the dry weather period (May-July 2007), while the new selected sites can be sampled towards the end of the dry weather period (August-September 2007). This would give the Copermittees additional time to select new sites. Assuming an adoption date of January 24, 2007 and sampling of new sites in August and September 2007, the Copermittees will have 6 months to select the additional sites, which is sufficient.

Section: Monitoring **Sub-section:** Monitoring II.B.3

Commenter(s): City of San Diego

Comment: 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 1/4 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 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.

Response: In order to ensure efficient use of monitoring resources, we agree that a cap on the number of dry weather monitoring sites is needed. 40 CFR sections 122.26(d)(1)(iv)(D)(6-7) provide guidance that a cap of 500 dry weather monitoring sites is appropriate. The Tentative Order has been modified to include a dry weather monitoring site cap.

REFERENCES

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USEPA, 1999. 40 CFR Parts 9, 122, 123, and 124 National Pollutant Discharge Elimination System – Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges; Final Rule.