CITY OF DANA POINT

OFFICE OF THE CITY MANAGER

January 24, 2008

Mr. John H. Robertus
Executive Officer
California Regional Water Quality Control Board
San Diego Region
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4353

Re: Revised Tentative Order No. 49-2008-0001; NPDES No. CAS0108740

Dear Mr. Robertus:

The City of Dana Point ("Dana Point") appreciates the opportunity to comment on Tentative Order R9-2008-0001 (the "Tentative Permit"), which will have widespread and significant impacts on Dana Point's ongoing attempts to efficiently address the water quality issues it uniquely faces as a coastal city.

Although the Regional Board's modifications to the Tentative Permit reflect the Regional Board staff's consideration of the prior comments provided by Dana Point, the County of Orange, and other cities and interested parties, the minimal changes made to the Tentative Permit have not substantively addressed and remedied the matters raised by the commentators. In this regard, we also provide the following additional comments in an effort to ensure the Tentative Permit meets the goals of all concerned in reasonably achieving water quality protection. Dana Point likewise concurs with and joins in the additional Comments of the County of Orange, which are being independently submitted by the County.

THE TENTATIVE PERMIT STILL DOES NOT CONTAIN THE ANALYSIS REQUIRED BY WATER CODE SECTIONS 13000 AND 13241.

An overarching concern with the Tentative Permit derives from the Regional Board's obligation to comply with the requirements of California Water Code sections 13000 and 13241 in issuing the Permit. Under the holding of *City of Burbank v. State Water Resources Control Board* (2005) 35 Cal.4th 613, the Regional Board must consider the factors set forth in Water Code sections 13000 and 13241 when adopting a waste discharge requirement (which simultaneously acts as an NPDES permit under the Clean Water Act ("CWA")), unless consideration of the those factors "would justify pollutant restrictions that do not comply with federal law." (*Id.* at 627.)

Water Code sections 13000 and 13241 impose an overarching requirement of achieving economically feasible, reasonable water quality standards when issuing WDRs and NPDES

33282 Golden Lantern, Dana Point, CA 92629 • (949) 248-3500 • FAX (949) 248-9920
Internet: www.danapoint.org

permits. "[S]ection 13263 directs regional boards, when issuing waste water discharge permits, to take into account various factors including those set out in section 13241." (*Burbank*, 35 Cal.4th at 625.) Pursuant to the express requirements of Water Code section 13241, factors to be considered when the Board adopts or amends water quality objectives "shall include, but not necessarily be limited to, all of the following:"

> **(a) Past, present, and probable future beneficial uses of water.**
>
> **(b) Environmental characteristics of the hydrographic unit under construction, including the quality of water available thereto.**
>
> **(c) Water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area.**
>
> **(d) Economic considerations.**
>
> **(e) The need for developing housing within the region.**
>
> **(f) The need to develop and use recycled water.**

Similarly, Water Code section 13000 provides, in part, as follows:

> The Legislature further finds and declares that activities and factors which may affect the quality of the waters of the state shall be regulated to attain the highest water quality which is **reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible.** (Emph. added.)

In its most recent responses to comments (No. 9 at p. 7), the Board has stated its position that "the California State Supreme Court has determined that the factors listed in CWA section 13241 must ***only*** be considered during adoption of permits if the permit requirements exceed federal law." (Emphasis added.) The response to comments further states that the Tentative Permit's requirements do not exceed federal law, and in staff's opinion, the factors listed in Water Code sections 13000 and 13241 therefore need not be considered.

The Board's reading of *Burbank*, however, essentially turns the case's holding on its head, apparently assuming that all storm water pollutant reduction requirements are mandated by federal law. This limited reading of *City of Burbank* actually is the reverse of that case's holding. *Burbank* held that the State and Regional Water Boards must comply with the Water Code's requirements, unless the Boards' compliance with the state laws creates a conflict with federal law and State law is thereby pre-empted. (*Burbank*, 35 Cal.4th at 626-627.) The decision specifically recognizes that state-issued permits can contain limitations that are "more stringent than required by federal law." (Id. at 628; see also *County of Los Angeles v.*

Commission on State Mandates (2007) 150 Cal.App.4th 898, 916 ["The court thus acknowledged in *Burbank* that an NPDES permit may contain terms federally mandated and terms exceeding federal law."].)

Fairly read, *Burbank* holds that the State's Water Boards need not comply with the Water Code provisions only when compliance with these state laws creates a conflict with the federal law because federal law imposes more stringent standards. Thus, *Burbank* requires that the Regional Board comply with Water Code sections 13000 and 13241 ***unless*** federal law mandates the specific requirements set forth in the Tentative Permit. If federal law does not impose the specific requirements, the Board must comply with state law, including Water Code section 13000 and 13241. Because the Tentative Permit contains numerous obligations which are not required by either the CWA or the U.S. EPA's regulations promulgated under the CWA, the Regional Board must consider the factors in Water Code sections 13000 and 13241 before issuing the Tentative Permit.

Under the CWA, municipalities are subject to the "maximum extent practicable" ("MEP") standard for storm water discharges. A number of the Permit provisions, however, go far beyond the MEP standard. To exemplify this, the Board revised finding 3.e to eliminate the phrase to this finding providing that "pollutant discharges into MS4s must be reduced to the "MEP," which is what is required by federal law. As revised, this finding now states that municipalities must instead use "a combination of management measures, including source control, and effective MS4 maintenance program." In effect, the MEP standard to control discharges into (and presumably from) the MS4 was deleted. This change, combined with the discharge prohibitions and receiving water limitations provisions, shows that the Regional Board is imposing requirements that go beyond federal law. Thus, the Tentative Permit must comply with State law, including imposing only conditions that are "reasonable" in achieving water quality conditions "that could reasonably be achieved."

There is no indication anywhere in the record of any analysis of whether the various requirements in the Tentative Permit are "reasonable" as required pursuant to Water Code section 13000. Nor is there any discussion as to whether the "water quality conditions" that are sought to be achieved "could reasonable be achieved" through the various terms of the Tentative Permit. The Water Code imposes a clear obligation on the Boards to conduct an analysis and determine whether the obligations are "reasonable" and whether the proposed water quality conditions "could reasonable be achieved" before adopting permit terms. No such analysis appears anywhere in the record. As such, the Tentative Permit should not be adopted until the reasonableness requirements of State law have considered.

For instance, under section A of the Tentative Permit, *"Prohibitions and Receiving Water Limitations,"* the Board has prohibited any discharges into or from the MS4 in a manner "causing or threatening to cause, a condition of pollution, contamination, or nuisance." Also, provides that "discharges from MS4s cause or contribute to the violation of water quality standards . . . are prohibited." Further, Section A.3.c. provides that nothing in Section A.3 "must prevent the Regional Board from enforcing any provision of this Order while the Copermittee prepares and implements the above report." Also, in section D.4, the Tentative Permit contains detailed requirements for "Illicit Discharge Detection and Elimination. Still elsewhere, the Tentative Permit makes findings regarding Copermittee's responsibility for the discharges of

others: section D.3.d provides that "[a]s operators of the MS4s, the Copermittees cannot passively receive and discharge pollutants from third parties."

Thus, as written and fairly construed within in the context of the Tentative Permit, Sections A.1 and A.3 indicate that any discharge that has caused or contributed to a violation of the water quality standards is a violation of the Tentative Permit, irrespective of compliance with the iterative process being followed. As such, the Tentative Permit as written requires that the Copermittees strictly comply with water quality standards, irrespective of whether it is reasonable to do so, and irrespective of whether the water quality conditions in issue "could reasonably be achieved." Such a requirement not only goes beyond what is required under federal law, it is also beyond what State law authorizes. To adopt such a provision is to take action that is contrary to law.

Several other provisions in the Tentative Permit are invalid because of the lack of an analysis of whether the Tentative Permit terms are "reasonable" or are imposed to achieve water quality conditions "that could reasonably be achieved" include the facilities that extract, treat and discharge (FETDs) provisions, the development planning portion of the Permit specifically including the Standard Urban Stormwater Mitigation Plan (SUSMPs) provisions, the Low-Impact Development (LID) program, the hydro modification requirements, and other provisions as discussed further below.

Because the Tentative Permit's strict limitations exceed the MEP standard of federal law, the Board must consider the series of factors set forth in Water Code sections 13000 and 13241, including an analysis of whether the water quality conditions in question are "reasonably achievable," along with analysis of "economic considerations," the "need for developing housing in the region," and "the environmental characteristics of the hydrographic unit in question." Because *Burbank* holds that NPDES requirements which are not in conflict with federal law require compliance with Water Code section 13241 (and by extension section 13000), the Board must consider the factors set forth in the Water Code in regard to the discharge prohibitions and receiving water limitations set forth in Tentative Permit section A, and otherwise comply with all State law requirements in adopting the terms of the Tentative Permit.

Indeed, a meaningful consideration of the economic impacts is necessary for multiple permit provisions, including the following sections: D.1.a. [General Plan], D.1.b. [Environmental Review Process], D.1.c. [Approval Process Criteria], D.1.d. [SUSMP], D.1.f. [Treatment Control BMP Maintenance Tracking], D.1.g. [Enforcement of Development Sites], D.1.h. [Requirements for Hydromodification and Downstream Erosion], D.2. [Construction Component], D.2.e [Inspection of Construction Sites], D.2.f. [Enforcement], D.3.b. [Commercial/Industrial], D.3.b.(5) [Enforcement of Industrial and Commercial Sites/Sources], D.3.b.(6) [Training and Education], D.3.c.(5) [Home Owner Associations Areas], D.4.f. [Illicit Discharge Detection and Elimination], and D.4.g. [Enforce Ordinances]. Because the Tentative Permit and related materials contain no analysis of the economic impacts of these provisions, they do not comply with Water Code section 13241.

In purporting to address the obligation to consider "economics," the Tentative Permit's Fact Sheet includes a general discussion of economic issues that almost exclusively focuses on the negative impacts of water quality on coastal cities, and cites a lack of uniform reporting of data

regarding economic impacts as an impediment to a conclusive analysis of the economic impacts from the Tentative Permit's proposed requirements. To be sure, Dana Point's experience has confirmed that coastal cities uniquely suffer from storm water pollution impacts. But the Fact Sheet's discussion of an extremely limited range of economic concerns does not adequately address the enormous costs and limited potential incremental benefits from the requirements of the Tentative Permit imposed on the regulated cities.

But the Tentative Permit and Fact Sheet contain no evidence of a cost-benefit analysis of the requirements imposed, and there is no indication that the Regional Board has adequately considered the far-reaching economic impacts of the Tentative Permit. The Board must conduct a meaningful economic analysis, and the permit should be revised accordingly.

Likewise, the recent changes in the housing market have resulted in a marked decline in home construction. To be sure, the development restrictions contained in the Tentative Permit will increase the costs of construction. The impact of the Tentative Permit on the current needs for housing in the region must be analyzed as well.

In sum, numerous provisions of the Tentative Permit exceed federal law. (See section D [the "Jurisdictional Urban Runoff Management Program" ("JURMP")], section D.1.d. ["Standard Urban Storm Water Mitigation Plans ("SUSMPs)"].) Further, as noted above, subsection D.3.d. (at p. 11) specifies:

> As operators of the MS4s, the Copermittees cannot passively receive and discharge pollutants from third parties. By providing free and open access to an MS4 that conveys discharges to waters of the U.S., the operator essentially accepts responsibility for discharges into the MS4 that it does not prohibit or control. (Finding D.3.d.)

Initially, this provision expressly exceeds federal law because its broad language would expand the permit to regulate "discharges into the MS4" when the CWA only prohibits the discharge of "pollutants." Further, this provision effectively makes MS4 operators like Dana Point responsible for all up gradient sources of pollutants, including sources that are not subject to discharge requirements. The Tentative Permit makes Dana Point and other MS4 operators responsible for CWA Phase II facilities regulated by the Board but not subject to NPDES permit requirements. As such, the Tentative Permit essentially imposes strict liability on MS4 operators for discharges from school district facilities, federal facilities, and certain private dischargers that fall under Phase II of the NPDES program.

In short, the Tentative Permit's Development Planning and Construction Components (sections D.1 and D.2, F.) improperly condition approval of development projects on very specific storm water mitigation measures for new development and redevelopment projects. These requirements to be imposed on such projects, however, are not required by federal law. To the contrary, the regulations to the CWA only contain a very general requirement for the control of pollutants from post-construction runoff from municipal storm drains which receive discharges from areas of "new development or significant redevelopment." (See 40 C.F.R. 122.26(2) (d) (iv) (A) (2).) The particularized storm water mitigation program in the Tentative Permit is nowhere to be found in federal law. As such, it is a program that is not "***required under***" federal

law, and compliance with the Water Code's non-conflicting provisions, including sections 13200 and 13241, is necessary.

Similarly, federal regulations specify that "states" are required to inspect construction and industrial sites, and the regulations do not impose upon municipalities the detailed requirements set forth in the Tentative Permit at section 4 (see p. 58). The Tentative Permit's inspection and enforcement provisions applicable to construction and industrial sites also impose detailed obligations on municipalities which the CWA has specified are to be carried out by the ***state***. These inspection and enforcement requirements go beyond state law, and therefore are subject to the analysis required by Water Code sections 13000 and 13241.

Again, the Tentative Permit contains no analysis of whether compliance with the strict prohibition against "passively" receiving discharges is "reasonably achievable," as required by Water Code section 13000. Notably, the finding at section D.3.a. at page 10 recognizes state's responsibility to regulate statewide permits, but the provision fails to acknowledge the states' responsibility for Phase II dischargers under the CWA. This section should be revised to expressly recognize that it is the ***state***'s responsibility to regulate Phase II dischargers. Likewise, the Tentative Permit does not provide that permittees will be placed in the iterative process or be subject to the MEP standard in regard to responsibility for third party Phase II dischargers. The permit should specify that the MEP standard applies to discharges from the MS4, and that the State will remain responsible for regulating all Phase II discharges and other discharges not currently subject to NPDES requirements.

Significantly, the Regional Board's consideration of the factors listed in Water Code sections 13000 and 13241 is particularly important because the Board did not rely on those factors in regard to storm water during the development of the water quality objectives and the beneficial use designations in the applicable Basin Plan, or at any time after adoption of the Plan. For example, a number of the water quality objectives were adopted to achieve "potential" beneficial use designations, rather than "probable future" beneficial uses. But section 13241(a) requires that the water quality objectives be based on "***probable*** future" beneficial uses rather than "potential" beneficial uses. (See also Water Code § 13000 [which requires achieving water quality for "demands made and to be made" on the State's waters].) Federal law likewise provides that when adopting water quality standards, states are only required to develop standards by "taking into consideration their use and value." (42 U.S.C. § 1313(c)(2)(A).) For this reason, the existing water quality objectives and standards in the Basin Plan are defective because they were not adopted, and have not been updated, in regard to their application to storm water.

To summarize, the Tentative Permit contains an exceptional level of detail that is not dictated by the CWA or federal regulations. Federal law does not require the specified development planning components, or the discharge detection elimination provisions and receiving water limitations and other components specified in the Tentative Permit. Accordingly, compliance with Water Code sections 13000 and 13241 is necessary before the Tentative Permit can be issued in compliance with law.

UNFUNDED MANDATES.

The California Court of Appeal recently confirmed that any NPDES requirements that are not dictated by federal law must be funded by the state, or the provisions would violate Article XIII B, Section 6 of the California Constitution. (*County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898, 915-916.)

Despite prior comments on this point, the revised Tentative Permit and related materials do not address the unfunded mandates that are being imposed on the Copermittees. Contrary to contentions made by the Regional Board on this issue that such unfunded mandates are appropriate where they are being imposed pursuant to a federal program, it is only where the federal program ***mandates*** a ***particular requirement*** upon the state agency that the exception to Article XIII B, Section 6 for federal mandates applies. Where the federal program provides ***discretion*** to the State agency to impose a local program, any mandate imposed upon the local municipality through the exercise of that discretion is considered an ***unfunded mandate*** and, as such, is prohibited by the California Constitution. (See *Hayes v. Commission on State Mandates* (1992) 11 Cal. App.4th 1564, 1570.) It is only when the State has no "true choice" in implementing a federal mandate that the prohibition under the California Constitution can be avoided. (See *id.* at 1593.)

As noted, the Tentative Permit imposes numerous detailed requirements that are not required by federal law. Each of those provisions, which are listed in section I,[1] above, violate unfunded mandates doctrine unless the state provides funding for the programs. (See sections The State Board already regulates such sites, pursuant to the general statewide permits for such activities, and the State Board already collects fees from permittees in order to recoup some of the costs related to the statewide permit programs. Because the State Board already collects fees from permittees in relation to such construction and industrial activities, municipalities are not able to realistically impose duplicative fees on the regulated public. Because such fees cannot practically be recouped, these obligations violate the unfunded mandate standard. The Tentative Permit places primary responsibility on cities to enforce a General Statewide Industrial Permit and Construction Permit issued by the State Board without any funding, and thus is a direct violation of Article XIII B, Section 6 of the California Constitution. (*County of Fresno v. State, supra*, 53 Cal.3d at 42, 47.)

Additional examples of unfunded mandates being shifted to municipalities, includes the costs associated with complying with the (i) strict discharge prohibitions and receiving water limitations that exceed the MEP standard (section A), (ii) the JURMP (section D) and its

---

[1] See the following sections of the Tentative Permit: D.1.a. [General Plan], D.1.b. [Environmental Review Process], D.1.c. [Approval Process Criteria], D.1.d. [SUSMP], D.1.f. [Treatment Control BMP Maintenance Tracking], D.1.g. [Enforcement of Development Sites], D.1.h. [Requirements for Hydromodification and Downstream Erosion], D.2. [Construction Component], D.2.e [Inspection of Construction Sites], D.2.f. [Enforcement], D.3.b. [Commercial/Industrial], D.3.b.(5) [Enforcement of Industrial and Commercial Sites/Sources], D.3.b.(6) [Training and Education], D.3.c.(5) [Home Owner Associations Areas], D.4.f. [Illicit Discharge Detection and Elimination], and D.4.g. [Enforce Ordinances].

component provisions consisting of the SUSMP (section D.1.d.) and LID requirements (section D.1.d(8)), and (iii) the illicit connection/illicit discharge provisions (section D.4.).

The Tentative Permit, fact sheet, and responses to comments do not adequately consider additional mandates that are not funded by the state but are imposed by the draft order. Section D of the Tentative Permit contains detailed enforcement requirements that essentially mandate prosecution of certain activities associated with connection with and discharges to municipal storm water systems. For example, the Tentative Permit states:

> Each Copermittee **must** establish, maintain, and force adequate legal authority to control pollutant discharges into and from its MS4 through ordinance, statute, permit, contract, or similar means. This legal authority must, at a minimum, authorize the Copermittee to:
>
> > A. Control the contribution of pollutants in discharges of runoff associated with industrial and construction activity to its MS4 and control the quality of runoff from industrial and construction sites. This requirement applies to both industrial and construction sites which have coverage under the Statewide general industrial or construction stormwater permits, as well as to those sites which do not. Grading ordinances must be updated and enforced as necessary to comply with this order;
> >
> > * * *
> >
> > C. Prohibit and eliminate connections to the MS4;
> >
> > D. Control the discharge of spills, dumping or disposal of materials other than stormwater to its MS4. (Section C.1 (p. 19) [emphasis added].)
>
> * * *
>
> Each Copermittee **must revise as needed its General Plan or equivalent plan** . . . for the purpose of providing effective water quality and watershed protection principals. (Section D.1.a (p 21) [emphasis added].)
>
> * * *
>
> Each Copermittee **must** enforce its stormwater ordinance for all Development Projects and all development sites as necessary to maintain compliance with this order. Copermittee ordinances or other regulatory mechanisms must include appropriate sanctions to achieve compliance. Sanctions must include the following or their equivalent: non-monetary penalties, fines, bonding requirements, and/or permit or occupancy denials for non-compliance. (Section D.1.g (p. 34) [emphasis added].)
>
> * * *

Each Copermittee **must implement a construction program which meets the requirements of this section, prevents illicit discharges into the MS4, implements and maintains structural and non-structural and BMPs for discharges and pollutants and stormwater runoff and construction sites to the MS4, reduces construction site discharges and pollutants from the MS4 to the MEP, and prevents construction site discharges from the MS4 from causing and contributing to a violation of water quality standards.** (Section D.2 (p. 41) [emphasis added].)

* * *

Each Copermittee **must conduct construction site inspections for compliance with its ordinances (grading, storm water etc.).** (Section D.1.e. (p. 44) [emphasis added].)

* * *

Each Copermittee **must develop and implement an escalating enforcing process that achieves prompt corrective actions at construction sites for violation of the Copermittee's water quality protection permit requirements and ordinances. This enforcing process must include authorized Copermittee's construction site inspectors to take immediate enforcement actions when appropriate and necessary. The enforcement process must include** appropriate sanctions such as stop work orders, non-monetary penalties, fines, bonding requirements, and/or permit denials for non-compliance.

* * *

Each Copermittee **must** implement a commercial/industrial program that meets the requirements of this section, prevents a list of discharges into the MS4, reduces commercial/industrial discharges of pollutants from the MS4 to the MEP, and prevents commercial/industrial discharges from the MS4 from causing or contributing to a violation of water quality standards. (Section D.2.b (p. 55) [emphasis added].)

* * *

Each Copermittee **must** enforce the stormwater ordinance for all industrial and commercial sites/sources as necessary to maintain compliance with this order. Copermittee's ordinances or other regulatory mechanisms must include appropriate sanctions to achieve compliance. Sanctions **must** include the following or their equivalent: non-monetary penalties, fines, bonding requirements, and/or permit denials for non-compliance. (Section D.2.b.(5) (p. 60) [emphasis added].)

* * *

Each Copermittee **must** implement an education program using all media as appropriate to: (1) measurably increase the knowledge of owners and operators of commercial/industrial activities regarding MS4s, impacts of urban runoff on receiving waters, potential BMP solutions for the target audience; and (2) to measurably change the behavior of target communities and thereby reduce pollutant releases to MS4s in the environment. At a minimum, the education program must meet the requirements of this section and address the following issues:

(i) Laws, regulations, permits, & requirements

(ii) Best Management practices;

(iii) General urban runoff concepts; and

(iv) Other topics, including public reporting mechanisms, water conservation, low-impact development techniques.

* * *

BMP notification: At least twice during the five-year period of this order, each Copermittee **must** notify the owner/operator of each inventoried industrial and commercial sites/source of the BMP requirements applicable to the site/source. (Section D.2.b.(6) (p. 60) [emphasis added].)

* * *

Each Copermittee **must take immediate action to eliminate all detected illicit discharges, illicit discharge sources, and illicit connections** as soon as practicable after detection. Elimination measures may include an escalating series of enforcement actions for those illicit discharges that are not a serious threat to public health or the environment. **Illicit discharges that pose s serious threat to the public's health or the environment must be eliminated immediately.** (Section D.4.f (p. 66) [emphasis added].)

Through these provisions, and others, the Tentative Permit removes from Dana Point's enforcement authorities their inherent prosecutorial discretion. And, the enforcement of the Tentative Permit provisions undoubtedly will require the expenditure of substantial enforcement costs by municipalities. But municipalities have no means by which to recoup such regulatory costs under the Penal Code. In this way, the Tentative Permit imposes an "unfunded mandate" by not providing a means of compensation for these mandated enforcement measures.

In sum, and as noted in prior comments, the Tentative Permit attempts to shift the responsibility of the State and Regional Boards to Copermittees, and to force Copermittees to regulate and control construction and industrial sites that are otherwise subject to regulation by the State Board. It also seeks to impose numerous other mandates on Permittees that are not required by Federal laws, including mandating the elimination of all illicit discharges and connections, and dictating the precise enforcement process to be followed, down to specifying the specific

sanctions to be imposed. Under the California Constitution, these mandates must be funded by the State.

THE LEGAL AUTHORITY PROVISIONS EXCEED THE REQUIREMENTS OF FEDERAL LAW AND IMPROPERLY DICTATE THE MANNER OF COMPLIANCE WITH THE TENTATIVE PERMIT

As referenced in part above, the Tentative Permit imposes numerous obligations on cities in regard to legal authority requirements related to actions by third-party dischargers. (See e.g., Tentative Permit pp. 34, 46 and 60.) Such detailed enforcement requirements also are not dictated by the CWA or the federal regulations promulgated under the CWA. In addition to going beyond federal law and being subject to the analysis required by Water Code sections 13000 and 13241, the Tentative Permit provisions also conflict with Water Code section 13360's prohibition of water boards specifying the manner of compliance with water quality regulations promulgated by the state and regional boards. (See Water Code § 13360 [prohibiting Water Boards from specifying the design, location, type of construction or particular manner of compliance with waste discharge requirements].)

These detailed prescriptions on what laws must be enacted, and how they must be enforced, also improperly impugn on the discretion of local entities in enforcing their own laws. The general language set forth section D.3.c. (3) (at p. 62) contains appropriate language regarding the Copermittee's obligations to enforce their laws. That section states "each Co-Permitee must enforce its storm water ordinance for all residential areas and activities as necessary to maintain compliance with this order." This general prescription properly sets forth the municipalities' obligation to enforce their own laws.

Unlike this appropriate general obligation on local entities' legal authority and enforcement obligations, the Tentative Permit contains extremely detailed provisions that essentially dictate the exact laws that cities must adopt, and how the laws must be enforced. (See, e.g., Section C.1.a, C.1.c, C.1.d, D.1, D.1.a, D.1.b, D.1.c, D.1.d, D.1.e, D.1.g, D.1.h, D.2, D.2.e, D.2.f, D.3.b, D.3.c and D.4.) These provisions improperly specify the manner of compliance with the Tentative Permit and are contrary to Water Code section 13360. Further, such detailed provision implicates separation of power concerns under the California Constitution. (Cal. Const. Art. 4, § 1; *Knudsen Creamery Co. of California v. Brock* (1951) 37 Cal.2d 485, 492.) The executive branch of government is charged with enforcing laws, but it cannot adopt laws themselves, which conflict with local agencies' powers under the State Constitution. The detailed legal enforcement provisions of the Tentative Permit, including the provisions requiring enforcement of specific obligations in relation to particular property owners, such as HOAs (section D.3.c.(5)(b) at p. 62), unduly restrict the inherent legislative power of cities.

THE TENATIVE PERMIT UNLAWFULLY SPECIFIES THE MANNER OF COMPLIANCE IN VIOLATION OF WATER CODE SECTION 13360.

Numerous provisions, including the legal authority provisions, the JURMP, SUSMP, and the low-impact development site design provisions ("LIDs") contain detailed means by which the cities must comply with the Tentative Permit, along with detailed requirements on what specific construction, commercial and industrial programs must be adopted, and how they are to be

enforced, including the specific penalties to be imposed for violations. These terms dictate the means of compliance with the Permit in contravention of Water code section 13360

Section 13360(a) provides as follows:

> **No waste discharge requirement or other order of a regional board or the state board** or decree of a court issued under this division **shall specify the design, location, type of construction, or particular manner in which compliance may be had with that requirement, order**, or decree, and the persons so ordered shall be permitted to comply with the order in any lawful manner. (§ 13360(a), emph. added)

Water Section 13360 provides that Water Board can not prescribe the manner in which compliance may be achieved with discharge standards. That is to say, the Water Boards may "identify the disease and command that it be cured but not dictate the cure." (*Tahoe-Sierra Preservation Council v. State Water Resources Control Board* ("*Tahoe-Sierra*") (1989) 210 Cal.App.3d 1421, 1438, emph. added; see also 16 Op. Cal. Atty. Gen. 200, 2001 (1951) ["a regional board may prescribe only the end result to be attained . . . . It may not control the manner of achieving this result."].)

As noted above and in earlier comments, the legal authority and construction, commercial, and industrial facility inspection and enforcement provisions are far more detailed and onerous than the requirements of the CWA and underlying regulations (See 40 CFR § 122.26). In addition to being more stringent than required by federal law, these detailed compliance measures also violate Water Code section 13360's prohibition against specifying the manner of compliance with water quality regulations.

The very specific components of the jurisdictional urban runoff management program, including the specificity imposed in the development planning component such as requirements on how and when the City's General Plan is to be revised, the specific compelled modifications to the City's California Environmental Quality Act ("CEQA") review process, the specific SUSMP program, the LID and hydro modification requirements, the enforcement and imposition of sanctions on development sites, the specificity in the commercial/industrial programs, respected and enforcement requirements to be imposed on homeowner association areas, and the illicit discharge detection and elimination program are all details and requirements of the Tentative Permit which were not required by federal law, these provisions impose particular design or manners of compliance in violation of Section 13360.

THE TENTATIVE PERMIT'S SUSMP AND LID PROVISIONS UNLAWFULLY REMOVE DANA POINT'S DISCRETION TO REVIEW PROJECTS UNDER CEQA.

The California Environmental Quality Act ("CEQA") codified at Public Resources Code ("PRC") section 21000 *et seq.* is an overall comprehensive statutory scheme that requires that governments analyze projects to determine if they result in significant adverse environmental impacts. If such impacts potentially exist, they must be reduced or mitigated to the extent

feasible. CEQA provides local entities with inherent discretion to analyze and approve projects which are deemed appropriate for the local community following the environmental analysis directed by the statute. This discretion in part is exemplified by the cities' ability to adopt a statement of overriding considerations when significant adverse environmental impacts have in fact been identified, analyzed, and mitigated as feasible. (PRC § 21084, sudv. (b).)

The Tentative Permit's detailed prescriptions contradict discretion afforded to local entities by CEQA. In this way, the Tentative Permit's provisions are preempted by the preexisting CEQA statutory terms enabling local governments to exercise the inherent discretion applicable to governmental decisions regarding improvement of developmental projects. (*See e.g., O'Connell v. City of Stockton* (2007) 41 Cal.4th 1061, 1072-1074 [reaffirming that local ordinances which conflict with state law are preempted].) By removing Dana Point's discretion under CEQA in regard to approving local developments, the Tentative Permit is essentially mandating the adoption of ordinances which conflict with existing state law and are preempted.

The Tentative Permit's Development Planning and Construction Components (sections D.1 and D.2, F.) directly conflict with CEQA and are an unlawful attempt to direct how a local agency is to approve a project under CEQA. Under Public Resources Code ("PRC") section 21081.6(c), a responsible agency cannot direct how a lead agency is to comply with CEQA's terms:

> Any mitigation measures submitted to a lead agency by a responsible agency or an agency having jurisdiction over natural resources affected by the project shall be limited to measures which mitigate impacts to resources which are subject to the statutory authority of and definitions applicable to, that agency. **Compliance or non-compliance by a responsible agency or agency having jurisdiction over natural resources affected by a project with that requirement shall not limit . . . the authority of the lead agency to approve, condition, or deny projects as provided by this division or any other provision of law.** (PRC § 21081.6(c); emphasis added.)

PRC section 21080.1 similarly makes clear that the lead agency's determination ***"shall be final and conclusive on all persons***, including responsible agencies, unless challenged as provided in Section 21167." (Emphasis added). It further states that the lead agency "shall be responsible for determining whether an environmental impact report, a negative declaration, or mitigated negative declaration shall be required for any project which is subject to this division." (PRC § 21080.1(a).)

In addition, under PRC section 21083.1, no additional procedural or substantive requirements beyond those expressly set forth in CEQA may be imposed on the CEQA review process:

> It is the intent of the Legislature that courts, consistent with generally accepted rules of statutory interpretation, shall not interpret this division or the state guidelines adopted pursuant to Section 21083 in a manner which imposes procedural or

> substantive requirements beyond those explicitly stated in this division or in, the state guidelines. (PRC § 21083.1.)

In short, the Tentative Permit imposes permit terms which expressly seek to "limit the authority of the lead agency [i.e. the municipalities] to approve, condition or deny [new development/redevelopment] projects." (PRC § 21081.6(c).)

The Tentative Permit's Development Planning and Construction Components conclude that all runoff from a wide class of new development and redevelopment projects will result in significant adverse impacts on the environment, and that such significant adverse impacts must be mitigated by particular mitigation measures, as set forth in the SUSMP and other specified design standards in the Tentative Permit. Likewise, the Tentative Permit's SUSMP and LID provisions effectively create a presumption that certain development projects will create significant adverse environmental impacts, and the provisions dictate express mitigation measures that must be adopted. Thus, the Tentative Permit dictates the environmental review that cities must undertake without regard to CEQA's provisions for local agency review of projects. The Tentative Permit thereby completely eliminates a local agency's discretion to consider and approve feasible alternatives or mitigation measures to these requirements, even if these alternative mitigation measures will have less of an impact on the environment.

PRC section 21002 provides that public agencies: "should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects, ..." (Emph. added.) The Tentative Permit's specific design standards provisions eliminate a city's discretion to consider feasible alternatives or mitigation measures. But "CEQA mandates that public agencies refrain from approving projects with significant environmental effects if there are feasible alternatives or mitigation measures that can substantially lessen or avoid those effects." (*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 104, 132.)

PRC section 21002 also provides that: "The Legislature further finds and declares that in the event specific economic, social, or other conditions make infeasible such project alternatives or such mitigation measures, individual projects may be approved in spite of one or more significant effects thereof." PRC section 21081(b) then establishes a mechanism for local agencies to approve projects with unmitigated adverse impacts, if they adopt a Statement of Overriding Considerations. (PRC § 21081(b).) The Tentative Permit's design standard requirements would eliminate a municipalities' discretion to approve a project without the design standards being met, even if a municipality adopts such a statement of overriding considerations.

As such, the Tentative Permit's Development Planning and Construction Components should be revised so as not to conflict with CEQA.

ILLICIT DISCHARGES.

As previously discussed in Dana Point's earlier comments, the CWA's discharge prohibitions only apply to non-storm water discharges. (33 U.S.C. § 1342(p)(3)(B)(i); 40 CFR § 122.26(b)(2).) The illicit discharge provisions of the Tentative Permit, however, seem to additionally impose specific discharge requirements on storm water. In this regard, the Tentative

Permit provisions continue to contradict the CWA's requirements. The illicit discharges provision should be revised to explicitly confirm that it applies only non-storm water discharges.

THE TENTATIVE PERMIT'S REPORTING REQUIREMENTS MUST INCLUDE A COST BENEFIT ANALYSIS UNDER WATER CODE SECTIONS 13225 AND 13267.

Numerous provisions of the Tentative Permit require that the regulated municipalities conduct monitoring and report to the Regional Board. (See, e.g., section G, H pp. 77-87.) To impose these monitoring and reporting requirements, however, Water Code section 13267 requires that the Regional Board first conduct a cost-benefit analysis.

Water Code section 13267(b) provides in relevant part as follows:

> (b)(1). In conducting an investigation specified in subdivision (a), the Regional Board may require that any person who has discharged . . . or who proposes to discharge, waste . . . within its region shall furnish, under penalty of perjury, technical or monitoring program reports which the Regional Board requires." **The burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports**. In requiring those reports, the regional board shall provide the person with **a written explanation** with regard to the need for the reports, and shall identify the evidence that supports requiring that person to provide the reports. (Water Code, § 13267(b), emph. added.)

Similarly, Water Code section 13225(c) requires a cost/benefit analysis. It provides as follows:

> Each regional board, with respect to its region, **shall:**
>
> (c) Require as necessary **any state or local agency** to investigate and report on any technical factors involved in water quality control or to obtain and submit analysis of water; **provided that the burden**, including **costs**, of such reports **shall bear a reasonable relationship to the need for the report and the benefits to be obtained therefrom**. (Water Code § 13225(c), emph. added.)

These statutes require a cost/benefit analysis before the Regional Board can impose any monitoring or reporting obligations on municipalities. Because there is no costs/benefit analysis included in the Tentative Permit, the monitoring and reporting requirements are void under sections 13225 and 13267. We therefore request that the cost-benefit analysis mandated by the Water Code be conducted, or alternatively, that the monitoring and reporting requirements be removed from the Tentative Permit until such an analysis is conducted.

RESPONSIBILITY FOR NATURALLY OCCURRING POLLUTANTS

Dana Point submits that the Tentative Permit continues to improperly hold cities responsible for non-anthropogenic sources of pollutants, thereby essentially imposing liability on municipalities for naturally occurring pollutants not generated from man-made sources. (See Response To Comments, p. 11 re Finding C.12). Although the Tentative Permit has been revised to remove the phrase "due to anthropogenic sources" from Finding C.2, this change does not adequately

address the fact that the Tentative Permit makes cities liable for naturally occurring pollutants contained in storm water.

Bacteria is a primary example of a pollutant which is not entirely man-made and should not fairly be included in the cities compliance obligations. Bacteria derives from numerous non-man-made sources, and cities cannot reasonably be held to predict the sources and quantities of such naturally occurring bacteria, and then be required to regulate such pollutants from non-anthropogenic sources. The Tentative Permit does not set a reasonably achievable standard by imposing strict numeric limitations (i.e., as required by TMDLs enforced through the Tentative Permit) on bacteria discharges. Accordingly, we reiterate our request that the definition of waste be modified to specify that the cities are not liable for storm water discharges that includes natural sources of pollutants.

THE "FETD" PROVISIONS FAIL TO ADDRESS DANA POINT'S UNIQUE EFFORTS TO REMOVE BACTERIA FROM STORM WATER.

Dana Point continues to believe that the FETD (Facilities that "extract, treat and discharge") provisions in the Tentative Permit (see section E.9) unfairly regulate Dana Point, which has expended substantial funds for its bacteria treatment plant. By specifying that separate discharge permits must be obtained by Dana Point for discharges from its treatment facility, the Tentative Permit is effectively penalizing Dana Point for taking a proactive approach to remove pollutants of particular concern from storm water.

As noted in prior comments, the current FETD provisions impede cities' ability to achieve a focused reduction of particular pollutants. In light of the extreme significance of bacteria pollution and its impact on coastal communities, including impacts on the local economy, discharges from FETD should be appropriately regulated under the Tentative Permit.

The prospect of onerous discharge prohibitions applicable to preexisting treatment plants that reduce pollutants unjustly punishes those entities which took effective action to improve water quality. Dana Point expended approximately $2 million, and the State expended approximately $4 million, in building the highly effective ozone treatment facility for bacteria. Dana Point went ahead with this extensive project with the Board's encouragement and support, including the existing regulatory approval for its ongoing operations. Indeed, the ozone treatment plan was installed with the State Board's financial and administrative support. The grant Agreement between the State Board and Dana Point approves in detail the specific facilities to be installed and maintained by Dana Point, including its location "at the outlet of Salt Creek." (Agreement No. 02-217-550-0, Exh. A-1.) The Agreement further recognizes that the "overall project, once completed will capture up to one thousand (1,000) gallons per minute of urban runoff, ***treat it, and direct it back tin to the flows at the Salt Creek Outlet***." (*Id.*, [emphasis added].) Dana Point also is required to maintain the facility, and to report its effectiveness. In short, Dana Point installed the treatment plant with the State Board's express approval of the treatment plant's specific operations.

Now, Dana Point faces additional potentially onerous obligations for discharges from its treatment facilities. Such a reversal in regulatory policy by the Board is barred by the doctrine of

equitable estoppel. (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 496-497 [confirming doctrine applies governmental entities].) Similarly, the proposal to regulate the FETD would constitute an unconstitutional "ex post facto" elimination of existing contractual rights and duties. Article I, section 9 of the California Constitution provides that a "bill of attainder, ex post facto law, or law impairing the obligation of contracts may not be passed." (See also, *Mendly v. County of Los Angeles* (1994) 23 Cal.App.4th 1193, 1210.) Under constitutional and equitable principles, at minimum, regulation of the existing FETD facilities---which were developed with the Board's explicit approval and encouragement---should be grandfathered into the Tentative Permit.

Implicating the adage that "no deed goes unpunished," Dana Point now faces unjustified regulations upon its bacteria treatment plant. The Board has the discretion to regulate discharges from the FETD's under this Tentative Permit. Dana Point respectfully requests that its effort to remove a significant pollutant concern is not met with unfair regulations which will impose unnecessary additional requirements upon the elimination of bacteria.

On a related note, the Tentative Permit continues to contain provisions that have the effect of unlawfully preventing Copermittees from using pollution control measures within receiving waters being regulated. (See Response to Comment 11 [addressing Findings E.7, E.9, D.3.c., and Sections B.5 and D.1.d.6.) If these provisions are interpreted to mean that municipalities cannot put any pollution control system anywhere in receiving water, it means that upstream cities have no ability to feasibly treat pollutants before they migrate through the storm channels to Dana Point. This will undoubtedly result in more pollutants being carried into downstream cities like Dana Point, making them responsible for the discharges of other entities subject to NPDES permits.

The Board's Response to Comment No. 11 "agrees that there is not a federal prohibition on placing pollution control practices within waters of the U.S." In light of this recognition that federal law does not require that the Tentative Permit must restrict pollution control systems within the waters of the U.S., the Tentative Permit should be revised to expressly recognize that pollution control measures can be employed within the regulated receiving waters.

Sincerely,

Doug Chotkevys
City Manager
City of Dana Point

cc: The Honorable Mayor and City Council
A. Patrick Munoz, City Attorney
B. Fowler, L. Zawaski, City of Dana Point
J. Haas, J. Smith, SQRWQCB
C. Crompton, R. Boon, County of Orange
South Orange County Permittees