

**SUBMITTAL TO THE BOARD OF SUPERVISORS
COUNTY OF RIVERSIDE, STATE OF CALIFORNIA**

239



FROM: Executive Office

SUBMITTAL DATE:
September 28, 2010

SUBJECT: Request For A Member Of The Board Of Supervisors To Provide Testimony On Tentative Order R9-2010-0016, Scheduled For Adoption By The San Diego Regional Water Quality Control Board On October 13, 2010

RECOMMENDED MOTION: That the Board of Supervisors:

1. Receive and file the attached comment letters dated September 7, 2010, from the Riverside County Flood Control and Water Conservation District (District) and Transportation Land Management Agency (TMLA) regarding requested revisions to the requirements of **Tentative Order R9-2010-0016**, on Behalf of the County of Riverside and the Copermitees named in the Tentative Order.
2. Authorize a member of the Board of Supervisors to testify on behalf of the County of Riverside regarding **Tentative Order R9-2010-0016**, renewal of the National Pollutant Discharge Elimination System (NPDES) Municipal Separate Storm Sewer System (MS4) Permit for the Santa Margarita Watershed region of Riverside County at the October 13, 2010, hearing before the San Diego Regional Water Quality Control Board (RWQCB) in Temecula.

(Continued on Page 2)

Michael R. Shetler
Michael R. Shetler, Senior Management Analyst

FINANCIAL DATA	Current F.Y. Total Cost:	N/A	In Current Year Budget:	N/A
	Current F.Y. Net County Cost:	N/A	Budget Adjustment:	N/A
	Annual Net County Cost:	N/A	For Fiscal Year:	N/A
SOURCE OF FUNDS: No Net County Cost				Positions To Be Deleted Per A-30 <input type="checkbox"/>
				Requires 4/5 Vote <input type="checkbox"/>

C.E.O. RECOMMENDATION: APPROVE

BY: *Dean Deines*
Dean Deines

County Executive Office Signature

MINUTES OF THE BOARD OF SUPERVISORS

On motion of Supervisor Benoit, seconded by Supervisor Ashley and duly carried, IT WAS ORDERED that the above matter is approved as recommended.

Ayes: Buster, Stone, Benoit and Ashley
Nays: None
Absent: Tavaglione
Date: September 28, 2010
xc: EO, Flood

Kecia Harper-Ihem
Clerk of the Board
By: *Kecia Harper-Ihem*
Deputy

Prev. Agn. Ref.:

District: 1 & 3

Agenda Number:

3.7

ATTACHMENTS FILED WITH THE CLERK OF THE BOARD
Departmental Concurrence

Department Recommendation: Consent Policy
Per Executive Office: Consent Policy

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COUNTY OF RIVERSIDE, STATE OF CALIFORNIA**

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SUBJECT: Request For A Member Of The Board Of Supervisors To Provide Testimony On Tentative Order R9-2010-0016, Scheduled For Adoption By The San Diego Regional Water Quality Control Board On October 13, 2010

BACKGROUND: The San Diego RWQCB is currently renewing the NPDES MS4 Permit that regulates the Santa Margarita River Watershed region of Riverside County, which includes portions of Murrieta, Temecula, Wildomar, Menifee and the unincorporated County area. The requirements of this Permit, which regulates discharges of stormwater and dry weather flows from storm drains operated by the aforementioned agencies (Copermittees) to Waters of the United States profoundly impacts public and private development (including road development and road maintenance), commercial/Industrial business and residential activities within the Permit area.

Late last year, RWQCB staff indicated their intent to use the NPDES MS4 Permit adopted for coastal Orange County as a model for the Santa Margarita River Watershed Permit renewal. The Copermittees analyzed that Permit and determined it would require significant and unnecessary modifications and expansions to existing Riverside County Permit programs. In an effort to stave off unnecessary costs, the Copermittees engaged RWQCB staff in an effort to develop a Permit that instead recognized and built upon the County's proactive efforts to protect local water resources and better reflected the resources available to the Copermittees as a result of current economic conditions. Although the Copermittees efforts improved the Permit, RWQCB staff insisted on maintaining many of the Orange County Permit requirements and also imposed several additional requirements regarding water quality monitoring, unpaved roads maintenance and business regulation.

The result is a Permit that still imposes significant program expansions that are not necessary to protect local water resources. The District has estimated that the monitoring requirements alone (which currently exceed coastal Orange County's Permit requirements) will increase by a factor of 5, with local Riverside County residents paying three times per capita the costs incurred by coastal Orange County residents.

Other program elements significantly impacting the County include:

- 1) Requirements to regulate public and private unpaved road construction and maintenance activities;
- 2) Requirements to prohibit excess residential and business irrigation runoff to public streets; and
- 3) Requirements to add additional business inspection program elements that far exceed current inspection protocols.

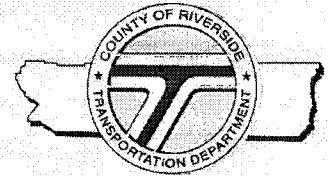
The District, as Principal Permittee, has prepared extensive comments regarding the requirements of the Permit on behalf of the Copermittees. TLMA has also provided a separate comment letter addressing specific impacts of the Permit on regulation of unpaved roads (see attached).

The Executive Office is requesting that a member of the Board of Supervisors be authorized to testify on behalf of the County of Riverside regarding the economics and resource ramifications of the Permit and make an appeal to the Regional Board to remand the Permit back to Regional Board staff to address the County's remaining issues.



COUNTY OF RIVERSIDE
TRANSPORTATION AND
LAND MANAGEMENT AGENCY

Transportation Department



Juan C. Perez, P.E., T.E.
Director of Transportation

September 7, 2010

Chairman David King and Members of the Board
San Diego Regional Water Quality Control Board
Attn: Executive Director Gibson
9174 Sky Park Court, Suite 100
San Diego CA 92123-4353

RE: Draft Tentative Order No. R9-2010-0016 (NPDES No. CAS0108740) - Proposed Unpaved Road Requirements

Dear Mr. Gibson:

The Riverside County Transportation Department has reviewed the proposed requirements applicable to unpaved roads presented in the Draft Municipal Separate Storm Sewer System Permit (Draft Tentative Order No. R9-2010-0016 (NPDES No. CAS0108740) for the Santa Margarita Region of Riverside County (Draft MS4 Permit) and has identified several major concerns. We appreciated the opportunity to meet recently with you and staff to discuss our concerns. Primarily, they have to do with requirements being imposed through this permit that go well above-and-beyond what is required in the Orange County permit to regulate the operation and maintenance of unpaved roads.

SUMMARY

There are many different categories of unpaved roads within the unincorporated County area. These include County-Maintained unpaved roads, dedicated and accepted public roads (which are not County maintained), roads dedicated but not accepted, private roads, utility access roads, roads through tribal lands, and others. These roads are maintained by numerous entities besides the County, such as Homeowners Associations, Quasi-public entities like County Service Areas, Community Service Districts, public and private utilities, Tribes, and in many cases, individual property owners. The County in fact is prohibited by law from spending general gas tax dollars (our main funding source) for maintenance of roads not in the County Maintained Road System, and is not financially able to take on new unpaved roads into the County Maintained System until they are improved to County Standards.

The proposed permit requirements would therefore impose an undue and substantial regulatory burden on the County and would create a class of potential unwitting "violators" that are not familiar with these requirements, including hundreds if not thousands of property owners that have been maintaining unpaved roads for many decades as needed to access their property. The special requirements for development and maintenance of unpaved roads were proposed by Regional Board staff for inclusion in the draft MS4 Permit very late in the process, after a number of weeks of discussions on the overall permit language and just prior to release for the Santa Margarita Region for public comment. During those discussions, unpaved roads were not raised by Regional Board staff as a source requiring additional regulatory attention.

Given the complexity of these jurisdictional issues, and the number of stakeholders that would be impacted, we respectfully request that the regulation of unpaved roads be removed from this permit. Alternatively, unpaved roads could be considered as part of a separate general permit to allow for proper stakeholder involvement and vetting, at the least within those areas of the permit (see below) that have to do with maintenance provisions. Given the complexity of this issue and the impact on thousands of properties, another option is to achieve a water quality benefit through education programs, not using limited resources on regulation and enforcement. We also note that unpaved road regulation was not included in the recent Orange County permit. Orange County receives approximately 8 times the amount of funding on a per mile basis towards their County-Maintained roads as does Riverside County, so imposing additional requirements on the Riverside County permit magnifies the undue regulatory and financial burden.

The Draft MS4 Permit includes requirements for unpaved roads that are either redundant to existing regulatory requirements or that impose new regulation requirements at a time that the County can ill afford to start new programs. The language proposed needs clarification to avoid potential misinterpretations that may result in operational disruptions to the transportation system and/or compliance costs way out of proportion to the potential impact on receiving water quality. Although the Department supports implementation of erosion and sediment control best management practices (BMPs) as appropriate for development of new unpaved roads, it does not agree that the statements in the Fact Sheet and Findings support identification of unpaved roads as a significant source of pollutants warranting special regulation. The following summarizes the Department's specific concerns and perspectives.

UNPAVED ROAD DEVELOPMENT REQUIREMENTS

Requirements for the development of unpaved road projects are addressed in section F.1.i. on page 45 of the Draft MS4 Permit. This requirement states:

i. Unpaved Roads Development

The Copermittees must develop, where they do not already exist, and implement or require implementation of erosion and sediment control BMPs after construction of new unpaved roads. At a minimum, the BMPs must include:

- (1) Practices to minimize road related erosion and sediment transport;
- (2) Grading of unpaved roads to slope outward where consistent with road engineering safety standards;
- (3) Installation of water bars as appropriate;
- (4) Unpaved roads and culvert designs that do not impact creek functions and where applicable, that maintain migratory fish passage;

It is our contention that construction of new unpaved roads is already adequately regulated through development regulations. New unpaved roads built through development fall under the definition of a "project", and as such are already required to develop and implement project-specific SUSMPs, which include identification of BMPs in the same manner as required of other development projects. Unpaved road projects are also required to comply with the General Permit-Construction which requires preparation of a SWPPP. These requirements are implemented by the Permittees during the development review process and in issuance of grading permits. We also note that the development process already achieves a gradual "retirement" of unpaved roads, as the County requires in many cases that new development replace unpaved access roads with paved access.

Additional separate requirements for development of unpaved roads are redundant to these requirements and may only complicate compliance. However, if the Board wishes to include permit language to further clarify what is already required through these permits, we would be pleased to work with the Board to help craft appropriate language.

UNPAVED ROAD MAINTENANCE

This is our primary issue of major concern, particularly since the proposed language would appear to impose regulatory requirements on roads that are not part of the County Maintained Road System that we operate.

Requirements for the maintenance of unpaved road projects are addressed in section F.3.a.(10) on page 56 of the Draft MS4 Permit. This requirement states:

(10) Unpaved Roads Maintenance

- (a) The Copermittees must develop, where they do not already exist, and implement or require implementation of BMPs for erosion and sediment control

measures during maintenance activities on unpaved roads, particularly in or adjacent to receiving waters.

(b) The Copermittees must develop and implement or require implementation of appropriate BMPs to minimize impacts on streams and wetlands during unpaved road maintenance activities.

(c) The Copermittees must regularly maintain their unpaved roads adjacent to streams and riparian habitat to reduce erosion and sediment transport;

(d) Re-grading of unpaved roads during maintenance must be sloped outward where consistent with road engineering safety standards;

(e) Through their regular maintenance of unpaved roads, the Copermittees must examine the feasibility of replacing existing culverts or design of new culverts or bridge crossings to reduce erosion and maintain natural stream geomorphology.

As we have stated, this issue should be addressed through a broad general permit or an education program. However, if the Board finds it necessary to impose additional permit requirements on maintenance activities, which go well beyond the Board's previous definitions of a "project", we respectfully request that this language be re-written to make it clear that it applies to those roads within the County (or City) Maintained Road System.

UNPAVED ROADS ARE NOT A SIGNIFICANT SOURCE OF WATER QUALITY IMPAIRMENT

Findings D.1.C, pg 57-59, states:

"During the previous permit period, the San Diego Water Board identified, through investigations and complaints, sediment discharges from unpaved roads as a significant source of water quality problems in the Riverside County portion of the San Diego Region. Enforcement and inspection activities conducted by the San Diego Water Board during the previous permit term have found a lack of source control for many unpaved roads within the jurisdiction of the Copermittees".

The Department supports the continued application of development and construction requirements and maintenance of temporary post-maintenance erosion and sediment control BMPs as specified in existing permits. However, we do not believe that sufficient justification has been presented to support the identification of unpaved roads as a significant source of water quality problems in the Santa Margarita Region. In these days of uncertain state funding and dwindling local funding sources, every dollar spent on additional regulatory requirements needs to be weighed against the benefit of otherwise using funding on basic public health-and-safety needs such as road maintenance and safety improvements.

The discussion of Finding D.1.c. states that the inclusion of unpaved road requirements were based on findings by the San Diego Regional Board during typical compliance assurance activities, audits, or receipt of complaints. However no feedback from these activities were reported to the Permittees at the MS4 Permit discussions prior to the proposal of the unpaved road requirements just before the draft permit was released.

The Department has reviewed the documents cited by Regional Board staff in the discussion of Finding D.1.c. and the conditions in the Santa Margarita River are vastly different from those in Pennsylvania and Northern California cited in those documents. Nevertheless, these documents do not suggest that unpaved roads are a significant source requiring special attention in MS4 permits. Further, neither the Permittee's monitoring data nor our observations support a conclusion that unpaved roads are a significant source of pollutants warranting special regulatory attention and we request that this finding be deleted unless significant data specific to the Santa Margarita Region can be produced. In particular, the Department requests a copy of the investigations and complaints along with the data that supports a significant source of water quality problems on unpaved roads, including a listing of roadways where water quality problems have been identified.

Thank you for the opportunity to review and comment on the Draft MS4 Permit. The County of Riverside Transportation Department is committed to managing the roads and highways within our County Maintained Road System in a manner that protects water quality. Our goal is to work constructively with the Regional Board staff to improve the effectiveness with which we address water quality issues, and put limited public and private dollars into those programs that provide the best return. We would be pleased to meet with you to discuss regulation of unpaved roads further and to explain our unpaved road development, construction, and maintenance practices.

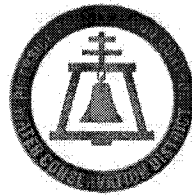
Please feel free to contact me or Ward Maxwell at 951-955-6740 if you have any questions regarding our comments on the proposed unpaved road requirements or our requests for modification of the draft Santa Margarita Region MS4 Permit.

Sincerely,



Juan C. Perez
Director of Transportation

CC: George A. Johnson, TLMA Director
Mike Shelter, Executive Office
Patty Romo, Deputy Director of Transportation
Ward Maxwell, Engineering Project Manager
Jason Uhley, Flood Control



RIVERSIDE COUNTY FLOOD CONTROL
AND WATER CONSERVATION DISTRICT
September 7, 2010

Chairman David King and Members of the Board
San Diego Regional Water Quality Control Board
9174 Sky Park Court, Suite 100
San Diego, California 92123-4353

Dear Chairman King:

Re: Tentative Order R9-2010-0016, NPDES
No. CAS0108740, Riverside County
Municipal Separate Storm Sewer System
Permit Reissuance *NWU:749045:bnell*

The Riverside County Flood Control and Water Conservation District (District) is submitting this comment letter on the above listed Tentative Order, on behalf of the Riverside County MS4 Permittees within the San Diego Region (Copermittees). Tentative Order R9-2010-0016 (draft MS4 Permit) was drafted by Board staff to serve as the reissuance of Order R9-2004-0001 (existing MS4 Permit) which covers the Santa Margarita Region of Riverside County. This letter was developed in consultation with the Copermittees and reflects our most critical concerns. The Board's careful consideration of these critical concerns will be appreciated.

This comment letter is organized as follows:

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Chairman David King
and Members of the Board

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In addition, the following attachments provide support for our priority issues and solutions, provide additional legal comments and/or summarize additional technical changes recommended to the draft MS4 Permit. Attachment 9 is a full redline markup of the draft MS4 Permit incorporating all of our recommended edits. Attachment 9 also includes additional minor edits not found elsewhere in this letter or its attachments.

- Attachment 1** – Summary of Proactive Efforts to Manage Stormwater
- Attachment 2** – Economic Assessment
- Attachment 3** – Language Changes Supported by Board Staff and Copermittees
- Attachment 4** – Monitoring and Reporting Program Requirements
- Attachment 5** – Proposed Unpaved Road Requirements of the Draft 2010 Santa Margarita Region MS4 Permit
- Attachment 6** – Prohibition of Irrigation Runoff
- Attachment 7** – General Legal Comments
- Attachment 8** – District Specific Comments
- Attachment 9** – Redline Comments of MS4 Permit and Attachments
- Attachment 10** - Fact Sheet Comments

EXECUTIVE SUMMARY

It is the goal of the Copermittees to obtain an MS4 permit that is both protective of the beneficial uses of the receiving waters in the Santa Margarita Region and respectful of the unprecedented economic conditions impacting the Copermittees. Further, the Copermittees have no interest in repeating the three-year Orange County MS4 Permit adoption process. In an effort to achieve our goal and head off a renewal process similar to Orange County's, the Copermittees approached David Gibson, Regional Board Executive Officer, in February 2010 regarding implementing a win-win process for developing the draft MS4 Permit.

In response, the Executive Officer authorized Board staff to meet with the Copermittees to foster communication and understanding. The Copermittees appreciate the Executive Officer's decision to dedicate staff time to meetings regarding the individual requirements of the South Orange County MS4 Permit and the appropriateness of those individual requirements to the Santa Margarita Region. The meetings provided an opportunity to foster a mutual understanding of the goals and objectives of Board staff and the capabilities and limitations of the Copermittees. As a result, the Permittees and Regional Board staff worked collaboratively to develop language for consideration in the Tentative Order.

However, the process did not resolve several significant issues due to the following constraints:

1. The process needed to be cut short as the Board expected the draft MS4 Permit to be heard in October. Copermittee staff requested that the hearing be delayed to allow the process to complete several times, but these requests were denied;

Chairman David King
and Members of the Board

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2. Regional Board staff indicated that the Board had adopted the South Orange County MS4 Permit as a model permit and, therefore, the Board would have to approve any major revisions to the provisions established in that MS4 Permit; and
3. Regional Board staff indicated that the Board would have to resolve our issues with several new provisions of the draft MS4 Permit addressing unpaved roads, inspection programs and monitoring requirements, all requirements that exceed the provisions of the Orange County MS4 Permit.

Although the collaborative process has improved the draft MS4 Permit with respect to several provisions of the Orange County MS4 Permit, Board staff also introduced several costly compliance and monitoring requirements, many of these requirements were introduced during the very latter part of the collaborative process. As described within this letter and its attachments, **the remaining issues and these new requirements result in a Permit that is economically infeasible** and has no substantiated nexus to demonstrated impairments of beneficial uses within the Santa Margarita Region caused by MS4 discharges. **At a minimum, the Priority issues outlined below must be addressed before the Copermittees can support the draft MS4 Permit.**

The Copermittees note that despite being directed to take several important issues to the Board, we have not been provided an opportunity for a formal or informal workshop before the Board. By contrast, the South Orange County MS4 Copermittees had at least three workshops and five formal hearings prior to adoption of that permit. Although we do not want to duplicate the Orange County renewal process, it is common practice to allow at least one workshop on significant permit issues before holding an adoption hearing. Given the issues outlined in this letter and in the attachments, there are numerous issues worthy of at least one workshop.

The Copermittees also have significant concern with the use of the South Orange County MS4 Permit as a model for our MS4 Permit area. As outlined in more detail throughout this letter and the attachments, the South Orange County and Santa Margarita Region MS4 Permit areas vary widely with regard to the water resources to be protected and available tax revenue to fund local programs and services, including compliance with MS4 permit requirements. Orange County has substantial coastal water resources with active recreational use, twice the population, and significantly higher tax revenues. The per capita cost for the residents within the Santa Margarita Region to comply with the requirements of the draft MS4 Permit is significantly greater than the per capita cost faced in South Orange County, with each dollar spent effectively hitting our residents three to four times harder. The expansion of regional program elements (e.g., coordination, monitoring, reporting, program development, effectiveness assessment) will result in an annual doubling of these costs, with a peak increase of nearly 300% for these programs alone. The Copermittees simply cannot economically support, nor does the Santa Margarita Region warrant, the same level of programs as South Orange County to protect our local receiving waters.

Chairman David King
and Members of the Board
Re: Tentative Order R9-2010-0016, NPDES
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September 7, 2010

In summary, the meetings between Regional Board staff and Copermittee staff were honest, good faith and productive efforts to bridge the gaps between the requirements of the Orange County MS4 Permit and the specific needs of, and resources available to, the Upper Santa Margarita Watershed (the draft MS4 Permit area). However, given the constraints identified herein, the differing impacts on beneficial uses and current economic realities, the current draft MS4 Permit cannot be supported by the Copermittees.

The Copermittees, therefore, request that the Board direct staff to work with the Copermittees to resolve the issues identified in this letter prior to considering adoption of the Permit.

In the interest of developing economically feasible requirements for Board consideration, the balance of this letter and its attachments propose and justify changes to the draft MS4 Permit that will reduce costs to an achievable level, while continuing to raise the bar, where appropriate, to effectively protect the beneficial uses of receiving waters in the Santa Margarita Region. Please note that the Copermittees have many other concerns in addition to those identified in this letter with provisions in the draft MS4 Permit. These concerns are discussed in the Attachments to this letter, the redline of the Permit and the letters drafted by individual Copermittees.

BACKGROUND

Receiving Waters and Water Quality Conditions

This draft Permit proposes to regulate discharges from the MS4 owned by the Copermittees within the Santa Margarita Region of Riverside County. The MS4 in the Santa Margarita Region primarily discharges into Murrieta and Temecula Creeks and immediate tributaries thereto.

Unlike several of the watersheds in South Orange County, which exhibit perennial flow, the Santa Margarita Region is an ephemeral watershed. The only areas of perennial flow in the Santa Margarita Region are located at the formation of the Santa Margarita River right at the County line and in mountain areas outside of the urbanized areas serviced by the MS4s. The creeks in the urbanized areas of the watershed serviced by the MS4s are ephemeral and flows are only observed during and immediately after significant storm events. Any non-stormwater flows quickly disappear by seepage into the alluvial sands. Additionally, rising groundwater has been observed in Murrieta and Temecula Creeks for a short distance at various locations upstream of the confluence with the Santa Margarita River; however such conditions existed prior to urbanization.¹

Since the initial MS4 permit was issued in 1990, the Copermittees have been actively and successfully implementing programs to manage their MS4 discharges. As described in the 2009 report of waste discharge (ROWD) submitted by the Copermittees, there have been no statistically

¹ State of California Department of Public Works Division of Water Resources, Bulletin No. 57, "Santa Margarita River Investigation," Volume I, June 1956, p. 48.

Chairman David King
and Members of the Board

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significant increases in pollutant concentrations since issuance of the initial MS4 permit in 1990, despite the fact that the Santa Margarita Region has experienced over 300% population growth over the same time period. Further, although staff points out several recent 303(d) listings as basis for the need to enhance regulations, these listings were based on data that mostly predates our existing management programs implemented under the 2004 NPDES MS4 Permit. Further, the Permittees have submitted additional data for the current round of listings that should result in the removal of some of these additional listings based on more recent data. Additionally, the likely sources of these impairments include natural background concentrations in soils and groundwater (iron and manganese), natural and/or agricultural source loads (nutrients, total dissolved solids, sulfates and bacteria), and/or federally authorized uses of products (pesticides and copper). Although all of these sources can have urban components, it is also clear that these sources are mostly non-point in nature and not solely urban sourced, as implied in the Fact Sheet and Findings.

Proactive Permittee Programs to Protect Local Resources

Murrieta and Temecula Creeks and their tributaries are an important economic, environmental and social resource for the Santa Margarita Region. The Copermittees are cognizant of these benefits and have implemented or initiated proactive programs beyond the requirements of the current and previous MS4 permits to ensure that these resources remain viable and are protected for future generations. These programs are described in Attachment 1 and include:

- Integrated Planning, including the development of an Integrated Regional Water Management Plan that is actively coordinated with San Diego and Orange Counties.
- Management of New Development, including a progressive LID BMP implementation program five years in the making. The program includes a comprehensive LID BMP design manual, proposed public maintenance mechanism and a \$3,000,000 LID BMP Testing and Demonstration Facility.
- Water Quality Monitoring and Assessment, including active participation in the Southern California Stormwater Monitoring Coalition, California Stormwater Quality Association (CASQA) and Santa Margarita Region Executive Management Team, and including funding of several special studies designed to improve the science of stormwater management.
- Statewide Stormwater Leadership, including active leadership in promoting changes in the regulations of pesticides at the state and federal level and strong leadership and representation within the CASQA organization.
- Habitat and Aquatic Resource Conservation, including development of the largest and most comprehensive Multiple Species Habitat Conservation Plan in California.

Chairman David King
and Members of the Board

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Economic Conditions

As the draft MS4 Permit for the Santa Margarita Region of Riverside County was modeled on the MS4 Permit developed for South Orange County, it is important to carefully contrast the economic resources available to the Counties:

- The population of the Santa Margarita Region (289,765) is 48% less than the population of South Orange County (553,161).²
- The 2009 per capita income in Riverside County (\$29,177) is 38% less than the per capita income in Orange County (\$46,898).³
- The current unemployment rate in Riverside County is 15.3 percent, which is 56% higher than the unemployment rate in Orange County (9.8 percent).⁴

Property and sales tax revenues are the primary sources of funding for local programs and services, including compliance with MS4 Permit requirements. Based on population and average home value, South Orange County generates over four times the property tax revenue generated in the Santa Margarita Region. Based on data presented in the Los Angeles Economic Development Corporation's July 2010 Economic Forecast, South Orange County generates 2.6 times the taxable sales generated in the Santa Margarita Region. As a less affluent area with a relatively small population, the Copermittees in the Santa Margarita Region receive significantly less property and sales tax revenue than municipalities in South Orange County and are less able to fund additional MS4 Permit compliance costs. These issues are discussed in detail in Attachment 2.

The recession also has impacted the economy in the Santa Margarita Region more than in South Orange County and it is projected that tax revenues will continue at a reduced level for an extended period, with **recovery not expected within the Permit term**. The poor economy has resulted in reductions of reserves to minimum levels and cuts or eliminations in virtually all local services and programs in the Santa Margarita Region. As a result any increases in funding for the water quality mandates contained in the draft MS4 Permit can come only by reducing funding for public safety or other existing state and federal mandates.

Modeling the draft MS4 Permit on the South Orange County permit represented a significant expansion of compliance requirements and compliance costs relative to the existing MS4 Permit issued to the Santa Margarita Region Copermittees. The requirements in the draft MS4 Permit have been expanded to include additional compliance and monitoring requirements beyond the South

² Richard Boon, County of Orange, personal communication, September 1, 2010.

³ Economic Forecast, Los Angeles Economic Development Corporation, July 2010.

⁴ Monthly Labor Force Data for Counties, July 2010 – Preliminary, Labor Market Information Division, Employment Development Department, August 20, 2010. <http://www.calmis.ca.gov/file/lfmonth/countyr-400c.pdf>

Chairman David King
and Members of the Board

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Orange County permit, further increasing compliance costs. We would submit that such an approach is fundamentally unfair and could be viewed as arbitrary.

Approach to the Permit Renewal

As noted above, the Copermittees share the Board's goal of continually improving both the effectiveness and the efficiency of the MS4 compliance program. To that end, the Copermittees proposed program revisions in the ROWD that were designed to effectively manage/address the discharge of pollutants from their MS4, while making effective and responsible use of sharply reduced and further declining public funds. The ROWD recognized the Copermittees' proactive efforts and integrated those efforts into our recommendations for enhancing the MS4 Permit program. Further, the Copermittees met with Regional Board staff prior to the submittal of the ROWD in January 2009 to ensure that we had identified and addressed all of staff's concerns.

In March 2010, the Copermittees met with the Regional Board staff to discuss a collaborative process for renewing the draft Permit. At that time, the Executive Officer identified that the Board's fundamental goals for the renewal would be to develop a permit that is:

- Socially responsible;
- Environmentally responsible;
- Affordable; and
- Protective of water quality.

The Copermittees proposed initiating the discussions by focusing on the existing MS4 Permit and identifying what provisions needed to be changed to address local water quality conditions, the approach outlined in the ROWD. Regional Board staff preferred to start with the South Orange County permit and require the Copermittees to justify why programs in the Santa Margarita Region should be different than those proposed for Orange County. Regional Board staff also noted that none of the major provisions of the South Orange County permit could likely be altered, as that permit was now a model for the San Diego Region. In the interest of moving the process forward in light of the current economy, the Copermittees agreed to proceed based on the Board staff's terms.

Outcome of Discussions with Board Staff

The discussions resulted in several improvements to the draft Permit including:

- Streamlined and more useful reporting and effectiveness assessment requirements.
- Greatly improved Development Planning / Low Impact Development (LID) requirements (further discussed in Attachment 3).

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- Language clarifications to more clearly state the intent of various requirements and to eliminate ambiguity.
- Enhanced understanding of the permit requirements and intent.

However, the addition of several new requirements not originally in the Orange County MS4 Permit as well as the constraints of working from within the boundaries of the existing Orange County MS4 Permit, resulted in an economically infeasible draft MS4 Permit that exceeds the water resource protection needs of the Santa Margarita Region and is too expensive for implementation by the Copermittees. Unless the permit requirements are revised to address specific local needs and resources, the Copermittees will not be able to implement the Permit requirements in a manner that is protective of water quality.

PRIORITY ISSUES AND SOLUTIONS

The Copermittees have identified specific and focused changes to the Permit that will allow the Copermittees to address staff's primary water quality concerns, while reducing compliance costs in a manner that is appropriate for the local watersheds. As previously noted, Board staff has directed the Copermittees to bring these changes directly to the Board for consideration, although we are hopeful that by summarizing them in writing that they may be addressed ahead of the scheduled October 13th hearing.

Monitoring and Reporting Program (Attachment 4)

Prior to the submittal of the ROWD, the Copermittees met with Board staff to propose changes to the Monitoring and Reporting Program (MRP). In these discussions, Board staff identified two areas for needed improvement:

- Relocation of Illicit Connection / Illicit Discharge (IC/ID) monitoring stations to MS4 outfalls, and
- Incorporation of Action Levels

In more recent discussions, Board staff noted that the MRP needed significant modification to reflect the South Orange County MRP, but would be scaled to be appropriate to the smaller Santa Margarita Region.

Unfortunately, the final MRP requirements have been expanded well beyond the South Orange County MRP requirements, resulting in a program that is completely out of proportion with the needs and resources of the Santa Margarita Region. In fact, the proposed MRP requirements will result in a **500% increase in monitoring program costs**, costing our residents **over two and a half times the per capita costs for South Orange County**.

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Per Capita Monitoring Cost Comparison

Draft Permit	OC Permit
\$5.13 per capita	~\$2.00 per capita

The Copermittees recognize that monitoring and data collection is necessary. However, the MRP requirements exceed what is necessary to address management questions related to water quality, are beyond requirements dictated in the South Orange County MRP, and are beyond the Copermittees' ability to fund. Not only are the level of requirements inappropriate for the Santa Margarita Region, but they disregard the economic realities faced by the Copermittees. As such, the MRP falls far short of meeting the Executive Officer's stated goals of affordability.

In the interest of finding ways to offer Board staff a comparable program in a more cost effective and appropriate manner, the Copermittees have identified nine adjustments to the MRP that will **save approximately seven hundred and eighty thousand dollars (\$780,000) annually** and bring per capita monitoring costs more in line with the South Orange County MRP, while maintaining the core components of the MRP. Table 1 summarizes the key changes and the respective cost savings. It is important to note that any change highlighted in RED reflects bringing the program in line with the South Orange County MRP. Figure 1 below shows graphically the comparative costs for the draft MRP with and without the requested adjustments. Please note that the 100% baseline in Figure 2 reflects the current cost of the Copermittees' current MRP.

Table 1 - Cost Savings resulting from proposed MRP changes¹

Component	Requested Change	Cost reduction
Mass Loading Stations	1) Wet Weather - 3 wet -> 2 wet	~\$79,000
	2) Dry Weather - Composite -> Grab	~\$66,000
Toxicity Testing (MLS and Bioassessment)	3) 3 organisms -> 2 organisms	~\$14,000
Bioassessment	4) 6 stations -> 3 stations	~\$158,000
	5) 2X each -> 1X each	~\$95,000
Action Levels	6) 'Representative Number/Percent' -> Representative - and remove 'within each sub area'	~\$241,000
	7) SAL Composites -> Grab	~\$165,000
Inland Aquatic Habitat Monitoring	8) Eliminate requirement	~\$140,000
Special Studies	9) 6 special studies -> 4 studies, and Replace with more locally appropriate studies	~\$220,000/year
<u>TOTAL ESTIMATED SAVINGS</u>	Net savings of all recommended changes (annualized)	<u>~780,000/year</u>

Note: Red text refers to requirements currently in the South Orange County MRP.

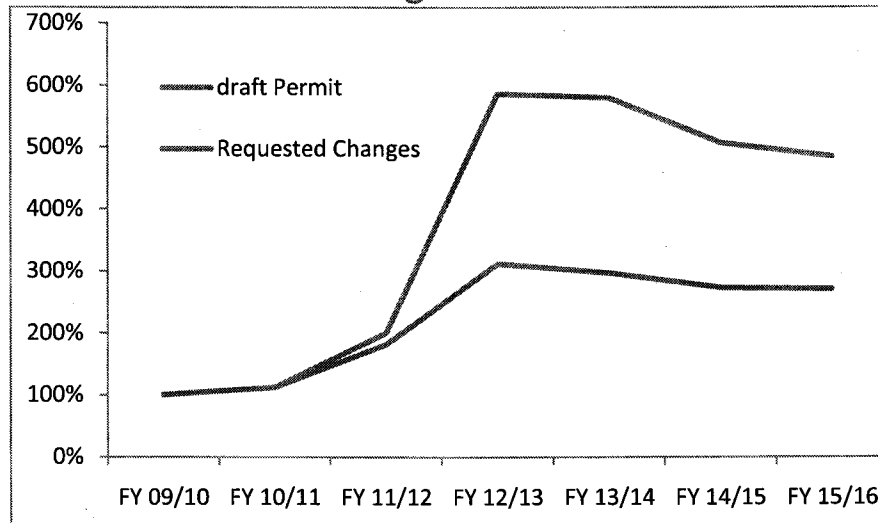
1. See Attachment 4 for detail descriptions of requested changes.

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Figure 1



Draft Permit	OC Permit	Proposed Changes
\$5.13/ per capita	~\$2.00/per capita	\$2.54/per capita

Although the requested adjustments to the MRP will not eliminate cost increases, and will result in an MRP which is more expensive, on a per capita basis, than the South Orange County MRP, they provide a more manageable program for the Copermittees.

The Copermittees request that the Board make the adjustments identified in Attachment 4 above before Permit adoption.

Each of these requested adjustments and justifications for each is further discussed in Attachment 4 to this letter.

Unpaved Roads Requirements (Sections F.1.i, F.3.a.(11), F.3.c.(5))

The requirements for unpaved roads are particularly cumbersome, onerous and unreasonable. Our detailed analysis of these requirements is provided in Attachment 5. In summary, the proposed unpaved road requirements may result in substantial and unnecessary additional Copermittee costs that are not justified by the facts in the Santa Margarita Region. The Copermittees believe that the existing MS4 Permit requirements for new development, construction, maintenance and IC/ID adequately address regulation of unpaved roads that threaten water quality. If the Regional Board believes that unpaved roads require further regulation, the Copermittees believe that the appropriate regulatory mechanism is a general permit (Waste Discharge Requirements or NPDES permit) that would apply to *all* unpaved roads in the San Diego Region, rather than only those that are under the jurisdiction of the Copermittees.

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The Copermittees request that Sections F.1.i, F.3.a.(11) and F.3.c.(5) regulating unpaved roads be deleted from the draft MS4 Permit.

However, should the Water Board insist on retaining unpaved road requirements in this Permit, the Copermittees request the following revisions. These revisions are needed to ensure that all parties have a clear understanding of the requirements as clarified in Attachment 9. In summary, the Copermittees request:

- Clarification that these requirements apply to those unpaved roads that the Copermittees maintain in their road system.
 - This should be commonly understood, but the clarification is important to include due to complex legal limitations and rights associated with access, ownership, and maintenance of unpaved roads.
- Removal of language that specifies specific BMPs that must be implemented.
 - Specifying the method of compliance is prohibited pursuant to CWC Section 13360, and inappropriately forces the Copermittees to adopt particular solutions that may not best fit the situation.
- Removal of requirement for BMPs for private unpaved roads.
 - The proposed requirements would require the creation of an additional and unnecessary program element addressing privately owned unpaved roads. The Copermittees believe that a focused public outreach program should be implemented to educate property owners and associations about the need to properly maintain unpaved roads. This education program combined with existing IC/ID enforcement capabilities seems a more reasoned and responsible response to addressing this issue.

Should Sections F.1.i, F.3.a.(11) and F.3.c.(5) regulating unpaved roads not be removed from the Permit, the Copermittees request they be modified as noted above. Specific redline edits to address the requested changes are contained in Attachment 9.

Post-Construction BMP Inspections

Section F.1.f of the draft MS4 Permit includes new requirements for the Copermittees to verify that Post-Construction BMPs are being appropriately maintained. The new requirements appropriately develop a risk-based approach to inspections, defining eight factors that the Copermittees must consider in determining 'high-priority' projects.

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However, language in Section F.1.f.(2)(a) removes that discretion by stating:

'At a minimum, high priority projects include those projects that generate pollutants (prior to treatment) within the tributary area of a 303(d) listed waterbody impaired for that pollutant; or those projects generating pollutants within the tributary area for an observed action level exceedance of that pollutant.'

This language is excessively broad, and will require virtually all sites in the watershed to be designated as 'high priority' and, therefore, subject to annual inspections. This language is inconsistent with the goals of a socially responsible and affordable permit and should be modified for several reasons:

- Inspections frequencies should be based on risk of discharge. Annual inspections are not needed for all sites that *generate* a specific pollutant. For example, if a site generates a pollutant associated with 303(d) listing, but the site retains runoff onsite or stores those pollutants indoors, annual inspections would be unnecessary. However, sites that store 303(d) listed pollutants outdoors or otherwise have a high risk of discharge should be inspected more frequently.
- The language dilutes Copermittee resources by requiring annual inspections of low-risk sites, preventing the Copermittees from appropriately concentrating resources on problematic sites/sources. This is because when an action level is exceeded then all parties in the watershed are assumed guilty until proven innocent.

While the Copermittees are not opposed to implementing a program to verify that these BMPs are being maintained, it is critically important that they be provided the flexibility to determine which sites warrant annual inspections. **Specifically, the Permittees request that the language in F.1.f.(2)(a) be amended as follows prior to adoption of the Permit:**

*At a **minimum**, high priority projects include those projects that ~~generate pollutants (prior to treatment) within the tributary area of a 303(d) listed waterbody impaired for that pollutant; or those projects generating pollutants within the tributary area for~~ have been determined to be the source of an observed action level exceedance. ~~of that pollutant.~~*

Commercial and Industrial Inspections

Section F.3.b. of the draft Permit includes requirements to inventory and inspect Commercial and Industrial businesses. The draft Permit expands upon existing inventory and inspection requirements in two problematic ways:

- It requires significantly more businesses to be inspected, and

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- It includes new requirements specifying what the Copermittees are required to inspect when they are onsite.

More inspections

Sections F.3.b.(1)(a)(i) and (ii) identify 42 categories of businesses that must be inventoried and inspected based on risk of pollutant discharge. However, Section F.3.b.(1)(a)(iii) adds virtually any business in the Permit area, independent of pollutant discharge risk:

'All other commercial or industrial sites/sources within or directly adjacent to or discharging directly to receiving waters within environmentally sensitive areas (as defined in Attachment C of this Order) or that generate pollutants tributary to an observed exceedance of an action level.' (Bold emphasis added)

In effect, section F.3.b.(1)(a)(iii) adds the following additional businesses:

- EVERY business that is adjacent to (or within) an Environmentally Sensitive Area (ESA), regardless of whether the business generates or discharges any pollutants, and
- EVERY business that 'generates' pollutants which happens to be upstream of an action level exceedance, *regardless* of whether the site has ever *discharged any* pollutants.

This language expands the list of sites far beyond the current requirements, and well beyond those sites that actually pose a threat to water quality. This is clearly unnecessary and should be removed for several reasons:

- It inappropriately separates 'risk' from the 'response', by requiring the Copermittees to inspect businesses irrespective of the risk that the business poses to water quality. For example, this language would require the Copermittees to expend resources and time inspecting hair salons, office buildings and other activities that happen to be adjacent to an ESA. This inappropriate broad-brush approach to permitting actually works to discredit the Copermittees' NPDES programs and dilute resources, rather than enhancing protection of water quality.
- It will further remove the flexibility that the Copermittees need to be able to re-allocate resources to inspecting and following up with sites/sources that are problematic.

Therefore, the Copermittees request that the language in F.3.b.(1)(a)(iii) be amended as follows prior to adoption of the Permit:

~~*All other commercial or industrial sites/sources within or directly adjacent to or discharging directly to receiving waters within environmentally sensitive areas (as*~~

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defined in Attachment C of this Order) or that generate pollutants tributary to that have been determined to be the source of an observed exceedance of an action level.

Additional items to review during inspections

Section F.3.b.(4)(a) specifies what the Copermittees must review when performing an inspection. The new requirements in subsections (i) and (ii) to review BMP implementation plans, and review facility monitoring data, respectively, are an unnecessary new mandate. They should be removed for several reasons:

- The requirements burden the Copermittees with reviewing information that is required under General Permits and is the responsibility of the Regional Board to enforce.
- The requirements would significantly increase the inspection time for sites with General Permits and endanger an existing collaborative inspection program (Compliance/Assistance Program (CAP)) that leverages the time highly trained Environmental Health Inspectors spend onsite for Certified Unified Program Agencies (CUPA) and Food Services inspections to also conduct NPDES inspections. The CAP program not only utilizes highly trained Environmental Health inspectors, but also regionalizes the inspections and, therefore, provides multiple benefits including uniformity, reduction in total number of inspections and higher-quality inspections. The Environmental Health HazMat inspection program administrators have indicated that they cannot accommodate the additional time required to implement the new requirements, as they would unduly cut into their ability to meet their own state-mandated inspection frequencies.
- By virtue of eliminating the CAP program, the requirements would effectively mandate a more fractured and disconnected set of inspections for the businesses, contrary to CAL EPA mandates for consolidated inspections, and in turn diluting the effectiveness of the program.

The Copermittees request that the language in F.3.b.(1)(a)(iii) be amended as follows prior to adoption of the Permit:

- (a) *Inspection Procedures: Inspections must include but not be limited to:*
- (i) *~~Review of BMP implementation plans, if the site uses or is required to use such a plan;~~*
 - (ii) *~~Review of facility monitoring data, if the site monitors its runoff;~~*
 - (iii) *~~Check for coverage under the General Industrial Permit (Notice of Intent (NOI) and/or Waste Discharge Identification Number), if applicable;~~*
 - (iv) *~~Assessment of compliance with Copermittee ordinances and Copermittee issued permits related to runoff;~~*
 - (v) *~~Assessment of the implementation, maintenance and effectiveness of the designated minimum and/or enhanced BMPs;~~*

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Retrofit

Section F.3.d. proposes a program to develop an inventory of existing developments that may be candidates for future water quality retrofits. The requirement goes on to encourage the Copermittees to collaborate with local property owners to promote urban retrofit in an effort to accelerate reductions in pollutant loading from existing urban areas.

Although laudable, this requirement has two significant problems:

- 1) The program is self-defeating as it contains no "carrots" to lure private property owners into participating in the program. Any property owner that is interested in volunteering in this effort would be required to fully comply with all provisions of the draft MS4 Permit. This includes preparation of compliance documents such as SSMPs, LID and hydromodification studies, subjecting themselves to additional regulatory scrutiny through business and BMP inspection programs required by the MS4 Permit, and otherwise incurring a myriad of costs and requirements. These costs and requirements would provide a strong disincentive to participate in a retrofit program. This program will only work if it is modified to remove these disincentives.
- 2) Current and projected economic conditions will limit the interest and participation of private property owners. Long-term economic predictions for Riverside County indicate that assessed valuations and property values will likely remain stagnant for the term of this Permit. Similarly, sales tax and unemployment are not expected to significantly improve either.

Without Co-Permittee resources to supplement private retrofit projects, the current economic disincentives for private redevelopment that are built into the program and the current impact of the economy on private property owners, there is no real value to the program.

PREFERRED POLICY CHOICE: The Permittees strongly request that this program be deleted for the aforementioned reasons.

Alternatively, and at minimum, the Copermittees request that the schedule for completion of the retrofitting program be revised to provide for development during the term of the Permit and submittal of the proposed program with the next ROWD. This will allow the Copermittees to defer expenditures related to development of the program until later in the Permit term when it is hoped that economic conditions and local revenues will improve. The Copermittees expect few opportunities for retrofit until the economy improves. Due to the Copermittees' limited ability to require retrofit on private property, our best opportunities for retrofit may be associated with approvals of proposed modifications of existing developments.

ALTERNATE POLICY CHOICE: If the Retrofit requirements are not removed, the Copermittees request that the Regional Board modify Section F.3.d. as follows:

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Each Copermittee must develop and implement a retrofitting program that meets the requirements of this section upon submittal of the ROWD.

Irrigation Runoff

The draft MS4 Permit categorically prohibits the discharge of landscape irrigation; irrigation water; lawn watering; (collectively 'irrigation runoff') and non-emergency fire fighting flow runoff to the MS4. The basis for this requirement comes from the current Orange County stormwater permit within the San Diego Region (NPDES No. CAS0108740), which prohibits such discharges.

Although irrigation runoff may have been shown to be a problem in South Orange County, it has **not** been shown to be causing problems in receiving waters in the Santa Margarita Region. Attachment 6 summarizes the unique conditions and other facts that warrant the restoration of irrigation runoff as a non-prohibited non-stormwater discharge category. It is important to reiterate the three key points made in Attachment 6:

- Unlike the watersheds in South Orange County, the Santa Margarita Region is an ephemeral watershed;
- Unlike South Orange County, the Copermittees have **not** identified landscape irrigation, irrigation water or lawn water as an actual source of pollutants or conveyance of pollutants to waters of the U.S.;
- The draft MS4 Permit requires Copermittees to eliminate irrigation runoff **TO THE MS4**, which by definition, requires elimination of discharges to streets, curbs and gutters.

As noted above, the prohibition appears to hold the Copermittees responsible for any amount of irrigation runoff discharged to the curb and gutter, *regardless* of whether or not the discharge ever reaches receiving waters or causes or contributes to the exceedance of a water quality standard. This fact, combined with the fact that irrigation runoff has not been shown to be causing impairments in the local receiving waters, will make enforcement difficult to justify with residents and will likely result in community outrage over bans on irrigation. Further the Copermittees are not water purveyors, and as such, have little control over residential irrigation runoff outside of sending code enforcement officers out to look for incidents of excessive irrigation runoff. This is a very inefficient use of resources. In any event, the provisions as written will do little for water quality but potentially much for community outrage against water quality programs. The Copermittees do not believe this is the intent of the Board.

It is further worth noting that the Permit already contains an investigation and remediation process via Non-Stormwater Action Levels (NALs) by which the Copermittees will identify the source of problematic non-stormwater discharges. Should the source be found to be a conditionally exempt non-stormwater discharge, the permit requires the Copermittees to address that discharge or the entire category of discharges as appropriate. By allowing the NAL process to determine when and where

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conditionally exempt discharges need to be prohibited, the Copermittees are better positioned to justify any enforcement actions.

PREFERRED POLICY CHOICE: the Copermittees request that the Regional Board restore the conditional exemption for landscape irrigation, irrigation water and lawn watering as outlined in Attachments 6 and 7.

Alternatively, if the Regional Board nevertheless insists on prohibiting Irrigation Runoff, the Copermittees request that the draft MS4 Permit be revised to allow for irrigation runoff to be managed as a JRMP program, rather than as a prohibited discharge to the MS4. This alternative request is consistent with how the Permit currently deals with non-emergency fire fighting discharges, which was also removed from the list of non-prohibited non-storm water discharges. The Executive Officer stated that he would be open to consideration of a program for irrigation runoff that would address discharges from the MS4. This alternative approach allows the Copermittees to develop a program that focuses on irrigation runoff problem areas, as opposed to holding the Copermittees responsible for eliminating any instant case of over-irrigation to a street independent of threat to receiving water quality.

ALTERNATIVE POLICY CHOICE: The Copermittees request that the Regional Board clarify that irrigation runoff is only prohibited where it is discharged *from* an MS4 (into receiving waters) by adding the following language:

B.4. As part of the JRMP, the Copermittees must develop and implement a program to address pollutants from landscape irrigation, irrigation water and lawn watering identified as significant sources of pollutants to waters of the United States.

Legal Issues

The Copermittees have identified legal issues that raise fundamental questions regarding several of the key elements of the Tentative Order.

The Copermittees request review of the legal issues and revision of the Tentative Order prior to adoption.

Each of the legal issues and requested adjustments and justifications for each requested revision is further discussed in Attachments 7 and 8 to this letter.

CONCLUSION

It is fundamental that the MS4 Permit be economically, technically, and legally feasible. To be credible, and to pass legal muster, MS4 Permit requirements must demonstrable a nexus to water quality improvements. Instead the current requirements, although well intended but not always well

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developed, will put the Copermittees in non-compliance since we cannot afford to implement all the requirements and consequently this will not lead to water quality improvement.

The present economic crisis has made daily headlines over the past three years and Riverside County has been identified as the 11th most impacted county in the nation. In the ROWD and throughout the development of the draft MS4 Permit, the Copermittees have provided abundant publicly available information regarding the impact of this crisis on their revenues, staffing, and programs. Virtually every program and service, including public safety services, has been impacted, and others have been eliminated. Contingency reserves have been depleted to the lowest levels allowable to maintain operations. At this point, the Copermittees cannot increase water quality compliance spending without real risks to reducing spending on existing state and federal mandates or other much-needed local programs and services. As proposed, the draft MS4 Permit is economically infeasible.

In an effort to promote a viable 4th-term MS4 Permit, the Copermittees proactively engaged Regional Board staff in a collaborative dialogue with the intent of developing an economically feasible MS4 Permit that was protective of receiving water quality in the Santa Margarita Region. However, the following constraints have limited the benefits of the process:

1. The discussions were curtailed because the Board expected the draft MS4 Permit to be heard in October;
2. The Board had adopted the South Orange County MS4 Permit as a "model" permit, and, therefore, would have to approve any major revisions to the provisions of that Permit; and
3. The inclusion of several new provisions of the draft MS4 Permit addressing unpaved roads, inspection programs and monitoring requirements go well beyond the Orange County Permit.

As noted in the Executive Summary, the MS4 Permit adopted for South Orange County was ultimately developed for a region with substantial coastal resources and perennial streams, twice the population, significantly higher property tax revenues, and more affluent tax payers.

By contrast, the ephemeral conditions found in the Santa Margarita Region result in stream channels that are dry during dry weather conditions and receive less rain during wet season conditions. The stream flow conditions in the Santa Margarita Region are entirely unlike the significant perennial flow conditions found in South Orange County. The proposed changes contained herein address these realities. The proposed changes also address necessary changes to ensure that the Copermittees can continue to afford implementation of the draft MS4 Permit given the significant economic disadvantages faced by the Santa Margarita Region, disadvantages that have been exacerbated by the impacts of the recession.

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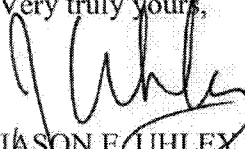
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The requirements in the Permit must protect beneficial uses in a cost effective manner. It is always a balance to protect water quality and avoid unnecessary increases in program compliance costs. Balancing local water quality needs and funding limitations should be paramount in the current economic climate. Proposed program expansions must be carefully weighed against economic realities and be justified by conditions actually found in the Santa Margarita Region. As described, unpaved roads and business inspections have been effectively addressed by existing programs, yet the draft MS4 Permit proposes requirements that can only be met by establishment of new compliance programs and, in the case of the business inspections, elimination of the highly effective CAP.

The legislature created Regional Boards to protect our beneficial uses while carefully considering the technical and economical feasibility of such protection. Even in the best of economic times, state and local government must carefully manage public revenues. A policy-level decision by the Regional Board is necessary to direct staff to work with the Copermittees to address the comments contained herein. The Copermittees request your support in our effort to develop an economically, technically, and legally feasible MS4 Permit that is appropriate to the Santa Margarita Region. As noted in the opening Executive Summary of this comment letter we specifically request that you direct Regional Board provide staff with direction to resolve the issues identified in this letter and attachments.

Thank you for your time and consideration. We look forward to discussing this issue further at the October 13th hearing.

Very truly yours,



JASON E. UHLEY
Chief of the Watershed Protection Division

JEU:bjp

Attachment 1: Summary of Proactive Efforts to Manage Stormwater

Introduction

Murrieta and Temecula Creeks and their tributaries are an important economic, environmental and social resource for the Santa Margarita Region. As an example, Murrieta Creek serves as the backdrop for Old Town Temecula, an important local tourist attraction. Several ecological preserves that are utilized by local residents and tourists are also located within the Santa Margarita Region. The Permittees are cognizant of these resources and their benefits and have implemented or initiated proactive programs beyond the requirements of the NPDES MS4 Permits to ensure that these resources remain viable and are protected for future generations.

Integrated Planning

Upper Santa Margarita River Integrated Water Management (IRWM) Plan

The County of Riverside, Riverside County Flood Control and Water Conservation District (District) and Rancho California Water District proactively entered into an agreement to form this program to manage the Upper Santa Margarita River Watershed. These three agencies have proactively engaged tribes, local stakeholders, and other local, state and federal agencies in an effort to develop a comprehensive plan to manage the watershed. Further, we have also built bridges to the San Diego County and Orange County IRWM programs to ensure proactive inter-regional planning of cross-jurisdiction watersheds such as the Santa Margarita River Watershed. The three-party agreement reached by the IRWM programs within the San Diego Region is the only one of its kind in California.

Santa Margarita River Executive Management Team

The Permittees also coordinate more technical issues with San Diego County, the U.S. Bureau of Reclamation, Camp Pendleton, and other stakeholders to address coordination of monitoring and analysis of monitoring data within the region.

Murrieta Creek Flood Control, Environmental Restoration and Recreation Project

Murrieta Creek poses a severe flood threat to the cities of Murrieta and Temecula. Overflow flooding from the undersized creek has periodically wreaked havoc on the communities – most recently in 1993 when nearly \$20 million in damages was incurred by the public and private sectors.

In 1997, at the request of District, the U.S. Army Corps of Engineers initiated studies on the Creek. The outcome of this endeavor was Congressional authorization in 2000 of a \$90 million, multi-faceted project known as the Murrieta Creek Flood Control, Environmental Restoration and Recreation Project. What was once viewed only as a needed local flood control project was now a federally cost shared, community endorsed corridor project that would not only safeguard the two cities from the ravages of uncontrolled flooding, but would celebrate the unique character of the communities by restoring and enhancing the environmental distinctiveness of the Creek bottom, utilizing the top of the river banks for hiking, biking and equestrian trails, and developing a 240-acre flow attenuation basin that would encompass 160 acres of new environmental habitat and a 50 acre sports park. The project is currently undergoing design of Phase II.

Attachment 1: Summary of Proactive Efforts to Manage Stormwater

Management of New Development

LID BMP Design Manual

The County, with input from the Permittees has spent the last five years developing and field testing a manual promoting Low Impact Development (LID). The manual is due to be published by December 31, 2010. The development of the manual was informed by meetings with authors of key LID manuals from throughout the nation, field visits to existing LID BMP sites to evaluate design and maintenance characteristics, and years of research into design methodologies and water quality effectiveness data. The manual includes detailed design criteria, standard drawings, maintenance requirements and other key information that will ensure that LID BMPs deployed in the Santa Margarita Region will provide long-term water quality benefits.

Public BMP Maintenance Mechanism

The District has also been developing a plan for public maintenance of post-construction BMPs that meet specified requirements. This mechanism will go hand-in-hand with the release of the LID BMP Design Manual. Development projects that design their BMPs to the criteria in the manual and place the BMPs consistent with our guidelines will be able to opt into a public maintenance mechanism that will provide for consistent and ongoing maintenance of post-construction BMPs throughout the region.

Management of New Development

LID BMP Testing and Demonstration Facility

The LID BMPs incorporated into our LID BMP Design Manual are being incorporated into a \$3,000,000 retrofit of the District's headquarters in the City of Riverside. The project will provide a regional center for LID BMP training and demonstration, include a five-year study to collect water quality and field data on the effectiveness of the BMP designs and maintenance programs, and facilitate a cycle of continuous improvement for LID BMP techniques.

Southern California Stormwater Monitoring Coalition

The Permittees voluntarily participate in a collaborative effort with the other Counties in southern California to conduct special studies to advance the science of stormwater management. These studies include regional bioassessment programs, inter-lab calibration programs, hydromodification management studies, programs to develop the scientific methods used to monitor for toxics, biological indicators and chemistry, and more.

Statewide Stormwater Leadership

Pesticide Regulation

The Permittees have proactively met with management of California Department of Pesticide Regulation and USEPA staff regarding negative receiving water impacts of authorized pesticides use in California. District staff have also submitted multiple comments and provided testimony at applicable state and federal listening sessions regarding the need to change the regulatory framework to better protect receiving waters.

Attachment 1: Summary of Proactive Efforts to Manage Stormwater

California Stormwater Quality Association (CASQA)

The District proactively participates in the activities of this pre-eminent organization addressing stormwater issues in California. District staff serves on the Board of Directors, as the Chairs for the Legislative Committee and Conference and on several committees including Monitoring, Pesticides, and Policy and Permitting. This organization and these committees are developing the programs and science that are driving the management of stormwater programs forward.

Habitat and Aquatic Resource Conservation

Western Riverside County Multiple Species Habitat Conservation Plan (MSHCP)

The Permittees have established the MSHCP to identify and proactively protect critical habitat for threatened and endangered species in Riverside County. The MSHCP establishes several key linkage corridors along existing streams and creeks to ensure protection of the habitat and safe paths of migration for species. The MSHCP will ultimately conserve over 40% of the lands within the Santa Margarita Region of Riverside County. Further, the plan proposes to purchase and preserve several of the remaining natural stream systems in the region for use as habitat conservation and species corridors.

Special Area Management Plan (SAMP)

The Permittees have also entered into ongoing negotiations with the San Diego Regional Water Quality Control Board and United States Army Corps of Engineers staff regarding a SAMP to proactively identify and protect the most important aquatic resources in the Santa Margarita Region of Riverside County.

Attachment 2: Economic Assessment

Economic Assessment Draft 2010 Santa Margarita Region MS4 Permit September 2, 2010

The Draft Municipal Separate Storm Sewer System Permit (Draft Tentative Order No. R9-2010-0016; NPDES No. CAS0108740) for the Santa Margarita Region of Riverside County (draft Permit) proposes new and expanded compliance requirements that would significantly increase the Copermittee compliance costs. Further, the draft Permit expands the compliance requirements and compliance costs beyond those required by the recently adopted MS4 Permit for South Orange County, a more populous and affluent area with significantly greater tax revenues to support the compliance programs. These additional requirements and costs are proposed at a time when the Copermittees have been severely impacted by the most significant economic downturn since the Great Depression. These impacts include high levels of unemployment and homes in default, sharply reduced Copermittee revenues and increased demands on public services. Moreover, these impacts have fallen disproportionately on communities in Riverside County relative to South Orange County and San Diego County, due in large part to the crash of the housing market.

Due to their reduced revenues, the Copermittees budgets and staffing have been significantly reduced for virtually all services and programs operated by the Copermittees, including police, fire, and paramedic services. Funding has been focused on essential public safety and existing state and federally mandated programs. Increases in funding for the water quality mandates contained in the draft Permit can only come from reduced funding for these basic priorities. Therefore, the expanded compliance requirements proposed in the draft Permit are economically infeasible. This paper describes the general economic conditions in the Santa Margarita Region, the Copermittees' current budget and budget projections, their assessment of projected increases in compliance costs, and economic forecasts provided by other parties.

POPULATION

Riverside County, which is subject to three NPDES MS4 permits, has a total population of 2,153,186. However, only 289,765 persons (approximately 13 percent) reside within the Santa Margarita Region.¹ Population and housing projections for the Santa Margarita Region are summarized in Table 1. MS4 discharges in Riverside County are regulated by separate NPDES stormwater permits issued by the Colorado River, Santa Ana, and San Diego Regional Water Quality Control Boards. Although these three MS4 permits address the same federal regulatory requirements, the provisions in the draft Permit are often not well aligned with the requirements of the other two MS4 permits. As such, the cost for complying with those requirements is borne entirely by the 289,765 residents within the Santa Margarita Region.

¹ Riverside County Projections 2010 (RCP-10), Transportation and Land Management Agency, Administrative Services, Center for Demographic Research, June 23, 2010.

Attachment 2: Economic Assessment

Table 1: Santa Margarita Region Population & Housing Projections 2010²

Jurisdiction	Population / Housing Units		
	2010	2015	2020
Murrieta	101,680/34,812	105,513/36,162	109,343/37,512
Temecula	102,727/33,194	109,136/35,270	112,242/36,321
Wildomar	32,720/11,123	37,289/12,722	42,475/14,537
Unincorporated	52,638/17,546	54,584/18,195	59,878/19,959
Total	289,765/96,675	306,522/102,349	323,938/108,329

CURRENT ECONOMIC CONDITIONS

Unemployment

Higher unemployment directly impacts the revenue streams available to the County and the Cities for funding programs and services. As illustrated in Figure 1, the unemployment rate in Riverside County is currently 15.3 percent, which is 42 percent higher than the unemployment rate in San Diego County (9.8 percent) and 56 percent higher than the unemployment rate in Orange County (9.8 percent).³

SOURCES OF LOCAL REVENUE

The Copermittee's primary revenue sources for implementation of programs and services are property taxes, sales taxes, and development/construction permit fees. Each of these sources has declined substantially since the beginning of the recession in FY 2006/2007. The 2009 per capita income in Riverside County (\$29,177) is 31% lower than the per capita income in San Diego County (\$42,094) and 32% lower than the per capita income in Orange County (\$46,898).⁴ The population of the Santa Margarita Region (289,765) is 48% lower than the population of South Orange County (553,161⁵) and 91% lower than the population of San Diego County. As a less affluent area with relatively small

² Riverside County Projections 2010 (RCP-10), Transportation and Land Management Agency, Administrative Services, Center for Demographic Research, June 23, 2010.

³ Monthly Labor Force Data for Counties, July 2010 – Preliminary, Labor Market Information Division, Employment Development Department, August 20, 2010. <http://www.calmis.ca.gov/file/lfmonth/countyur-400c.pdf>

Attachment 2: Economic Assessment

population, the Santa Margarita Region has far less revenue than South Orange County and San Diego County to fund local programs and services, and MS4 permit compliance costs.

Per Capita Income⁶

	Riverside County	Orange County	San Diego County
2006	29,148	49,098	42,110
2007	29,950	49,790	43,816
2008	30,088	49,650	44,438
2009	29,177	46,898	42,094
2010 (forecast)	28,117	47,435	42,651

Figure 1. Unemployment Rates of California Counties (title for figure on next page)

⁴ Economic Forecast, Los Angeles Economic Development Corporation, July 2010.

⁵ Richard Boon, County of Orange, personal communication, September 1, 2010.

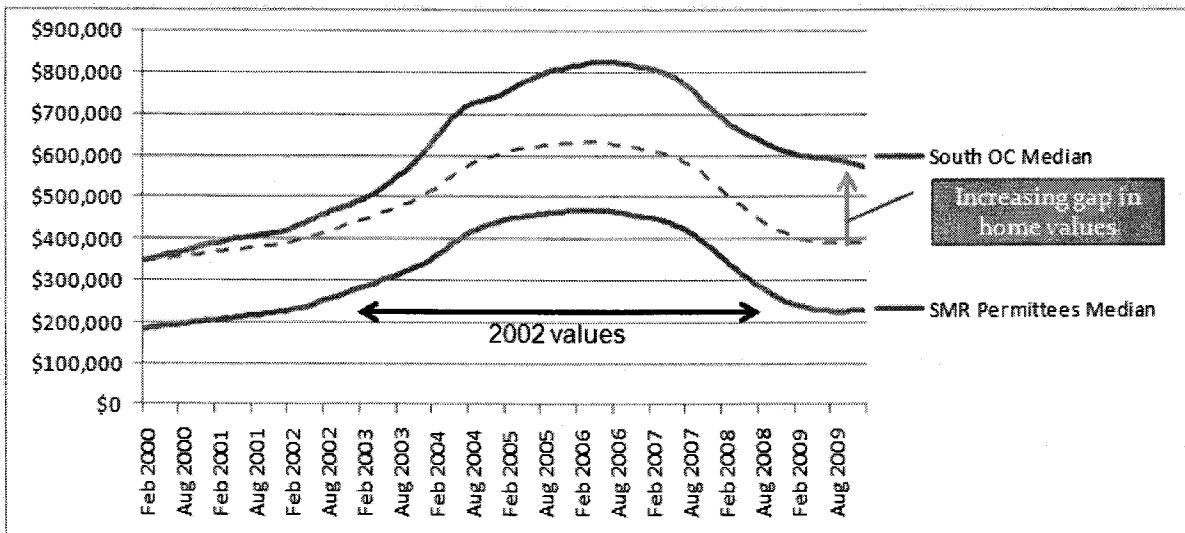
⁶ Economic Forecast, Los Angeles Economic Development Corporation, July 2010.

Attachment 2: Economic Assessment

Home Values/Property Tax Revenue

Property tax revenue, which is a major source of funding for the County and Cities, is a direct function of the total inventory of real estate and the assessed values of the real estate. With a small population relative to South Orange County and San Diego County and a limited amount of commercial and industrial property, the Santa Margarita Region is supported by a much smaller inventory of real estate from which to obtain property tax revenue. The high rate of foreclosures in Riverside County has also resulted in significant declines in real estate values and, consequently, property tax revenue. The Riverside County Auditor-Controller projects that property values will fall over 10 percent in FY 2009-10 and could fall further in FY 2010/2011.⁷ Figure 3 illustrates the decline in median home values in the Santa Margarita Region and South Orange County. Although home values in both areas have declined, home values in the Santa Margarita Region have declined at a greater rate and the difference in home values between the two areas has grown with the recession.

Figure 3. Median Home Values⁸



The Inland Empire (Riverside and San Bernardino Counties) registered more defaults and foreclosures than any other area of Southern California.⁹ The Inland Empire was ranked No. 5 in nationwide foreclosure activity during the first half of 2010, with almost 4.5 percent of households in default. A total 63,717 mortgage default notices, auction sale notices, and bank repossessions were recorded in the Riverside-San Bernardino-Ontario metropolitan area between January and June 2010, according to RealtyTrac. Accordingly, one in 23 households were in some stage of foreclosure during this six-month period. Additionally, almost 45 percent of homeowners with a mortgage in Riverside and San Bernardino Counties owe more on their homes than the homes are worth. As illustrated in Figure 3, Orange County

⁷ Comprehensive Annual Financial Report of the County of Riverside for the Fiscal Year Ended June 30, 2009, Robert E. Byrd, Riverside County Auditor-Controller, December 9, 2009. P. vii. http://www.auditorcontroller.org/opencms/publications/FinancialPub/cafr/CAFR_2009/Introductory.pdf

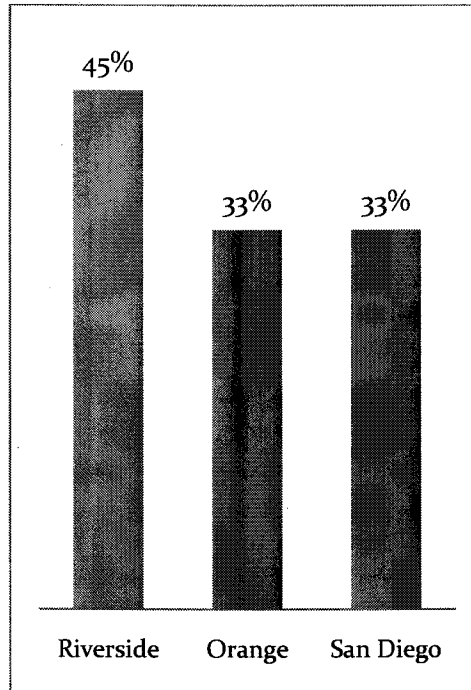
⁸ Source: www.zillow.com

⁹ Economic Forecast, Los Angeles Economic Development Corporation, July 2010, p. 50.

Attachment 2: Economic Assessment

and San Diego County have not been impacted by "upside-down mortgages" to the same extent as has Riverside County.

Figure 3. "Upside-Down Mortgages"



One expert, Professor Mason Gaffney of the UC Riverside Economics Department believes that the housing market is in a vicious cycle simply because there are too many homes. According to Professor Gaffney, because demand is down, prices will go down, and more people will go "upside-down" on their mortgage, and then go into foreclosure. Professor Gaffney estimates that the bottom of the housing market will not be seen for another three years, due to the previous overbuilding in Riverside County.¹⁰

Although the recession has impacted property values throughout Southern California, Riverside County remains at a distinct disadvantage relative to Orange and San Diego Counties. The average home value in Riverside County is \$207,900, which is 58% less than the average home value in South Orange County (\$499,500) and 45% less than the average home value in San Diego County (\$378,800).¹¹ As a result, property tax revenues per home in Riverside County are 58% less than in Orange County and 45% less than in San Diego County. The larger populations and number of homes in Orange and San Diego Counties multiply this disparity in property tax revenue that can be used to help fund NPDES compliance programs. Based on population and average home value, South Orange County generates over four times the property tax revenue generated in the Santa Margarita Region, and San Diego County generates 20 times the property tax revenue of the Santa Margarita Region. Clearly, the Copermittees in the Santa Margarita Region receive significantly less property tax revenue than either Orange or San Diego Counties and are less able to fund additional MS4 permit compliance costs.

¹⁰ Ibid.

¹¹ Zillow Home Value Index – Riverside County, Zillow.com. August 10, 2010.

Attachment 2: Economic Assessment

Sales Tax Revenue

The next most significant revenue source for program funding is sales tax. Sales tax revenue is a function of population and relative income. As described, the Santa Margarita Region has a less affluent and smaller population than South Orange County and San Diego County on which to generate sales tax revenue.

The high levels of unemployment in Riverside County have reduced disposable income which has further depressed sales tax revenues. Retail sales in Riverside County fell by nearly 27% in 2008 and 2009.¹² Statewide sales and use tax revenues for the second quarter of 2010 declined approximately 10.4 percent. Additionally, taxable sales for the first quarter of 2010 remained flat compared to a year earlier.¹³ Although data specific to the Santa Margarita Region is not available, it is anticipated that taxable sales have been impacted more significantly than in Orange and San Diego Counties due to the higher unemployment rate in Riverside County.

Taxable sales are directly proportional to sales tax revenue. Based on data presented in the Los Angeles Economic Development Corporation's July 2010 Economic Forecast, South Orange County generates 2.6 times the taxable sales generated in the Santa Margarita Region and San Diego County generates 13.3 times the taxable sales of the Santa Margarita Region. Clearly, the Copermittees in the Santa Margarita Region receive significantly less sales tax revenue than either Orange or San Diego Counties and are less able to fund additional MS4 permit compliance costs.

Development and Construction Permit Fees

Prior to the recession, development and construction permit fees funded a variety of compliance activities related to review, approval, inspection and enforcement associated with development and construction activities. Since the recession, revenues from these fees have been virtually eliminated. As a result, Copermittee inspection and enforcement of development and construction activities, including abandoned projects, has been funded by the Copermittees' general funds. General fund budgets are in turn supported by sales and property tax revenues which, as described, have declined significantly.

New Fees or Taxes

Another potential source of funding would be the establishment of a new fee or tax. Such revenues would be subject to the requirements of Proposition 218. Recent efforts to pass supplemental fees have been mixed and given the current economic conditions, this option appears infeasible. For example, on the March 2006 ballot, an attempt by the City of Encinitas to pass a Clean Water Fee was defeated by the voters.¹⁴ It is notable that this rejection of a Clean Water Fee occurred prior to the recession in a relatively affluent coastal city.

Economic Forecasts

The Riverside County Executive Office assessed Riverside County's economy in a report to the Board of Supervisors submitted with the FY 2010/2011 Recommended Budget. In this assessment, it was noted that the economy is still staggering and that economic news has been mixed. Although a slightly rising

¹² Economic Forecast, Los Angeles Economic Development Corporation, July 2010, p. 51.

¹³ News release "Local Sales Tax Allocations Reduced in Many Areas of the State," California Board of Equalization, August 27, 2010. <http://www.boe.ca.gov/news/2010/92-10-G.pdf>

¹⁴ FY 2008-2009 JURMP Annual Report, City of Encinitas, p. 10-3.

Attachment 2: Economic Assessment

stock market and other nationwide measures could be interpreted to signal improvement, persistently high unemployment and personal and national debt call for caution, and a double-dip recession is possible. Locally, while some experts project revenues will shrink again in FY 2011/2012, Riverside County's economic consultants foresee a long and gradual muted recovery and the County will be managing with drastically reduced budgets for an extended period. Budget reductions of approximately \$21 million are projected for FY 2011/2012. The County projects that it will see a balanced but significantly reduced budget in FY 2012/2013, with a total budget of \$670 million (compared to \$736 in 2007). Based on this assessment and reports in the media, it appears that the economy in Riverside County will stabilize at a reduced level and may not recover during the term of the SMR MS4 Permit.

Projected Increases in Compliance Costs

The draft Permit proposes a significant expansion of compliance requirements that would significantly increase the Copermittee compliance costs. The draft Permit was developed by starting with the MS4 Permit for South Orange County. The requirements proposed in the draft Permit that would significantly increase compliance costs include:

Regional Compliance Requirements

- Monitoring and special studies (See Attachment 4)
- Hyrdomodification Management Plan (including monitoring)
- Retrofit study
- Other general program updates (JRMP)

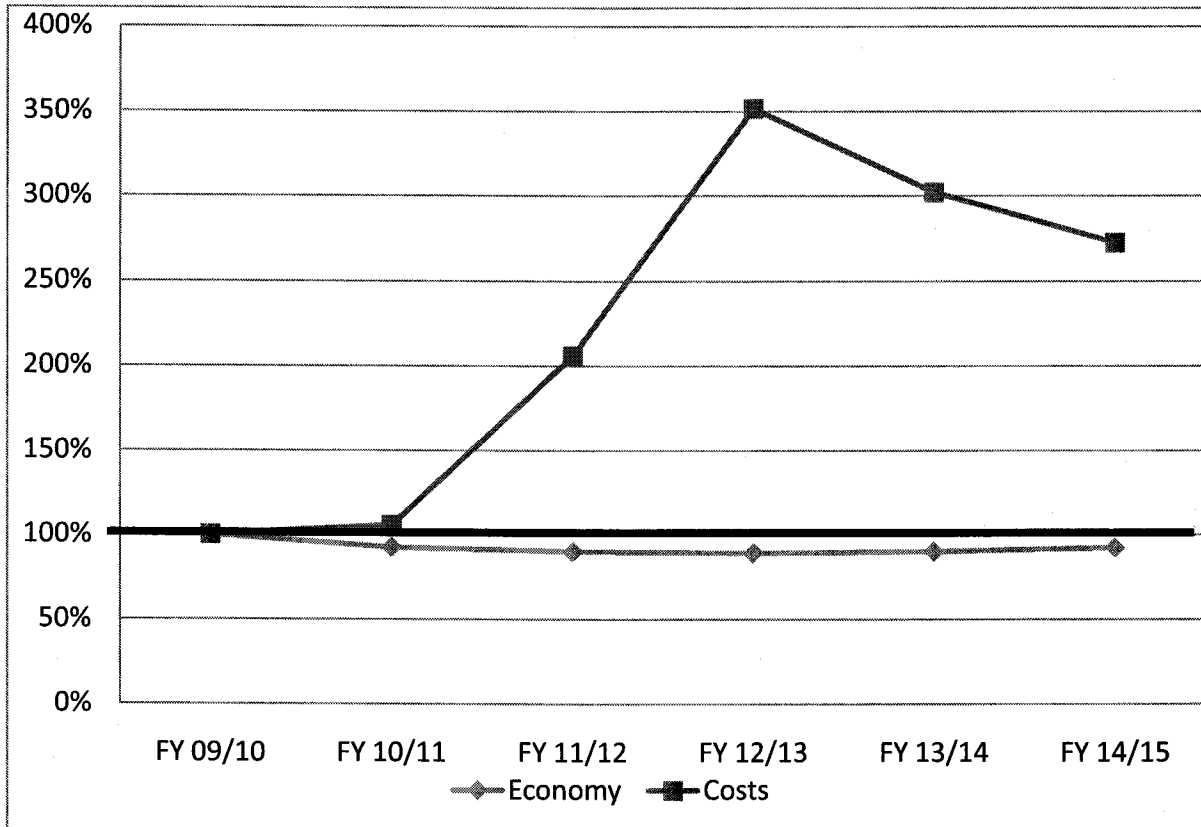
Individual Copermittee Compliance Requirements

- Enforcement of Irrigation runoff prohibition (See Attachment 6)
- Significantly Increased business and BMP inspections
- BMP retrofit requirements
- Regulation of unpaved roads (See attachment #5)
- Hydromodification requirements
- Monitoring Source Identifications
- Expanded IC/ID requirements

Estimates for implementation of the regional compliance requirements have been prepared and Figure 4 illustrates the disparity between projected Copermittee revenues and costs for implementation of the proposed regional programs. Due to the fact that calculating costs for implementing entirely new programs is excessively difficult, cost estimates for the implementation of individual Copermittee compliance requirements have not been completed, although it is expected that their individual costs will parallel the regional costs presented in Figure 4.

Attachment 2: Economic Assessment

Figure 3. Projected Revenues vs MS4 Permit Compliance Costs



ECONOMIC SUMMARY

As all sources of revenues have been reduced significantly, the Copermittees have been required to reduce staffing through layoffs, attrition and furlough; reduce funding across the board for public services and programs, and, in some cases, completely eliminate public services and programs. For example, it is estimated that County of Riverside staffing has been reduced by 2,500 since FY 2006/2007 mostly in the form of early retirement and layoffs. It is estimated that an additional 500-700 staff positions will be eliminated by the County in FY 2011/2012.

Due to the loss of revenue, virtually all Copermittee programs or services have been reduced, including fire and police. As an example, the Riverside County FY 2010/2011 Recommended Budget for Riverside County proposes:

- Public safety department cuts of 3 – 5 percent
- Other department cuts averaging 19 percent
- Continued staff reductions

Attachment 2: Economic Assessment

After three years of modest cuts culminating in a 25% decrease, the Board of Supervisors approved an additional 19% cut in the general fund and a 4% cut to public safety for FY 2010/2011. These additional cuts will decrease spending by an additional \$71 million. The remaining budget gap will be filled from general fund reserves set aside for economic uncertainty. Since FY 2006/2007 Riverside County general fund reserves have declined from over \$300 million to \$30 million. The County cannot decrease the reserve fund any further without affecting the County's ability to obtain credit. According to the Associated Press Economic Stress Index, of counties with populations of at least 25,000, Riverside County was identified as the eleventh most economically stressed county in the nation based on its June 2010 stress scores.¹⁵

All County departments have been directed to only provide those core services that the County is mandated to provide. At this point, the Copermittees are struggling to maintain the existing compliance programs required by the 2004 MS4 Permit with available staff and funding. Implementation of expanded or new Permit compliance requirements would require the Copermittees to either further reduce implementation of other mandated programs or reduce the level of implementation of MS4 Permit compliance programs - at risk of receiving an NOV and ACL. In other words, the Copermittees cannot increase MS4 Permit compliance expenditures without directly impacting compliance with other state or federally-mandated programs.

CONCLUSION

The draft Permit was developed by starting with the MS4 Permit for South Orange County. This represented a significant expansion of compliance requirements and compliance costs relative to the 2004 Permit issued to the Copermittees in the Santa Margarita Region, and by no means are the costs incremental in nature. South Orange County is a permit area with twice the population, 2.6 times the sales tax revenue, and over four times the property tax revenue of the Santa Margarita Region. The draft Permit was then expanded to include additional compliance and monitoring requirements, further increasing compliance costs. Plainly, it is unrealistic to impose greater, or even the same Permit requirements on the Santa Margarita Region, as have been imposed on South Orange County.

In addition to having a lower property tax revenue based on lower property tax base and lower per capita retail sales, the Santa Margarita Region has also been hit harder by the recession, which has further diminished funding resources. It is projected that revenues will continue at a reduced level for an extended period with recovery not expected within the term of the Permit term. Therefore, the available resources to fund public safety, existing state and federal mandates, and expanded water quality permit requirements are much less than San Diego and Orange Counties.

The economy has resulted in reductions of reserves to minimum levels and virtually all local services and programs have been reduced or eliminated. As increases in funding for the water quality mandates contained in the draft Permit can only come from reduced funding for public safety, existing state and federal mandates, the expanded compliance requirements proposed in the draft Permit are economically infeasible.

¹⁵ "20 Most Stressed, 20 Least Stressed Counties, The Associated Press, August 2, 2010.

Attachment 3: Language Changes Supported by Board Staff and Copermittees

Introduction

This document highlights the agreed upon revisions resulting from detailed discussions between Water Board Staff and the Copermittees on program implementation. The intent of these revisions is to ensure that requirements in the Draft MS4 Permit continue to be protective of water quality while allowing the Copermittees flexibility in resource allocation and cost efficiencies. This collaborative process enhanced a mutual understanding of these goals and, consequently, many of the Permit's requirements are streamlined, clearer, implementable and protective. This document highlights specifically the Low Impact Development (LID) and the Interim Hydromodification requirements that have been revised from the Orange County NPDES MS4 Permit in order to recognize the Copermittees' advanced efforts.

Important Program Revisions

Low Impact Development (LID)

The Copermittees strongly support the language in the draft Permit with regard to Low Impact Development (LID) BMPs (Section F.1.d.(4)). Through discussions with staff, the Copermittees have presented their commitment and vision for LID, emphasizing that their programs' goals are in line with the intent of the LID language found in the Orange County permit. The District and the County, with input from the Copermittees, have invested five years into developing a well thought through LID program including:

- The design of a detailed and thoroughly researched LID BMP Manual,
- An implementation policy focused on a tiered approach to BMP selection,
- Incorporation of a public maintenance mechanism, and
- Construction of a \$3,000,000 LID BMP retrofit, demonstration and testing facility.

These various features are already in effect in the unincorporated County, or in the process of being finalized, for broader use.

The LID BMP manual provides the development community guidance for designing LID BMPs that will be effective at reducing pollutants from the site to the MEP. While the current program is based on a tiered approach that encourages landscaped LID BMPs first, above detention BMPs, and those above proprietary/mechanical BMPs, this tiered approach will be further revised to support Staff's goal for more onsite BMPs to infiltrate runoff, although some Copermittees are still concerned with the infiltration mandate. Specifically, this tiered approach will prioritize BMPs for new development and redevelopment that:

- Provide for the harvest and reuse of stormwater through safe infiltration of site runoff, similar to natural conditions where such runoff can then help replenish the groundwater table,
- Treat site stormwater runoff on a project scale, generally providing a more robust system as compared to individual lot features,

Attachment 3: Language Changes Supported by Board Staff and Copermittees

- Are the most protective of surface water resources, providing 100% 'removal' of pollutants for the water quality volume infiltrated,
- Even for runoff that is biotreated, provide substantial benefit by ensuring that BMP designs maximize the opportunities for incidental infiltration and runoff capture,
- Focus on passive/landscape BMPs that do not require extensive or special maintenance, or that rely on external factors to function for water quality purposes,
- Provide hydromodification mitigation by more closely mimicking pre-development hydrology,
- Ensure that all sites will have runoff water quality that is consistent.

Not only are the Copermittees committed to implementing effective BMPs, they are also committed to effective maintenance. The District's proposed public maintenance mechanism will bolster BMP maintenance for areas where private BMP maintenance has historically been found to be lacking, thus ensuring a higher level of protection for receiving waters. Lastly, the retrofit, demonstration and testing facility will be used to confirm the effectiveness of BMPs included within the BMP manual, provide Copermittees data to review and enhance the program, and provide a demonstration of BMPs for the Copermittees, developers, and the general public.

The Copermittees also believe the passive-treatment BMPs, as opposed to capture and re-use BMPs, are the most reliable for the ongoing protection of water quality. For example, properly designed infiltration BMPs provide benefit during and between storms, without intervention from site owners, operators or occupants, and only require occasional and relatively simple landscape contractor maintenance on an annual basis. This concept has been integrated into the LID BMP Manual through conservative designs that provide a significant margin of safety against failure, and have design features that facilitate proactive maintenance (e.g., integrated landscape features). For the purposes of requiring BMPs that will be most protective of water quality, the Copermittees have de-emphasized the use of BMPs that harvest stormwater for on-site use, since the BMP will not operate passively, and if the BMP 'use' or maintenance should not occur, the BMP will bypass 100% of runoff without treatment. The Copermittees believe that the draft Permit appropriately encourages such water conservation technologies, while not mandating their use.

Regional Board Staff has recognized the efforts, thoughtfulness, and funding that the County has invested in their LID BMP approach, and have, in coordination with the Copermittees, developed a prioritization process that supports the Copermittees' investment in a plan for LID, while ensuring that an appropriate prioritization for the most effective BMPs is implemented. As such, infiltration BMPs must be used for all sites unless it is technically infeasible to infiltrate. Technical infeasibility will be based on criteria that will be developed by the Copermittees and approved by the Regional Board. Only when infiltration is deemed infeasible through the approved analysis can other LID BMPs be used in place of infiltration. These LID BMPs must be consistent with the Copermittees design manual or other regional LID manuals, which have been developed to ensure these LID BMPs are designed to have the greatest pollutant removal

Attachment 3: Language Changes Supported by Board Staff and Copermittees

over the life of a project. If LID BMPs are found to be technically infeasible due to poor site or other conditions, then conventional BMPs must be implemented and the project must participate in the LID waiver/mitigation program that will ensure pollutant removal effectiveness consistent with the preferred LID BMPs.

One other important consideration for new development and LID requirements in MS4 permits is the ability for the project proponent (developer) to understand and easily comply with the requirements, such that they can easily be incorporated into projects. Recently adopted MS4 permits, such as the south Orange County MS4 Permit, have very complicated new development and LID requirements. The result of such requirements is a WQMP guidance document that can be confusing, and may be difficult to implement consistently and in a way that will provide consistent protection of water quality. The Copermittees and Regional Board staff, working together, have crafted new development LID requirements that are easily understood, and will ensure the highest likelihood of integration of LID features consistently into projects.

Interim Hydromodification Criteria

Pursuant to discussions between the Copermittees and Water Board staff, the proposed interim hydromodification criteria is aligned with the Copermittees' existing hydromodification program. This agreed language ensures that adequate hydromodification protection measures continue to be in place, while allowing the Copermittees to focus resources and funds on developing the Final Hydromodification Management Program and avoid diversion of scarce resources to developing new interim criteria that will only be in effect for a short duration. In addition, this approach will save the development community from confusion as to which requirements are in effect.

The Copermittees' current hydromodification mitigation program is described in the WQMP, but has been slightly modified as presented in the draft MS4 Permit. Although the Copermittees request the minimal changes to the language shown in the attached redlines, the Copermittees otherwise support the currently drafted interim hydromodification requirements. Under the proposed interim requirements, project applicants must either demonstrate numerically that the project will not adversely impact downstream alluvial channels, or, they must mitigate both the two-year and 10-year recurrence interval storms to pre-project levels in the post-project condition. All analysis must be performed by a registered civil engineer specializing in water resources. Mitigation of both the two-year and the 10-year storms to pre-project levels has been demonstrated to be consistent with the range of flows that are the primary determinants of the stream geomorphology in the southern California area. By maintaining these storm events at pre-project levels, impacts to the downstream alluvial channel should be mitigated to a level of less than significant. Additionally, the Copermittees believe that the onsite LID requirements will further reduce the need for on-site hydromodification controls that would otherwise be required with conventional treatment BMPs. The final comprehensive hydromodification mitigation program will further develop more detailed analysis methods, as well as establish a monitoring program to help verify the effectiveness of the HMP requirements.

Attachment 3: Language Changes Supported by Board Staff and Copermittees

Revisions tentatively agreed to with Board Staff

Per discussions between the Water Board Staff and Copermittees the following revisions were agreed upon.

Section	Alternate Permit Language	Page in T.O.
Non-Stormwater Dry Weather Action Levels (NALs)		
C.2	In response to an exceedance of an NAL, the Copermittee(s) having jurisdiction must investigate and <u>seek to</u> identify the source of the exceedance in a timely manner.	20
Legal Authority		
E.1	Each Copermittee must establish, maintain, and enforce adequate legal authority <u>within their jurisdiction</u> to control pollutant discharges into and from its MS4 through ordinance, statute, permit, contract or similar means.	24
E.2	Each Copermittee must submit on or before June 30, 2012, a statement certified by its chief legal counsel that the Copermittee has taken the necessary steps to obtain and maintain full legal authority <u>within their jurisdiction</u> to implement and enforce each of the requirements contained in 40 CFR 122.26(d)(2)(i)(A-F) and this Order.	25
Jurisdictional Runoff Management Program - JRMP (Development Planning)		
F.1.c.(8)	Rain water harvesting, where feasible, must shall be implemented <u>encouraged</u> as part of the site design and construction, and to supplement offsite beneficial uses.	29
F.1.d.(4)(b)(i) Footnote	<p>Maintain or restore natural storage reservoirs and drainage corridors (including depressions, areas of permeable soils, swales, and ephemeral and intermittent streams) to the extent feasible¹².</p> <p>¹² Priority Development Projects proposing to dredge or fill materials in waters of the U.S. <u>must obtain a CWA §401 Water Quality Certification</u> and/or Priority Development Projects proposing to dredge or fill materials in waters of the State must obtain a CWA §401 Water Quality Certification and/or Waste Discharge Requirements.</p>	34

Attachment 3: Language Changes Supported by Board Staff and Copermittees

<u>Section</u>	<u>Alternate Permit Language</u>	<u>Page in T.O.</u>
F.1.f.(1)	Inventory of SSMP projects: Each Copermittee must develop and maintain a watershed-based database to track and inventory all projects <u>within their jurisdiction</u> , that have a final approved SSMP (SSMP projects), and its structural post-construction BMPs <u>implemented therein within its jurisdiction</u> since July, 2005. LID BMPs implemented on a lot by lot basis in low density residential areas <u>for at single family residential homes</u> , such as rain barrels, are not required to be tracked or inventoried.	38-39
F.1.f.(2)(b)(iv)	At least 20 percent of all approved and inventoried SSMP projects must be inspected by the Copermittee annually;	39
F.1.h.(2)	In addition to the control measures that must be implemented by Priority Development Projects per section F.1.h.(1)(d), the HMP must include a suite of management measures to <u>that can</u> be used on Priority Development Projects to mitigate hydromodification impacts, protect and restore downstream beneficial uses and prevent or further prevent adverse physical changes to downstream channels.	43
F.1.h.(3)	As part of the HMP, the Copermittees may develop a waiver program that allows a redevelopment Priority Development Project, as defined in Section F.1.d.(1)(b), to implement offsite mitigation measures. A waiver may be granted if onsite management and control measures are technically infeasible to fully achieve post-project runoff flow rates and durations that do not exceed the pre-development (naturally occurring) runoff flow rates and durations. Redevelopment projects that are granted a waiver under the program must not have post-project runoff flow rates and durations that exceed the pre-project runoff flow rates and durations. The <u>estimated</u> incremental hydromodification impacts from not achieving the pre-development (naturally occurring) runoff flow rates and durations for the project site must be fully mitigated.	43
Commercial / Industrial		
F.3.b.(2)(b)	Designate / Update Minimum BMPs: Each Copermittee must designate a minimum set of BMPs for all inventoried industrial and commercial sites/sources. Where BMPs have already been designated, each Copermittee must review and update its existing BMPs for adequacy <u>within one year of permit adoption by no later than the submittal of the JRMP</u> . Copermittees may continue to regularly review and update their designated BMPs for adequacy and subsequently submit any updates in their Annual Report.	58

Attachment 3: Language Changes Supported by Board Staff and Copermittees

Section	Alternate Permit Language	Page in T.O.
<p>F.3.b.(4)(b) And NEW F.3.b.(6)(a)</p>	<p>F.3.b.(4)(b) Each Copermittee must annually notify the San Diego Water Board, prior to the commencement of the rainy season, of all Industrial Sites and Industrial Facilities subject to the General Industrial Permit or other individual NPDES permit with alleged violations of the Copermittees ordinances, that pose a significant threat to water quality.</p> <p>F.3.b.(6)(a) – New</p> <p>(6) <u>Reporting of Non-Compliant Sites</u></p> <p>(a) <u>Each Copermittee must annually notify the San Diego Water Board, prior to the commencement of the wet season, of any unresolved high level enforcement action (as defined in the Copermittees' JRMP) that poses a significant threat to water quality in its jurisdiction as a result of violations of their stormwater ordinances.</u></p>	60-62
Retrofit		
F.3.d.	<p>Each Copermittee must develop and implement a retrofitting program that meets the requirements of this section. The goals of the existing development retrofitting program are to <u>provide a means to the Copermittees to address the impacts of existing development through retrofit projects that reduce impacts from hydromodification, promote LID, support riparian and aquatic habitat restoration, reduce the discharges of stormwater pollutants from the MS4 to the MEP, and prevent discharges from the MS4 from causing or contributing to a violation of water quality standards.</u></p>	64
F.3.d.(5)	<p>The completed retrofit BMPs must be tracked in accordance with Section F.1.f. Retrofit BMPs on publicly owned properties must be inspected per section F.1.f. Privately owned retrofit BMPs must be inspected as needed to ensure proper operation and maintenance.</p>	65
IDDE		
F.4.b	<p>Remove the following language: all known locations of access points (i.e. manholes) to the Copermittee's MS4</p>	67

Attachment 3: Language Changes Supported by Board Staff and Copermittees

<u>Section</u>	<u>Alternate Permit Language</u>	<u>Page in T.O.</u>
Education		
F.6.	Quasi-Governmental Agencies / Districts (i.e., educational institutions, water districts, sanitation districts, etc.)	
Watershed Workplan		
G.1.d.	Develop a watershed BMP implementation strategy to attain receiving water quality objectives in the identified highest priority water quality problem(s) and locations. The BMP implementation strategy must include a schedule for implementation of the BMP projects to abate specific receiving water quality problems and a list of criteria to be used to evaluate BMP effectiveness. Identified watershed water quality problems may be the result of jurisdictional discharges that will need to be addressed with BMPs applied in a specific jurisdiction in order to generate a benefit to the watershed. This implementation strategy must include a map of <u>any</u> implemented and/or proposed <u>structural</u> BMPs.	72
Principal Copermittee Responsibilities		
M.3.	Produce and submit Coordinate the submittal of the documents and reports as required by section K of this Order and Receiving Waters and MS4 Discharge Monitoring and Reporting Program No. R9-2010-0016 in Attachment E of this Order.	84

Attachment 4: Monitoring and Reporting Program Requirements

Introduction

Tentative Order R9-2010-0016 (draft MS4 Permit) includes proposed requirements within Attachment E Monitoring and Reporting Program (draft MRP) that are not necessary to address management questions related to water quality, beyond requirements dictated to Orange County and beyond the Copermittees' ability to fund. Due to the expansion of monitoring requirements proposed by Regional Board staff, costs for monitoring program compliance are two and half times more expensive for Santa Margarita Region residents than to South Orange County residents. The Copermittees recognize monitoring and data collection are necessary to assist with program effectiveness assessment and address stormwater management questions within the Santa Margarita Region. However, the proposed revisions provided within this paper allow these assessments and questions to be answered in a more cost effective manner while retaining all major components of the draft MRP. The proposed revisions prune requirements that are not necessary to answer key management questions for this MS4 program, eliminate elements that may be of general interest and therefore should be handled at a more regional, state or federal level and/or correct provisions that are contrary to, or not aligned with, methods of practice established by the Southern California Stormwater Monitoring Coalition or other MS4 Permits approved by your Board. The changes proposed herein result in annual savings of approximately \$780,000 while maintaining the integrity of the MRP. Even with these proposed revisions, this MRP is significantly more expensive than the Copermittees' current program.

Table 1 - Cost Savings resulting from proposed MRP changes

Section	Component	Requested Change	Cost reduction
A	Mass Loading Stations	1) Wet Weather - 3 wet -> 2 wet	~\$79,000
		2) Dry Weather - Composite -> Grab	~\$66,000
B	Toxicity Testing (MLS and Bioassessment)	3) 3 organisms -> 2 organisms	~\$14,000
C	Bioassessment	4) 6 stations -> 3 stations	~\$158,000
		5) 2X each -> 1X each	~\$95,000
D	Action Levels	6) 'Representative Number/Percent' -> Representative - and remove 'within each sub area'	~\$241,000
		7) SAL Composites -> Grab	~\$165,000
E	Inland Aquatic Habitat Monitoring	8) Eliminate requirement	~\$140,000
F	Special Studies	9) 6 special studies -> 4 studies, and Replace with more locally appropriate studies	~\$220,000/year
	<u>TOTAL ESTIMATED SAVINGS</u>	Net savings of all recommended changes (annualized)	<u>~\$780,000/year</u>

Note: Red text refers to the requirements that are beyond the MRP requirements in the OC permit.

Attachment 4: Monitoring and Reporting Program Requirements

Draft Monitoring and Reporting Program Requirements

Background

Prior to the release of the first draft of the MRP requirements to the Copermittees, Water Board staff indicated the program would be similar to the South Orange County MS4 Permit (OC Permit) yet scaled appropriately to the Santa Margarita Region. The first draft of the MRP was not released until three weeks prior to the public release draft MRP. To our surprise, instead of being appropriately scaled, the draft MRP actually exceeded the scope and costs of the OC Permit MRP. Due to limited time, Water Board staff recommended the discussions regarding MRP requirements be brought before the Regional Board at the appointed October 13, 2010 Board Hearing. This was particularly frustrating as it was not consistent with our mutual goal to resolve technical issues at the staff level and bring only necessary policy issues to the Regional Board.

One of the most significant issues with the MRP is that the Copermittees proposed several new special studies in the ROWD. The Copermittees moved forward on these studies in good faith, including a \$3,000,000 LID Demonstration and Testing Facility at the District headquarters in Riverside. The final MRP does not recognize any of these efforts, and instead mandates six new special studies and a habitat monitoring program. Initially, Board staff indicated that these six studies were for discussion and that it was not their intent to include all of the studies, however, later Board staff changed their position and mandated all of the studies. Further, the habitat monitoring program was actually removed from the Orange County MS4 Permit due to the addition of the NAL/SAL monitoring which was expected to effectively address the underlying habitat monitoring questions. These unnecessary additions put the Copermittees in the precarious position of having to abandon special studies that were already deemed by local stakeholders to be of critical value to managing stormwater within our region.

Cost Saving Requirement Revisions – Overview

The proposed draft MRP includes additional stations, constituents, data analysis and multiple special studies that exceed other programs such as South Orange County's or established standards of practice. These elements will not add substantively to the understanding of MS4 water quality impacts within the Santa Margarita Region and vastly exceed the ability of the Copermittees ability to pay and staff. Table 1 summarizes the Copermittees' requested revisions to the draft MRP and the costs savings from each revision.

These changes are also critical as the draft MRP proposes a program that exceeds available monitoring staffing and equipment resources. The District is currently in the process of recruiting for budgeted positions that were based on the monitoring program contained in our ROWD. However, review of the MRP has determined that our estimations were woefully inadequate. The MRP special studies and other requirements require scientists and other staff with specialized training and backgrounds that are not readily available. The District will likely have to find staff with generalized knowledge in related fields and spend significant resources training them to be knowledgeable in the science of stormwater management. Even if we were to consult out most of the work, we would still need specialized staff to scope, manage and review the consultants' work. It is not feasible to find, recruit and train the necessary staff and also deploy the proposed MRP in the time allotted. The Copermittees' proposed revisions scale

Attachment 4: Monitoring and Reporting Program Requirements

requirements to a more financially attainable and manageable level. Detailed justifications for each revision are described below.

Cost Saving Requirement Revisions – Section A

Mass Loading Station Monitoring - Attachment E: II.A.1.b & II.A.1.c

Revision: Request wet weather monitoring to be required twice a year instead of three times a year.

Justification: (1) The Water Board Staff has referenced the SMC guidance and indicated not enough data has been collected to warrant a requirement change from three wet weather samples to two. However this guidance states once three wet weather samples have been collected for three years, sampling for two wet weather events is acceptable. This data has been collected by the Copermittees. The Copermittees successfully collected three wet weather events for three reporting periods; in addition, the Copermittees have over 10 years of data to form the basis of future analyses. Although the methods of collection have changed, our statistical analysis indicates that there is no statistically significant difference between data sets collected during prior terms and the current term. (2) The current OC and SD Permits require only two wet weather samples. (3) The Santa Margarita Region is semi arid with ephemeral flows, sampling for a third storm event has proven, and will continue to prove difficult and may result in non compliance due to climate (lack of storm events). (4) The cost to Copermittees to fund a third wet weather monitoring event during this permit term is significant.

Mass Loading Station Monitoring - Attachment E: II.A.1.d

Revision: Request dry weather sampling method to be changed from composite sampling to grab samples.

Justification: (1) The Copermittees currently conduct dry weather sampling using an instantaneous grab sample. The MRP proposes 24-hour composite sampling, which represents a significant cost increase due to the need to construct infrastructure at the sampling sites to secure and facilitate portable automatic sampling equipment. (2) Composite samples will mask illicit discharges which is one of the primary reasons for dry weather monitoring. (3) Due to dry weather flows' steady nature, the flows can be accurately characterized using a grab sample. (4) The SMC Regional Bioassessment Program, which effectively defines the standard of practice for receiving waters monitoring, has found that chemistry samples must be collected at the most downstream transect (Transect A) to be representative of the flow through the assessed reach. This program therefore uses Grab samples collected immediately prior to benthomacroinvertebrate (BMI) and periphyton sampling. If composite sampling was required, it similarly must be done at the downstream transect; however, the composites would not be representative as they would pick up sediment, nutrients and other pollutants that had been unnaturally introduced by the BMI and periphyton collection activities. This would create an unrepresentative sample and the sampling equipment would be at risk of failure due to the suspension of sediment.

Cost Saving Requirement Revisions – Section B

Toxicity Testing - Attachment E: II.A.1.h

Revision: Request change in toxicity testing from three organisms to two organisms.

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Justification: (1) The MRP specified in the OC Permit requires toxicity testing of two organisms and this permit should not go beyond requirements found within the OC Permit due to limited funding and resources. This is an example of a simple change where cost-savings can be realized. (2) The USEPA only has chronic toxicity protocols for *Pseudokirchneriella subcapitata* (formerly, *Selenastrum capricornutum*). Therefore there are no established protocols for the other two species, and data collection results will be difficult to compare to other regions.

Cost Saving Requirement Revisions – Section C **Stream Assessment Monitoring - Attachment E: II.A.2.a**

Revision: Request that three stream assessment stations be monitored instead of six stations.

Justification: (1) The existing MS4 Permit requires three stream assessment stations annually. These stations are our mass loading stations. It should be noted that this is an ephemeral watershed. The current stations were selected because they were the only stations that had flowing water during the bioassessment sampling periods, not because they were necessary representative of urban runoff (although they are downstream of the entire MS4 system). Specifically, during dry weather, none of the current receiving waters stations receive runoff from the MS4 due to the ephemeral nature of the watershed. Similarly, efforts to find flowing water for the Regional Bioassessment Program have been challenging. For example, in 2009, the first year of the program, 35 random sites were evaluated before one perennial site could be identified. In 2010, 39 random sites were evaluated. The final sites that were selected were actually our CURRENT mass loading stations as they were the first randomly selected sites that had flow. This lack of flow was recognized by SCCWRP in establishing the distribution of Regional Bioassessment Stations in southern California. This is why southwest Riverside County is only assigned one Bioassessment station. (2) As is demonstrated above, the Copermittees are not likely to find three additional flowing stations that are indicative of impacts from MS4 discharges. The Permit requirement therefore puts the Copermittees in unavoidable non-compliance with the Permit. (3) The cost of monitoring the additional three stations is substantial, and given the relative size of the MS4 system and population of RC to OC, the additional stations are not appropriate on an environmental, economic or social justice scale.

Stream Assessment Monitoring - Attachment E: II.A.2.b

Revision: Request frequency be changed from twice per year to once per year for stream assessment monitoring.

Justification: (1) The Water Board Staff and Executive Officer agreed to make this change as a trade for the Copermittees participation in the SMC Regional Bioassessment special study. The change was based on findings by the Southern California Coastal Watershed Research Project (SCCWRP) scientists indicating that there is no seasonally significant difference in bioassessment scores. The Copermittees volunteered to implement the Regional Bioassessment Program ahead of the necessary changes to the NPDES MS4 Permit program to reduce the bioassessment sampling events in a good faith effort. (2) To determine if two sampling events are in fact necessary, the Copermittees evaluated the difference in biological community scores between Spring and Fall for data collected at Lower Murrieta, Lower Temecula and

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Adobe Creeks during May and October from 2007 through 2009. Utilizing a Two-Way Analysis of Variance of Southern California Index of Biological Integrity (IBI) scores, with season (Spring/Fall) and year (2007 through 2009) as variables, results indicated no statistical difference between years for any of the Permittee's three sites. No seasonal statistical difference in IBI scores ($p \geq 0.19$) was noted within any of the three stations, indicating that the IBI scores were consistent across seasons, regardless of the year. This data confirmed SCCWRP findings that there is not a change in the biological communities between the Spring and Fall seasons. (3) Further, the MRP within the OC Permit states that stations with year-round flow conditions may be monitored in May/June or September/October. Current assessment stations at Murrieta Creek, Temecula Creek, and Adobe Creek are perennial stations. Consistency across programs would denote assessments of these creeks once per year.

Cost Saving Requirement Revisions – Section D

MS4 Outfall Monitoring - Action Levels - Attachment E: II.B.1 and II.C.1.b.(1)

Revision: Request "a representative percentage of the major outfalls within each hydrologic subarea" (**II.B.1**) and "a representative number of major outfalls within each hydrologic subarea" (**II.C.1.b.(1)**) be changed to "representative major outfalls" as shown in the redlines attached to this comment letter.

Justification: (1) The draft MRP requires sampling of a representative number or representative percentage of major outfalls. This is a problematic compliance target as it focuses the program on a particular and open-ended "number" or "percent" of outfalls. By revising the language to require monitoring of "representative major outfalls", the burden is on the Copermittees to come up with a program that is truly representative, without requirements to meet an arbitrary number or percent of outfalls. The Copermittees are concerned about subareas that have many outfalls, which could require sampling of more sites than are economically feasible. These costs could escalate beyond the initial sampling event because if a NAL or SAL exceedance is recorded, source assessments studies are triggered that require additional staff time and resources. If this requirement is not revised, costs will quickly rise beyond the Copermittees' ability to sustain the MS4 compliance program.

MS4 Outfall Monitoring - Action Levels - Attachment E: II.B.1 and II.C.1.b.(1)

Revision: Request the following text revisions in footnote:

"A representative ~~percentage~~ determination must consider hydrologic conditions, total drainage area of the site, ~~population density of the site, traffic density, age of the structures or buildings in the area, and land use types (commercial, residential and industrial)~~, costs and other considerations as appropriate."

Justification: (1) The Copermittees originally asked for clarification on what factors would be considered for "representative percentage" and Water Board staff agreed to cost being included. The failure to include cost as a factor results in a program that reduces resources and diminishes funds quickly. The revision of the above allows for cost to be included through "other considerations as appropriate". (2) Deletion of percentage is consistent with previous comments. (3) Hydrologic conditions, population density of the site, traffic density and age of the structures or building in the area are all proposed

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deletions because each subarea may not be sensitive to these factors and if one of this factors is applicable it will be included under the addition "other considerations as appropriate".

MS4 Outfall Monitoring - Action Levels - Attachment E: II.B.1.a

Revision: Request samples for Storm Water Action Levels (SALs) to be changed from 24-hour composite to grab.

Justification: (1) Composite sampling would result in significant increased cost due to the cost of purchasing additional automatic sampling equipment and constructing the necessary infrastructure to support its use. (2) Grab samples are likely more conservative. The Copermittees propose that grab samples be collected first and then, if a problem is indicated, the Copermittees would specify needed follow-up monitoring in the Source Assessment Monitoring Plan. (3) Freed resources can be dedicated to other key components of the program, such as follow-up source assessment studies.

Cost Saving Requirement Revisions – Section E

High Priority Inland Aquatic Habitat Monitoring - Attachment E: II.D

Revision: Request removal of the High Priority Inland Aquatic Habitat Monitoring requirements.

Justification: (1) This is an entirely new monitoring program. This monitoring program was initially proposed in the Orange County NPDES MS4 Permit, but later deleted when the NAL/SAL monitoring requirement was added. This trade was made as it was expected that the outfall monitoring data from the NAL and SAL program would effectively answer the underlying management question – "are MS4s impairing beneficial uses in priority aquatic habitat areas?" The underlying logic for removing the requirement in Orange County similarly applies here. Given the current economic conditions and the fact that this was considered and deleted from the OC Permit; the Copermittees respectfully request that this requirement similarly be deleted from the Riverside County MRP.

Cost Saving Requirement Revisions – Section F

Special Studies - Attachment E: II.E

Revision: Request alteration of Special Study Program.

Justification: The Draft Permit requires six special studies to be conducted (TMDL Development and Implementation, Sediment Toxicity, Trash and Litter Investigation, Agricultural, Federal and Tribal Input Study, MS4 and Receiving Water Maintenance Study and Intermittent and Ephemeral Stream Perennial Conversion Study). *This is in excess of the four special studies required by the OC MRP.* Given the larger MS4 Permit Area, population and resources available to South Orange County, the additional studies proposed on Riverside County are inappropriate from a social, economic and environmental justice standpoint. (1) Water Board staff acknowledged multiple studies were added to the draft MRP with the intention of that would be eliminated. (2) The issues addressed by these studies are not all specific to the Santa Margarita Region and would be more appropriate to be evaluated as part of a broader regional study, such as the Sediment Toxicity study. (3) The Agricultural, Federal, and Tribal Input Study is specifically inappropriate as it requires the Copermittees to monitor the discharges of other entities subject to separate NPDES regulations. (4) The Intermittent and Ephemeral Stream Perennial Riverside County MS4 Copermittees

Attachment 4: Monitoring and Reporting Program Requirements

Conversion Study is specifically inappropriate as it incorrectly presumes that such ephemeral streams are actually being converted to perennial systems within the permit area due to MS4 discharges. Some additional specific points include:

- Sediment Toxicity – In the waterbodies found in the Santa Margarita watershed (which are intermittent at best and dry most of the time) the idea of investigating sediment toxicity and its impacts on benthic macroinvertebrates seems a reach. Current sediment toxicity monitoring in the State is focused on year round streams and estuaries (e.g. the Delta). Furthermore the current state of sediment toxicity monitoring is at best in its infancy as is the State's policy regarding Sediment Quality Objectives. It would seem that a more reasonable approach associate with sediment toxicity is to allow the science to catch up with the policy and for the Copermittees to learn from these other statewide efforts.
- Agricultural, Federal, and Tribal Input Study - Ongoing monitoring efforts in the Central Valley and the Los Angeles Regions for the Agriculture Waiver Program are more robust and statistically valid to make any efforts by Riverside County to be pale in comparison and likely insignificant. Likewise, monitoring in watersheds (e.g. Lake Tahoe, and the northwest part of the State) where water bodies are impaired by sediment and where Federal and Tribal land uses have inputs to the impaired water bodies is significant and should take precedent over any efforts in Riverside County. As previously noted, it is inappropriate to require the Copermittees to not only monitor their own discharges, but also expend resources monitoring the discharges of others. The Regional Board has authorities to require these sources to collect their own data and should exercise that authority appropriately if such studies are required.
- MS4 and Receiving Water Maintenance Study - It is likely that every flood control district in the State and Caltrans would be impacted by the MS4 and Receiving Water Maintenance Study; therefore it would be imperative to have a well thought out, comprehensive, and regional study to answer the questions being posed in the MRP. Requiring the Copermittees to take on this responsibility is misleading and will not be sufficient to answer the broad questions being posed in the MRP. A more reasonable approach would be to model a regional program similar to the current SCCWRP efforts to assess hydromodification requirements for southern California.
- Intermittent and Ephemeral Stream Perennial Conversion Study – Finally, review of historical water resource data by the Copermittees (as indicated in the ROWD), USGS and state and federal courts have all found that the construction of Vale and Skinner dams has significantly increased the ephemeral nature of local watersheds, resulting in much drier conditions than naturally occurred. This is why Rancho California Water District is required to discharge raw water down the Santa Margarita River at the County Line. Requiring a study to study the impacts of ephemeral conversion demonstrates a clear lack of understanding of historical and current receiving water conditions. Further, similar to our comment above regarding the MS4 and Receiving Water Maintenance Study, this study is better addressed at a regional or statewide level. It is not possible to develop a sufficient local database to statistically validate any impacts from non-stormwater discharges within any reasonable timeframe. Furthermore any minimal

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monitoring effort that could be provide by the Copermittees would not comprehensively address the questions being proposed in the MRP and would be a waste of resources. Again a regional approach, whether it be SCCWRP or other combination of stormwater Copermittees, would be a more logical and constructive approach to address this issue. The Copermittees have proposed maintaining two of the special studies (TMDL Development and Trash Assessment), while replacing the other four with locally preferred special studies already in place (Regional Bioassessment Program and LID BMP design, maintenance, and effectiveness study). The Copermittees believe the alternate proposal provides information that is directly relevant and beneficial to the Santa Margarita Region. This would result in an annual cost savings of \$314,000 per year. This would maintain parity with the OC Permit, which only has four special studies, three of which are identical to the studies proposed below (TMDL Development, Regional Bioassessment, Trash and Litter investigation). Specific language to incorporate the new studies is included in the redline markup of the MRP.

The Copermittees propose the following studies, the write-up for which can be found in Attachment 9 to the comment letter:

1. TMDL Development and Implementation
2. **LID BMP design, maintenance and effectiveness study and demonstration**

This study will be valuable in ensuring BMPs that are required are effective and the benefit and integration of LID BMPs into a site is understood. This proposed study would directly affect the Copermittees ability to ensure effective LID BMPs are being implemented.

3. **Regional Bioassessment study**

All the Southern California counties have committed to participate in this study, with the understanding that it would be written into the MS4 permits as a special study for which they would get credit. The Copermittees have been proactively implementing this study without a MS4 Permit requirement, and want to be able to continue to support these regional studies.

4. Trash and Litter Investigation

Other Changes

Table 1: Analytical Testing for Mass Load (A.1) and Bioassessment (A.2)

Revision: Request "Carbamates" be removed as a constituent for analytical testing in Table 1.

Justification: The testing of carbamates should be dictated by the completion of toxicity identification evaluations (TIEs). The use of carbaryl in urban areas throughout California dropped approximately 80% between 2004 and 2008¹. This drop is also matched by an 80% reduction in the number of USEPA-registered carbaryl products between 2004 and 2008. A downward trend since 2006 likely reflects a long-

¹ TDC Environmental, LLC (2010). *Annual Urban Pesticide Use Data Report 2010*. Prepared for the Urban Pesticide Pollution Prevention Project (UP3 Project) and the San Francisco Estuary Partnership (SFEP) through grant agreement from the State Water Resources Control Board (Agreement 09-305-550-1). June.

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term reduction in the availability of carbaryl products due to USEPA regulatory requirements.² Further, once the USEPA completes its regulatory process for the full implementation of new carbaryl restrictions³, urban carbaryl use is likely to continue to decline.

Revision: Request "Hexavalent Chromium" be removed as a constituent for analytical testing in Table 1.

Justification: Since 2004, monitoring in the Santa Margarita Region has reflected that out of 62 total samples, there were 60 non-detected levels of Hexavalent chromium. The 2 detected levels of Hexavalent chromium occurred in April 2007 in wet weather samples. It may be noted that 2007 was the driest year on record for the region and analyzed samples reflect an extended period between wet weather events.

Revision: Request "Biological Oxygen Demand, 5day" and "Chemical Oxygen Demand" be removed as constituents for analytical testing in Table 1.

Justification: The reference in the Fact Sheet supporting the inclusion of these constituents is to the initial Phase 1 application requirements. It should be noted that the initial constituent list is not required of future permits. Further, these constituents are costly to analyze and do not provide new information that is relevant to the management of the NPDES MS4 Program.

Revision: Request "Total Organic Carbon" and "Dissolved Organic Carbon" be removed as constituents for analytical testing in Table 1.

Justification: The reference within the Fact Sheet does not require these constituents and there is a significant cost in analyzing the constituents. It is not clear what additional information these constituents provide that would be useful in managing the MS4 program that is not already addressed through the collection of other constituents.

Table 4: Analytical Testing for Wet Weather MS4 Discharges

Revision: Request "Biological Oxygen Demand, 5day" and "Chemical Oxygen Demand" be removed as constituents for analytical testing in Table 4.

Justification: The reference in the Fact Sheet supporting the inclusion of these constituents is to the initial Phase 1 application requirements. It should be noted that the initial constituent list is not required of future permits. Further, these constituents are costly to analyze and do not provide new information that is relevant to the management of the NPDES MS4 Program.

Revision: Request "Total Organic Carbon" and "Dissolved Organic Carbon" be removed as constituents for analytical testing in Table 4.

Justification: The reference within the Fact Sheet does not require these constituents and there is a significant cost in analyzing the constituents. It is not clear what additional information these constituents

² USEPA (2008). Amended Reregistration Eligibility Decision (RED) for Carbaryl. EPA-738-R-08-010. August.

³ USEPA (2007). Reregistration Eligibility Decision (RED) for Carbaryl. EPA-738-R-07-018. September.

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provide that would be useful in managing the MS4 program that is not already addressed through the collection of other constituents.

Attachment E: II.B.2

Revision: Request the following text revisions:

"The Copermittees must collaborate to develop and implement a ~~monitoring~~ program to identify sources of pollutants causing the priority water quality problems within each hydrologic subarea. The ~~monitoring~~ program must include focused monitoring ~~which moves upstream into each watershed as necessary to identify source areas, or other methods to identify the societal sources of pollutants, as appropriate.~~ This ~~monitoring~~ program must be ~~implemented within each hydrologic subarea and must begin no later than the 2012-2013 monitoring year.~~"

Justification: As drafted, the permit requires source identifications to start at the end point of the watershed and move upstream. The requested revisions are intended to provide flexibility to allocate resources appropriately based on field judgements. The second part of the revision is to acknowledge some pollutant contributions to the MS4 are in-fact, non-point source, and cannot be pinpointed through focused source ID Monitoring.

Attachment E: II.C.1.b.(2)

Revision: Request text additions:

"Sampling of non-storm water discharges may be done utilizing grab samples. If a ponded MS4 discharge is observed at a monitoring station, the Copermittee(s) must record the observation and collect at least one (1) grab sample, however ponded water samples will not be used in determining action level exceedances. If flow is evident, a 1-hour composite sample may be taken. The Copermittee(s) must estimate the flow using techniques such as by measuring the width of water surface, approximate depth of water, and approximate flow velocity."

Justification: The first text addition is to avoid triggering action levels due to increased concentrations caused by evaporation of ponded water. Evaporation of ponded water will result in increased concentrations of any constituents contained in the water. NALs are based on Water Quality Objectives that are based on stable, flowing stream conditions. The second text addition is to allow flexibility in measuring stream flows. In some cases, flow gauges or flow meters may be available to estimate flow.

Attachment E: III.A.2.

Revision: Request text additions:

Attachment 4: Monitoring and Reporting Program Requirements

Monitoring Annual Report: The Principal Copermittee must submit the Receiving Waters and MS4 Discharge Monitoring Annual Report to the San Diego Water Board on October 1 of each year, beginning on **October 1, 2013**. Receiving Waters and MS4 Discharge Monitoring Annual Reports must cover the monitoring activities and results from the previous fiscal year, and must meet the following requirements:

Justification: All of the Copermittees' activities are tracked and reported on a Fiscal Year basis. This facilitates clearer data and cost tracking, and results that can be more effectively integrated into the JRMP reports in a clear and understandable manner, since the reporting periods are aligned. This change is important, so as to allow for a simpler transition from the existing monitoring and data tracking methods, to those that will be developed for compliance with the permit.

Attachment E: III.A.2.e

Revision: Request the following text revisions:

~~"Annual. The 4th year monitoring report must include identification and analysis of any long-term trends in the Copermittees' MS4 storm water discharges or receiving water quality. Appropriate statistical methods shall be used to evaluate the water quality data. Trend analysis must use nonparametric approaches, such as the Mann-Kendall test, including exogenous variables in a multiple regression model, and/or using a seasonal nonparametric trend model, where applicable"~~

Justification: The first edit is to require the long term statistical analyses be performed on a time schedule consistent with submission of the ROWD. Requiring long-term statistical trend analyses on an annual basis is unnecessary and inappropriately increases analysis and reporting costs and complexity. The second edit recognizes a multitude of different statistical methods could be used and others may be more appropriate to the dataset than those identified in the draft MRP.

Attachment E: III.A.2.f

Revision: Request elimination of requirement for annual monitoring reports to include total pollutant loads (wet weather loads plus dry weather loads) due to MS4 Discharge for each of the hydrologic subareas.

Justification: Many assumptions go into the calculations of total loads, making their use in statistical analyses questionable at best. The Copermittees have continued to provide this data, but do not see that it has any value.

Note: Other redlines noted but not included in this paper are for clarification purposes and to make sure permit language is consistent with requested changes throughout Attachment E.

Attachment 5: Proposed Unpaved Road Requirements of the Draft 2010 Santa Margarita Region MS4 Permit

Executive Summary

The Draft Municipal Separate Storm Sewer System Permit (Draft Tentative Order No. R9-2010-0016; NPDES No. CAS0108740) for the Santa Margarita Region of Riverside County (Draft MS4 Permit) includes proposed findings and requirements for development and maintenance of unpaved roads that are redundant to existing regulatory requirements. The proposed requirements for maintenance of unpaved roads may lead to the unintended consequence of discouraging maintenance of the majority of the unpaved roads in the Santa Margarita Region, which may increase the potential for erosion and sediment discharge from such roads. Statements in the Fact Sheet and Findings, monitoring data, and Permittee observations and experience do not support identification of unpaved roads as a significant source of pollutants to receiving waters in the Santa Margarita Region, thereby warranting additional regulation of unpaved roads.

The Copermittees request that the proposed requirements for development and maintenance of unpaved roads be removed from the Draft MS4 Permit. The Copermittees believe that enhancement of existing programs by identifying Best Management Practices (BMPs) specific to maintenance of unpaved roads and providing public education to owners and contractors providing maintenance of privately maintained unpaved roads will be as effective as the program in the draft Permit at substantially less cost. If the San Diego Regional Board determines that unpaved roads within their jurisdiction require further regulation, the Permittees believe that the appropriate regulatory mechanism is a General Permit (Waste Discharge Requirements or NPDES Permit) since the Draft MS4 Permit addresses only a fraction of unpaved roads within the jurisdiction of the San Diego Regional Board.

Attachment 5: Proposed Unpaved Road Requirements of the Draft 2010 Santa Margarita Region MS4 Permit

1.0 Background

The stream system in the Santa Margarita Region is ephemeral, with only small isolated segments exhibiting natural perennial flow due to rising groundwater. Such a stream system does not support fish migration. Runoff from the Santa Margarita Region naturally exhibits high sediment loads due to precipitation patterns, limited vegetative cover, soil types and steep topography.

Most existing unpaved roads in the Santa Margarita Region are private roads on private property that have not been engineered and have evolved through use. Such unpaved roads consist of earthen materials that have been compacted by vehicular use and do not include improved drainage, engineered grading or surface improvement. However, proposed unpaved road projects are subject to the development requirements of the MS4 Permit and the Construction General Permit and would be engineered.

In contrast to paved roads, unpaved roads are predominantly lightly traveled and found in rural areas serving economically disadvantaged residents. Many of these roads remain unpaved for economic reasons. Moreover, some residents do not want paved roads as they desire to preserve the rural/rustic nature of their communities.

Maintenance of unpaved roads in the Santa Margarita Region is generally limited to smoothing washboard depressions that have been created by vehicle use and to improve drainage by properly sloping the surface. The smoothed road surface is compacted by the grading equipment and, subsequently, by regular traffic use. This routine maintenance activity is intended to maintain original lines and grade, and the original purpose of the unpaved road. Repair of landslides and washouts, and replacement of culverts is also performed as needed, in some instances on an emergency basis. Landslide and washout repairs may require the implementation and maintenance of temporary erosion and sediment control BMPs until the disturbed area is stabilized.

The Permittees voluntarily provide limited maintenance of Copermittee maintained, dedicated and accepted unpaved roads for public access. This voluntary maintenance is provided for public safety, including emergency vehicle access, and to maintain utility of the public easement. There is no requirement that the Permittees provide this maintenance.

Most unpaved roads in the Santa Margarita Region are not maintained by the Permittees, but instead are private roads located on private property. Permittee staff is only allowed to enter private property if a crime or illegal activity is observed. The County of Riverside has not accepted maintenance of unpaved roads since the late 1940s and now only accepts paved roads that have been designed and constructed to County standards. Murrieta and Temecula will only approve new subdivisions with paved roadways constructed to their standards. In some instances, the Permittees maintain unpaved roads under contract to Home Owners' Associations or through Community Service Areas. However, the Permittees are prohibited by law from using Gas Tax funds for maintenance of unpaved roads on private property.

Other entities that are not under the legal authority of the Permittees also own unpaved roads in the Santa Margarita Region. These entities include:

Attachment 5: Proposed Unpaved Road Requirements of the Draft 2010 Santa Margarita Region MS4 Permit

- Agricultural Operators
- Eastern Municipal Water District
- Federal Lands
- Metropolitan Water District of Southern California
- Nature Conservancy
- Railroads
- Rancho California Water District
- Southern California Edison
- State of California
- Tribal Lands

2.0 Findings Addressing Proposed Requirements for Unpaved Roads

Finding D.1.c of the Draft MS4 Permit states:

This Order contains new or modified requirements that are necessary to improve Copermittees' efforts to reduce the discharge of pollutants in storm water runoff to the MEP and achieve water quality standards. Some of the new or modified requirements, such as the revised Watershed Water Quality Workplan (Watershed Workplan) section, are designed to specifically address these high priority water quality problems. Other requirements, such as for unpaved roads, are a result of San Diego Water Board's identification of water quality problems through investigations and complaints during the previous permit period. Other new or modified requirements address program deficiencies that have been noted during audits, report reviews, and other San Diego Water Board compliance assessment activities. Additional changes in the monitoring program provide consistency with the Code of Federal Regulations, USEPA guidance, State Water Board guidance, and the Southern California Monitoring Coalition recommendations.

The discussion of Finding D.1.c states:

The Copermittees are required to update and expand their runoff management programs on jurisdictional and watershed levels in order to improve their efforts to reduce the contribution of storm water pollutants in runoff to the MEP and meet water quality standards. Changes to Order No. R9-2004-001's requirements have been made to help ensure these two standards are achieved by the Copermittees.

The Orders' jurisdictional requirements have changed based on findings by the San Diego Water Board during typical compliance assurance activities, audits, or receipt of complaints. Where the audits found common implementation problems, requirements have been altered to better ensure compliance. In addition, the San Diego Water Board conducted reviews of the jurisdictional annual reports submitted by the Copermittees. Updates to the requirements for the Copermittees' programs are also based in part on

Attachment 5: Proposed Unpaved Road Requirements of the Draft 2010 Santa Margarita Region MS4 Permit

information found in the Copermittees' ROWD requirements that were included in the San Diego and Orange County MS4 permits, and discussions with the Riverside County Copermittees.

To better focus on attainment of water quality standards, the Order's jurisdictional and watershed requirements have been improved. The conditions of the receiving waters now drive management actions, which in turn focus diminishing resources on the highest priority water quality problems within the receiving waters in the watershed. Improvements to jurisdictional and watershed requirements were also made to facilitate a mutually clear understanding of the requirements between the San Diego Water Board and Copermittees.

During the previous permit period, the San Diego Water Board identified, through investigations and complaints, sediment discharges from unpaved roads as a significant source of water quality problems in the Riverside County portion of the San Diego Region. Enforcement and inspection activities conducted by the San Diego Water Board during the previous permit term have found a lack of source control for many unpaved roads within the jurisdiction of the Copermittees. Unpaved roads are a source of sediment that can be discharged in runoff to receiving waters, especially during storm events. Erosion of unpaved roadways occurs when soil particles are loosened and carried away from the roadway base, ditch, or road bank by water, wind, traffic, or other transport means. Exposed soils, high runoff velocities and volumes, sandy or silty soil types, and poor compaction increase the potential for erosion. Road construction, culvert installation, and other maintenance activities can disturb the soil and drainage patterns to streams in undeveloped areas, causing excess runoff and thereby erosion and the release of sediment. Poorly designed roads can act as preferential drainage pathways that carry runoff and sediment into natural streams, impacting water quality. In addition, other public works activities along unpaved roads have the potential to significantly affect sediment discharge and transport within streams and other waterways, which can degrade the beneficial uses of those waterways.

USEPA also recognizes that discharges from unpaved roads are a threat to water quality. USEPA guidance emphasizes the threat of unpaved roads to water quality:

"Dirt and gravel roads are a major potential source of these pollutants [sediment] and pollutants that bind to sediment such as oils, nutrients, pesticides, herbicides, and other toxic substances]. Many roads have unstable surfaces and bases. Roads act like dams, concentrating flows that accelerate erosion of road materials and roadsides. Both unstable surfaces and accelerated erosion then lead to sediment and dust."

There are several guidance documents, developed by the USEPA, the US Forest Service, the University of California, and others, that include design and construction specifications and BMPs that are readily available for implementation by private and

Attachment 5: Proposed Unpaved Road Requirements of the Draft 2010 Santa Margarita Region MS4 Permit

public entities. Implementing design and other source control BMPs for unpaved roads in the region is necessary to reduce and minimize the impacts of sediment discharged during storm events from unpaved roads to the MS4s and receiving waters.

Comment: The evidence cited in the Finding, water quality monitoring data, and Permittee observations and experience since establishment of the MS4 Permit in 1990 do not identify unpaved roads as a significant source of pollutants resulting in water quality impairments. The Copermittees support the continued application of development and construction requirements and maintenance of temporary erosion and sediment control BMPs as specified in existing permits.

The requirements for development and maintenance of unpaved roads were proposed by Regional Board staff for inclusion in the Draft MS4 Permit just prior to its release for public comment. Prior to that time, and dating from the original establishment of the MS4 Permit requirements in 1990, unpaved roads had not once been mentioned by Regional Board staff as a significant source of water quality impairment requiring additional regulatory.

The discussion of Finding D.1.c. states that the inclusion of unpaved road requirements was based on "investigations and complaints" reviewed by the San Diego Regional Board. However, Regional Board staff identified only one recent case regarding an unpaved road in the Santa Margarita Region as a problem. The Copermittee in question has investigated this case and it is being addressed as an enforcement action. Although the Copermittees have not had the opportunity to review the investigations and complaints cited by Regional Board staff, no feedback from these investigations was reported to the Copermittees at the MS4 Permit discussions prior to the proposal of the unpaved road requirements. This indicates to the Copermittees that unpaved roads do not in fact present a significant water quality concern.

The Copermittees have reviewed the documents cited by Regional Board staff in the discussion of Finding D.1.c. and the conditions in the Santa Margarita Region are vastly different from those in Pennsylvania and Northern California cited in those documents. These areas receive regular precipitation, have significant vegetative cover, and perennial streams, some of which may support migrating fish. Nothing in these documents suggests that unpaved roads are a significant source requiring special attention in the Santa Margarita Region. Further, no data collected during Copermittee monitoring nor their observations support a conclusion that unpaved roads are a significant source of pollutants warranting special regulatory attention.

The lack of evidentiary support for the unpaved roads provisions makes their inclusion in the Draft MS4 Permit arbitrary and capricious. The Copermittees therefore request deletion of Finding D.1.C.

3.0 Fact Sheet Addressing Proposed Requirements for Unpaved Roads

Page 146 of the Fact Sheet states:

Section F.1.i (Unpaved Roads Development) specifically requires the Copermittees to implement or require implementation of BMPs for erosion and sediment control after construction of all new unpaved roads. As discussed for Finding D.1c, design and source control BMPs for unpaved roads are needed to minimize the discharge of sediment to the MS4s and receiving waters,

Attachment 5: Proposed Unpaved Road Requirements of the Draft 2010 Santa Margarita Region MS4 Permit

especially during storm events. There are several guidance documents available (see Discussion for Finding D.1.c) that include design and source control BMPs that can be readily implemented by the Copermittees for the development of new unpaved roads.

Page 155 of the Fact Sheet states:

Section F.3.a.(10) (Unpaved Roads Maintenance) requires the Copermittees to implement or require implementation of BMPs for erosion and sediment control during and after maintenance activities on unpaved roads, particularly in or adjacent to stream channels or wetlands. As discussed for Finding D.1.c, source control BMPs for unpaved roads are needed to minimize the discharge of sediment to the MS4s and receiving waters. There are several guidance documents available (see Discussion for Finding D.1.c) that include BMPs that can be readily implemented by the Copermittees for the development of new unpaved roads. This requirement is necessary to ensure the Copermittees minimize the discharge of sediment from their unpaved roads used for their maintenance activities.

Page 160 of the Fact Sheet states:

Section F.3.c.(5) (Privately Owned Unpaved Roads Maintenance) includes requirements for privately owned unpaved roads. The Copermittees must require implementation of BMPs for erosion and sediment control during maintenance activities on privately owned unpaved roads, particularly roads that are in or adjacent to receiving waters. As discussed for Finding D.1.c, BMPs for unpaved roads are needed to minimize the discharge of sediment to the MS4s and receiving waters. There are several guidance documents available (see Discussion for Finding D.1.c) that include design and source control BMPs that can the Copermittees can readily require to be implemented.

In addition, where the Copermittees identify illegal construction and maintenance grading activities on privately owned unpaved roads, the Copermittees must enforce their ordinances to prevent illicit discharges of sediment and other pollutants from privately owned unpaved roads to their MS4s and receiving waters.

Comment: For the reasons set forth above, there is no evidence that unpaved roads require special regulatory attention in the MS4 Permit. Moreover, proposed requirements specific to unpaved roads are redundant to existing requirements in both the existing Permit and the draft MS4 Permit, the state General Construction Permit, and the Copermittees' Stormwater ordinances. To the extent that unpaved roads are of concern to Regional Board staff, those concerns can be effectively addressed by minor adjustments to these existing compliance programs. In a time of tight regulatory budgets, adding these additional requirements, especially where there is no demonstrated need for them, is arbitrary and capricious. The Copermittees request deletion of requirements specific to unpaved roads (see discussion below) as well as these statements in the Fact Sheet.

Attachment 5: Proposed Unpaved Road Requirements of the Draft 2010 Santa Margarita Region MS4 Permit

4.0 Draft MS4 Permit Requirements for Unpaved Roads

4.1 *Unpaved Road Development Requirements*

Proposed requirements for the development of unpaved road projects appear on page 45 in section F.1.i of the Draft MS4 Permit. The proposed requirements state:

i. Unpaved Roads Development

The Copermittees must develop, where they do not already exist, and implement or require implementation of erosion and sediment control BMPs after construction of new unpaved roads. At a minimum, the BMPs must include:

- (1) Practices to minimize road related erosion and sediment transport;
- (2) Grading of unpaved roads to slope outward where consistent with road engineering safety standards;
- (3) Installation of water bars as appropriate;
- (4) Unpaved roads and culvert designs that do not impact creek functions and where applicable, that maintain migratory fish passage.

Virtually all unpaved road development activities would be greater than one acre and/or be part of a priority development project of one acre or more. Such development projects are required to prepare and implement project-specific Standard Urban Stormwater Mitigation Plans (SUSMPs) under Section F of both the existing MS4 Permit and the Draft MS4 Permit. The SUSMPs identify post-construction BMPs that will be implemented for all elements of the project, including the unpaved road elements of the project. Unpaved road projects are also required to comply with the state General Construction Permit, which requires preparation of a SWPPP that identifies construction-phase BMPs and post-construction BMPs. These development and construction phase requirements are applicable to unpaved roads and are imposed by the Copermittees during the development review process, during the issuance of grading permits and during construction inspections. Either the general requirements for development projects in the existing or Draft MS4 Permit and/or the General Construction Permit already require identification and implementation of post-construction BMPs, including erosion and sediment control BMPs, when developing new unpaved roads. Therefore, additional requirements for development of unpaved roads are redundant and the Copermittees request that these redundant requirements be removed from the Draft MS4 Permit.

4.2 *Unpaved Road Maintenance Requirements*

Proposed requirements for the maintenance of unpaved roads appear on page 56 in Section F.3.a(10) and on page 64 in Section F.3.c.(5) of the Draft MS4 Permit. The proposed requirements state:

F.3.a. (10) Unpaved Roads Maintenance

Attachment 5: Proposed Unpaved Road Requirements of the Draft 2010 Santa Margarita Region MS4 Permit

- (a) The Copermittees must develop, where they do not already exist, and implement or require implementation of BMPs for erosion and sediment control measures during such maintenance activities on unpaved roads, particularly in or adjacent to receiving waters.
- (b) The Copermittees must develop and implement or require implementation of appropriate BMPs to minimize impacts on streams and wetlands during unpaved road maintenance activities.
- (c) The Copermittees must regularly maintain their unpaved roads adjacent to streams and riparian habitat to reduce erosion and sediment transport;
- (d) Re-grading of unpaved roads during maintenance must be sloped outward where consistent with road engineering safety standards;
- (e) Through their regular maintenance of unpaved roads, the Copermittees must examine the feasibility of replacing existing culverts or design of new culverts or bridge crossings to reduce erosion and maintain natural stream geomorphology.

F.3.c. (5) Privately Owned Unpaved Roads Maintenance

- (a) The Copermittees must require implementation of BMPs for erosion and sediment control during maintenance activities on privately owned unpaved roads, particularly in or adjacent to stream channels or wetlands.
- (b) The Copermittees must enforce their ordinances against illegal construction and maintenance grading activities on privately owned unpaved roads, so as to prevent impacts to water quality.

The documents^{1,2,3} cited in Finding D.1.c discuss shaping of the surface of unpaved roads during smoothing, and maintenance of temporary sediment and erosion control BMPs associated with maintenance activities, such as repair of landslides and wash outs. The temporary erosion and sediment control BMPs identified include straw bales and silt fencing. The documents do not describe conditions in the Santa Margarita Region, but rather in Pennsylvania and Northern California.

Unpaved Roads Maintained by Copermittees

The conditions in the Santa Margarita Region are vastly different from the conditions found in Pennsylvania and Northern California. Nevertheless, the Copermittees conduct surface grading and maintain temporary erosion and sediment control BMPs as appropriate following completion of maintenance on unpaved roads. These BMPs associated with the routine maintenance of unpaved roads

¹ USEPA 2006 "Environmentally Sensitive Maintenance for Dirt and Gravel Roads." Gesford and Anderson, USEPA-PA-2005.
² US Forest Service, 1996. Forest Service Specifications for Construction of Roads & Bridges. EM-7720-100. Revised August 1996.
³ University of California Division of Agriculture and Natural Resources, 2007. Rural Roads: A Construction and Maintenance Guide of California Landowners. Publication 8262.

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will be documented and procedures formalized in the Riverside County Drainage Area Management Plan (DAMP).

Unpaved Roads Maintained by Others

As previously described, the vast majority of unpaved roads within the jurisdiction of the Copermittees are not maintained by the Copermittees, but are maintained by others, typically private property owners. As these are public easements over private property, however, the underlying property owner is under no legal obligation to provide maintenance. To provide reasonable access, maintenance of such unpaved roads is voluntarily provided by property owners and, in some cases, home owners' associations. State law prohibits the use of Gas Tax funds by the Copermittees for the maintenance of unpaved roads on private property. Requirements for implementation and maintenance of temporary erosion and sediment control BMPs in areas under the legal jurisdiction of the Copermittees are addressed by the general requirements of the Copermittees' stormwater ordinances and, where grading activities are significant, through the Copermittees' grading ordinances. As maintenance of unpaved roads on private property is voluntary, more aggressive regulation of such private roads may in fact discourage routine maintenance of unpaved roads, likely resulting in an increase in erosion and sediment discharge from such roads.

As an alternative, maintenance of unpaved roads can be effectively addressed by enhancing existing programs. There is no need to create a new compliance program requirement specific to unpaved roads, especially where such programs cannot in any event be implemented by the Copermittees on private property. The Copermittees believe that a better approach is to provide public education to property owners and grading contractors in areas served by unpaved roads, focusing on the proper methods of shaping unpaved road surfaces and the benefits of implementing and maintaining temporary erosion and sediment controls.

The Copermittees request that these proposed provisions be removed from the Draft MS4 Permit.

5.0 Alternative Regulation of Unpaved Roads

There is nothing unique about potential discharges from unpaved roads under the legal jurisdiction of the Copermittees such that they would require special regulation. As discussed above, there is significant mileage of unpaved roads in the Santa Margarita Region that are not under the legal jurisdiction of the Copermittees. If there is concern about the impact of unpaved roads on water quality (a concern that, for the reasons already stated, is not supported by the evidence), there is no reason to believe that unpaved roads not under the legal jurisdiction of the Copermittees do not present the same potential to affect receiving water quality.

If it is determined that development and maintenance of unpaved roads requires special additional regulation, then such regulation should apply equally and on the same schedule to all unpaved roads under the jurisdiction of the San Diego Regional Board, not just those under the legal authority of the Copermittees. The Copermittees request that, if staff continues to maintain that unpaved roads require additional regulation, those requirements be addressed through a general permit for unpaved roads, and not in the Draft MS4 Permit.

Attachment 5: Proposed Unpaved Road Requirements of the Draft 2010 Santa Margarita Region MS4 Permit

6.0 Conclusion

No evidence, whether statements in the Fact Sheet and Findings, monitoring data, or Copermittee observations and experience, supports identification of unpaved roads as a significant source of pollutants to receiving waters in the Santa Margarita Region warranting additional regulation. The proposed unpaved road requirements are redundant to requirements of existing permits, including the state General Construction Permit, as well as existing Copermittee ordinances and programs. To the extent that unpaved roads may be a source of pollutants to the MS4 and thence to receiving waters, the Copermittees believe that enhancement of existing programs by documenting BMPs specific to maintenance of unpaved roads and providing public education to owners and contractors who provide maintenance of privately maintained unpaved roads will be as effective in reducing such pollutants, at a much reduced cost.

If the Regional Board determines that unpaved roads within its jurisdiction require further regulation, the appropriate method for addressing those roads is through a General Permit (Waste Discharge Requirements or NPDES Permit) rather than the Draft MS4 Permit, since a General Permit would address all unpaved roads in the San Diego Region, not just the subset of unpaved roads under the legal jurisdiction of the Copermittees.

Attachment 6: Prohibition of Irrigation Runoff

Introduction

The Draft Municipal Separate Storm Sewer System Permit (Draft Tentative Order No. R9-2010-0016 (NPDES No. CAS0108740) for the Santa Margarita Region of Riverside County (Draft SMR MS4 Permit) categorically prohibits the discharge of landscape irrigation; irrigation water; lawn watering; (collectively 'irrigation runoff') and non-emergency fire fighting flows runoff to the MS4. The basis for this requirement comes from the current Orange County Stormwater Permit within the San Diego Region (NPDES No. CAS0108740), which prohibits such discharges.

Context of Requested Changes

Stream and Watershed Characteristics

Unlike the watersheds in South Orange County, the Santa Margarita Region is an ephemeral watershed that includes Murrieta and Temecula Creeks which are perennial interrupted streams, i.e., they include some reaches in which the flow is continuous and others where flow is ephemeral. However, the areas of perennial flow in the Santa Margarita Region are located in mountain area tributaries outside of the urbanized areas serviced by the MS4s. These perennial flows quickly disappear by seepage into the sands and gravels and resurface upstream of the confluence of Murrieta and Temecula Creeks. The creeks in the urbanized areas of the watershed, located primarily in the valley, are ephemeral and flows are only observed during and immediately following significant storm events¹.

Rising groundwater is currently observed in Murrieta Creek below its confluence with the Santa Gertrudis Channel, an observation consistent with the observations made by the State of California in 1956.² Rising groundwater is also observed in Temecula Creek approximately one quarter mile upstream of the Interstate 15 Bridge. In 1956, the State observed more extensive rising groundwater conditions occurring as far upstream as the Highway 79 Bridge. Based on the virtual absence of non-stormwater flows and the rising groundwater conditions observed in lower Murrieta and Temecula Creeks prior to development of the watershed, there is no evidence that the rising groundwater currently observed is due to Urban Runoff nor that Urban Runoff has affected the quality of rising groundwater.

Irrigation Runoff is Not a Source of Pollutants

Finding C.15 states:

Non-storm water discharges to the MS4 granted an influent exception [i.e., which are exempt from the effective prohibition requirement set forth in CWA section 402(p)(3)(B)(ii)] under 40 CFR 122.26 are included within this Order. Any exempted discharges identified by Copermittees as a source of pollutants are subsequently required to be addressed (emphasis added) as illicit discharges through prohibition and incorporation into existing IC/ID programs. Furthermore, the USEPA contemplates that permitting agencies such as the San Diego Water Board may also identify exempted discharges as a source of pollutants required to be addressed as illicit discharges (See VOL.

¹ Riverside Flood Control and Water Conservation District, "Hydrologic Data for 1975-76 Season," March 1982, p. 49.

² State of California Department of Public Works Division of Water Resources, Bulletin No. 57, "Santa Margarita River Investigation," Volume I, June 1956, p. 48.

Attachment 6: Prohibition of Irrigation Runoff

55 Fed. Reg. 48037). The San Diego Water Board and the Copermittees have identified landscape irrigation, irrigation water and lawn water, previously exempted discharges, as a source of pollutants and conveyance of pollutants to waters of the U.S. Of course, rising groundwater is exempt from regulation under 40 CFR 122.26 as a non-prohibited non-storm water discharge.

The last sentence of this Finding does not accurately reflect the facts. Unlike Orange County, and despite Board staff's contentions in the fact sheet the Copermittees have **not** identified landscape irrigation, irrigation water or lawn water as a source of pollutants or conveyance of pollutants to waters of the U.S. Rather, this statement is based on the efforts in Orange County where that County found that the significant perennial flows throughout the urbanized areas were caused by irrigation runoff. Not only has irrigation runoff not been found to be a source of pollutants to waters of the U.S. in the Santa Margarita Region as a category, no individual discharges of irrigation runoff in the region have been found to be a source of pollutants. As described in the Stream Flow Characteristics section above, during dry weather there is no perennial flow in the waters of the U.S. in the urbanized area until rising groundwater occurs just before the confluence of Murrieta and Temecula Creeks. This is unlike streams in South Orange County, that it was found that the significant perennial flows throughout the urbanized areas were caused by irrigation runoff. In the Santa Margarita Region, any weather runoff that does reach receiving waters quickly seeps into the alluvial soils.

Second, the Discussion of Finding C.15 in the Fact Sheet fails to demonstrate the need for a prohibition of this irrigation runoff as a non-stormwater runoff *category*. The discussion references conditions outside of and unlike those found in the Santa Margarita Region and misconstrues statements in public education materials that encourage runoff management as justification for the proposed prohibitions. Finally, no justification is provided in this discussion or elsewhere to support the prohibition of the non-emergency fire fighting flows runoff as a category.

Prohibition Not Economically Justifiable

A prohibition of irrigation runoff will result in significant costs to the public and the Copermittees as the prohibition is **TO THE MS4**, which is defined to include streets, curbs and gutters. As the MS4 Permit has eliminated the MEP protections for dry weather non-stormwater discharges (see also legal comments in Attachment 7 to the comment letter), this makes the Copermittees responsible for every incidence of over-irrigation, regardless of whether such discharges ever affect receiving waters. As such, the cost to eliminate these discharges is not commensurate with any measurable environmental benefit. The Copermittees cannot impose fees to recover the costs of enforcing this new requirement and, as described in the Economics White Paper (Attachment 2 to the comment letter), the Copermittees have even fewer resources to carry out the requirements of the current MS4 Permit than in past years, much less carry out the additional requirements set forth in the draft Permit, including the development and implementation of a new program to prohibit irrigation runoff.

As this prohibition would also apply to Copermittees' facilities, retrofit of existing facilities would likely be immediately required to ensure compliance. The City of Murrieta, for example, has estimated that retrofit of their sprinklers to a drip system to avoid irrigation runoff from their facilities alone would cost \$250,000.

Attachment 6: Prohibition of Irrigation Runoff

Irrigation Runoff Addressed by Existing Requirements and Programs

Management of irrigation runoff is currently addressed by existing requirements and programs and the additional requirements proposed in the draft Permit are unnecessary. The use of reclaimed water is regulated under Waste Discharge Requirements (WDRs) issued by the Regional Board.

The draft Permit also provides other mechanisms to address irrigation runoff. **First**, if a discharge of irrigation runoff was determined to be a source of stormwater pollutants, the Copermittees already have the legal authority to take appropriate enforcement action to control the discharge as an illegal discharge, under their existing storm water ordinances. **Second**, the non-stormwater action level monitoring required by this draft Permit will identify any potentially problematic non-stormwater discharges and identify the source of those discharges. Should the source be determined to be irrigation runoff, it will require the Copermittees to address that discharge. Both mechanisms are better suited (financially and legally) to deal with irrigation runoff than a complete prohibition provision in the absence of local data showing it as a problem.

Finally, local water purveyors are better equipped and able to address irrigation runoff. As an example, Rancho California Water District and Eastern Municipal Water District actively promote water conservation programs, which are supported by the Metropolitan Water District of Southern California. The County and the cities have adopted water conservation ordinances as required by the Water Conservation in Landscaping Act (AB 1881, Laird). Given these facts, there is even less justification for an extensive and expensive program to address an irrigation runoff issue that is not, in fact, a source of pollutants causing or contributing to a violation of water quality standards in the Santa Margarita Region.

Preferred Requested Permit Revisions

Specifically, the Permittees request that the language in the Permit be amended as follows prior to adoption of the Permit:

Delete Finding C.15

As the last sentence of this Finding is not supported by fact, the Permittees request that it be deleted as noted in the following text and the entirety of the Discussion of Finding C.15 in the Fact Sheet be deleted.

Non-storm water discharges to the MS4 granted an influent exception [i.e., which are exempt from the effective prohibition requirement set forth in CWA section 402(p)(3)(B)(ii)] under 40 CFR 122.26 are included within this Order. Any exempted discharges identified by Copermittees as a source of pollutants are subsequently required to be addressed (emphasis added) as illicit discharges through prohibition and incorporation into existing IC/ID programs. Furthermore, the USEPA contemplates that permitting agencies such as the San Diego Water Board may also identify exempted discharges as a source of pollutants required to be addressed as illicit discharges (See VOL. 55 Fed. Reg. 48037). ~~The San Diego Water Board and the Copermittees have identified landscape irrigation, irrigation water and lawn water, previously exempted discharges, as a source of pollutants and conveyance of pollutants to waters of the U.S.~~

Attachment 6: Prohibition of Irrigation Runoff

Restore Conditional Exemption

The Permittees request that the landscape irrigation; irrigation water; lawn watering; and non-emergency fire fighting flows runoff categories be restored to the list of non-prohibited, non-stormwater discharges identified in B.2 of the draft SMR MS4 Permit as noted below. In the event that an individual irrigation runoff discharge is determined to be a source of pollutants as identified by the non-stormwater dry weather action level (NAL) process, appropriate action can be taken by the Permittees to control that source.

B.2. Non-Stormwater Discharges

This item includes a listing of discharges that are not prohibited unless a discharge is determined to be a source of pollutants to waters of the U.S. Landscape irrigation, irrigation water, lawn watering and non-emergency fire fighting flows were deleted from this list as noted:

- a. Diverted stream flows;
- b. Rising groundwaters;
- c. Uncontaminated groundwater infiltration [as defined at 40 CFR 35.2005(20)] to MS4s;
- d. Uncontaminated pumped groundwater³;
- e. Foundation drains³;
- f. Springs;
- g. Water from crawl space pumps³;
- h. Footing drains³;
- i. Air conditioning condensation;
- j. Flows from riparian habitats and wetlands;
- k. Water line flushing^{4,5};
- l. Landscape irrigation;
- m. Discharges from potable water sources not subject to NPDES Permit No. CAG679001, other than water main breaks;
- n. Irrigation water;
- o. Lawn watering;
- p. Individual residential car washing;
- q. Non-emergency fire fighting flows; and
- r. Dechlorinated swimming pool discharges

Additional Clarifications

It is not practicable for the Copermittees to prevent or eliminate irrigation runoff. The Permittees request that the following requirements be revised as noted to provide achievable compliance requirements:

F.1.c.(1) Approval Process Criteria and Requirements for All Development Projects states:

³ Requires enrollment under Order R9-2008-002. Discharges into the MS4 require authorization from the owner and operator of the MS4 system.

⁴ This exemption does not include fire suppression sprinkler system maintenance and testing discharges. Those discharges may be regulated under Section B.3.

⁵ Requires enrollment under Order R9-2002-0020.

Attachment 6: Prohibition of Irrigation Runoff

Performance Criteria: Discharges from each approved development project must be subject to the following management measures:

(1) Source control BMPs that reduce stormwater pollutants of concern in runoff; ~~prevent~~ reduce the potential for illicit discharges into the MS4; ~~prevent~~ reduce the potential for irrigation runoff; storm drain system stenciling or signage; properly design outdoor material storage areas; properly design outdoor work areas; and properly design trash storage areas.

F.1.d.(5) Source Control BMP Requirements states:

Each Copermittee must require each Priority Development Project to implement applicable source control BMPs. The source control BMPs to be required must:

- (a) Prevent illicit discharges into the MS4;
- (b) Minimize storm water pollutants of concern in runoff;
- (c) ~~Eliminate~~ Reduce the potential for irrigation runoff;
- (d) Include storm drain system stenciling or signage;
- (e) Include properly designed outdoor material storage areas;
- (f) Include properly designed outdoor work areas;
- (g) Include properly designed trash storage areas;
- (h) Include water quality protection requirements applicable to individual priority project categories.

Alternative Requested Permit Revisions

Regulate irrigation runoff discharges from the MS4, rather than as prohibited discharge to the MS4

If the Regional Board nevertheless insists on prohibiting irrigation runoff, the Copermittees request that the draft MS4 Permit be revised to allow for irrigation runoff to be managed as a Jurisdiction Runoff Management Plan (JRMP) program, rather than as a prohibited discharge to the MS4. This alternative request is consistent with how the Permit currently deals with non-emergency fire fighting discharges, which was also removed from the list of non-prohibited non-stormwater discharges. The Executive Officer stated that he would be open to consideration of a program for irrigation runoff that would address discharges from the MS4. This alternative approach allows the Copermittees to develop a program that focuses on irrigation runoff problem areas, as opposed to holding the Copermittees responsible for eliminating any instant case of over-irrigation independent of threat to receiving water quality.

As the alternative to restoring the conditional exemption, the Copermittees request the Board to ADD Provision B.4 as follows:

B.4. As part of the JRMP, the Copermittees must develop and implement a program to address pollutants from landscape irrigation, irrigation water and lawn watering identified as significant sources of pollutants to waters of the United States.

Attachment 7: General Legal Comments

LEGAL COMMENTS OF THE RIVERSIDE COUNTY FLOOD CONTROL AND WATER CONSERVATION DISTRICT ON TENTATIVE ORDER NO. R9-2010-0016, WASTE DISCHARGE REQUIREMENTS FOR DISCHARGES FROM THE MUNICIPAL SEPARATE STORM SEWER SYSTEMS (MS4s) DRAINING THE COUNTY OF RIVERSIDE, THE INCORPORATED CITIES OF RIVERSIDE COUNTY, AND THE RIVERSIDE COUNTY FLOOD CONTROL AND WATER CONSERVATION DISTRICT WITHIN THE SAN DIEGO REGION

The following comments are made by the Riverside County Flood Control and Water Conservation District (District) with respect to legal issues raised by the above-referenced Tentative Order (Order). These comments are being made on behalf of the District and, with respect to issues common to the other Copermittees, also on behalf of the County of Riverside and the Cities of Menifee (to the extent that this City will remain as a Co-Permittee under the Order), Murrieta, Temecula and Wildomar. We also understand that the County and the individual Cities will be filing comments on the Order under separate cover. The comments contained in this document are intended to complement, but not supersede, the individual comments of the County and the City. Also, the District will be filing separate comments concerning issues specific to it.

The District reserves the right to make additional legal comments on the Order prior to the close of the public hearing to adopt the order. In addition, legal comments may also be included in the Technical Comments separately filed herewith by the District.

The redlined version of the Order submitted with the District's comment letter also addresses the following and additional comments, along with requested changes in the text of the Order.

General Comments:

1. *Dual Requirement to Adopt Programs and Guarantee Results*

Throughout Part F. of the Tentative Order relating to the Jurisdictional Runoff Management Program, the language requires not only that the Copermittees adopt programs intended to achieve control of pollutants but also requires such programs to achieve certain ends. See, for example, Part F.1., where each Copermittee must implement a development planning program which meets the requirements of Section F of the Tentative Order *and* which requires such a program to (1) reduce development project discharges from the MS4 to the MEP, (2) prevent such discharges "from causing or contributing to a violation of water quality standards", (3) prevents illicit discharges to the MS4, and (4) manages increases in runoff discharge rates. A similar requirement is set forth in other provisions, including Part F.3, relating to existing development, Part F.3.b., relating to commercial/industrial programs, Part F.3.c., relating to residential programs and Part F.6, relating to the education component where, in each case, the Copermittees are required to develop programs and ensure their performance.

This dual requirement, to develop a program and then to ensure that it achieves the intended ends, is unlawful, as it goes beyond the requirements of the MS4 regulations and requires the Copermittees to guarantee the results of activities that will often be in the control of third parties.

Attachment 7: General Legal Comments

The MS4 regulations require that the MS4 permittees develop the required programs. See, for example, 40 CFR § 122.26(d)(2)(iv)(A)((2), which requires the Copermittees to, among other things, develop and implement a management program including a "description of planning procedures including a comprehensive master plan to develop, implement and enforce controls to reduce the discharge of pollutants from municipal separate storm sewers which receive discharges from areas of new development and significant redevelopment". The Copermittees certainly could be liable under the permit if they failed to adequately "develop, implement and enforce controls". However, the MS4 regulations do not require that the Copermittees guarantee, under threat of being found in violation of the permit, that such controls achieve the desired ends of the management programs. It should be also noted that in many other parts of the Order, the Copermittees are directed to develop programs "designed" to achieve water quality goals.

Further, the iterative BMP approach required by the State Water Resources Control Board ("State Board") in precedential State Board Order WQ 99-05 and subsequent rulings would be made meaningless if the Copermittees were strictly liable for ensuring in their programs that discharges did not cause or contribute to a violation of a water quality standard. It is appropriate for the Board to set forth in these sections the "elements needed in the Copermittees' program to fulfill the goals of [the] directive", as set forth in staff's Response to Comment 297 on the Orange County MS4 permit, Order No. R9-2009-0002. However, the Board has no authority to require the Copermittees to guarantee that such goals will be fulfilled, as the current language appears to require.

In addition to the portions of the Order cited, the Copermittees also request changes to similar provisions found at Sections F.1.d, F.1.d.5, F.2, F.3.a, F.4, and G. The attached redline identifies those and any additional parts.

2. Requirement to Follow State Law on Requirements Not Required by Federal Law

A number of requirements in the Tentative Order exceed the requirements of federal law. The Board may have discretion to impose such requirements under state law (*Defenders of Wildlife v. Browner*, 191 F.3d 1159 (9th Cir. 1999)), however, the California Supreme Court has determined that to the extent such state law requirements are included in an NPDES permit, the Board must consider the factors set forth in Water Code § 13263(a) and § 13241, including the water quality that could reasonably be achieved by the requirements and economic considerations. *City of Burbank v. State Water Resources Control Board* (2005) 35 Cal. 4th 613. See also Water Code § 13000, setting forth that the 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 on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible".

The Fact Sheet and findings for the Tentative Order do not establish that staff has considered such factors or, to the limited extent the factors were considered, staff used out-of-date and incomplete information. In particular, the economic analysis contained in Section VI of the Fact Sheet uses out-of-date information on the economic viability of the cities in the Santa Margarita Region, ignoring the impact of the national recession, which has hit the Region with particular force and which has caused a major reduction in property tax and sale tax revenues available to

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fund water quality activities under the Order. For a more complete economic analysis, please see Attachment 2 to the comment letter.

Findings in Tentative Order:

Finding A.4: This finding states that responses to comments on the Order would be "incorporated by reference" into the findings supporting the Order.

Comment: Incorporating responses to comments as to which interested parties have no chance to comment prior to the hearing on the Order raises a due process concern.

Finding C.14: This finding states, in relevant part, that "[n]on-storm water (dry weather) discharge from the MS4 is not considered a storm water (wet weather) discharge and therefore is not subject to regulation under the Maximum Extent Practicable (MEP) standard". The finding further asserts that such discharges are to be "effectively prohibited" from discharge into the MS4.

Comment: The rationale for this finding, as set forth in the Fact Sheet, relies on a State Board precedential decision, Order No. WQ 2009-0008. This order has been vacated by order of the Los Angeles County Superior Court in *County of Los Angeles v. State Water Resources Control Board*, Case No. BS 122724 (July 16, 2010). Thus, the order has no further effect and cannot be cited or relied upon by the Board in support of this finding or any other finding or directive in the Order.

Moreover, the finding incorrectly states that discharges of non-stormwater from the MS4 are not subject to the MEP standard. This parsing of "stormwater" and "non-stormwater" is not found in the Clean Water Act, which states only that the MS4 permit "shall require controls to reduce the discharge of *pollutants* to the maximum extent practicable". 33 U.S.C. 1342(p)(3)(B)(iii) (emphasis supplied). The preamble to the MS4 regulations promulgated by U.S. EPA moreover also acknowledges that "MEP control measures" would be implemented to address not only pollutants in "stormwater" but also from "non-stormwater discharges."

As the preamble states:

[Copermittees are required] to develop management programs for four types of pollutant sources which discharge to large and medium municipal storm sewer systems. Discharges from [such systems] are usually expected to be composed primarily of: (1) Runoff from commercial and residential areas; (2) storm water runoff from industrial areas; (3) runoff from construction sites; and (4) *non-storm water discharges*. Part 2 of the permit application has been designed to allow [permittees] the opportunity to propose *MEP control measures for each of these components of the discharge*". 55 Fed. Reg. at 48052 (emphasis supplied).

This language sets forth EPA's understanding of the plain language of the Act: "pollutants" must be controlled to the MEP from the MS4 "discharge", not merely stormwater. While State Board Order No. WQ 2009-0008 improperly attempted to ignore this distinction and liken non-stormwater discharges to prohibited "illicit discharges", that order has been vacated and cannot be cited by the Board.

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Moreover, the interpretation that the Clean Water Act requires controls of dry weather discharges from the MS4 in the same manner as if such discharges were from an industrial wastewater source ignores the factual complexity of the MS4 discharge. For example, some of that discharge will be composed of exempt discharges, such as car washing runoff, swimming pool drainage, rising groundwater, foundation drains and other such sources. As to these types of discharges, U.S. EPA stated that "it is unlikely Congress intended to require municipalities to effectively prohibit . . . *seemingly innocent flows that are characteristic of human existence in urban environments and which discharge to municipal separate storm sewers*". 55 Fed. Reg. at 48037 (emphasis added). Other parts of that discharge will be comprised of industrial discharges separately permitted by the Board, such as well development discharges. These discharges cannot be distinguished from possible illicit discharges, yet they must still be treated to the MEP. There is no requirement in the Clean Water Act, or in the implementing regulations, to ensure that these mixed dry weather discharges must be "effectively prohibited" in the same way that an industrial plant would be required to control its discharges.

Finding C.15: This finding states, in relevant part, that the Board and the Copermittees have identified "landscape irrigation, irrigation water and lawn water, previously exempted discharges, as a source of pollutants and conveyance of pollutants to waters of the U.S." The finding further asserts that such non-exempt discharges are required to be "addressed" as "illicit discharges" and effectively prohibited from entry into the MS4.

Comment: The rationale for this prohibition lacks both a factual and legal basis. The factual issues are discussed in the District's technical comments on this issue. With regard to legal issues, the justification for removing the preexisting exemption for these discharges (referred to hereafter as "irrigation water") is completely lacking. First, given that the justification is based on State Board Order WQ 2009-0008, which likens dry weather discharges to "illicit discharges" required to be "effectively prohibited" from entry into the MS4, the vacation of this order by the Los Angeles County Superior court eliminates this Order as a justification for the prohibition.

Second, EPA, in the preamble to the federal MS4 regulations, required that a *permittee* must make a finding that the "irrigation water" discharges must be a "source of pollutants to waters of the United States . . .". 55 Fed. Reg. 48037. Moreover, such discharges must represent a "significant" source of pollutants to waters of the United States "under certain conditions". U.S. EPA *Guidance Manual for the Preparation of Part 2 of the NPDES Permit Application for Discharges from Municipal Separate Storm Sewer Systems*, November 1992 ("EPA Part 2 Guidance Manual"), at p. 6-33. These conditions require a focus not on an entire category of discharges, but rather a discharger-by-discharger examination.

In the MS4 regulatory preamble, EPA stated that "[i]n general, municipalities will not be held responsible for prohibiting some specific components of discharges or flows listed below through their [MS4], even though such components may be considered non-storm water discharges, unless such discharges *are specifically identified on a case-by-case basis as needing to be addressed*". 55 Fed. Reg. 47995 (emphasis supplied). In the Guidance Manual, EPA states:

If an applicant knows . . . that landscape irrigation water from a *particular site* flows through and picks up pesticides or *excess* nutrients from fertilizer applications, there may

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be a reasonable potential for a storm water discharge to result in a water quality impact. In such an event, the applicant should contact the NPDES permitting authority to request that the authority order *the discharger* . . . to obtain a separate NPDES permit (or in this case, the discharge could be controlled through the storm water management program of the MS4).

EPA Part 2 Guidance Manual, p. 6-33 (emphasis added).

Third, the finding asserts that the Board has the authority to "identify exempted discharges as a source of pollutants" and that it has identified the irrigation discharges "as a source of pollutants and conveyance of pollutants to waters of the U.S." Read in the context of the previously cited language, however, the Board has no power greater than a municipality and must identify specific discharges, and not entire categories of discharges. See 55 Fed. Reg. 48037. And, as noted in the white paper on irrigation runoff, the Copermittees have not, in fact, identified irrigation discharges as a source of pollutants or a "conveyance of pollutants" to waters of the United States.

Finding D.1.b.: This finding states that "MS4 discharges, however, continue to cause *or contribute to* violations of water quality standards as evidenced by the Copermittees' monitoring results". (Emphasis added)

Comment: With respect to discharges that "contribute to" violations of water quality standards, it should be noted that for concentration-based water quality standards, an MS4 discharge at concentrations *below* the water quality standard cannot, as a matter of simple scientific fact, *contribute to* a violation of such a water quality standard. If the discharge is below the standard in question, that discharge will never exceed the water quality standard, no matter the volume of the discharge.

Finding D.2.g: This finding, which concerns the effects of urbanization on the characteristics of stormwater flow, states in part that "[h]ydromodification measures for discharges to hardened channels are needed for the future restoration of the hardened channels to their natural state"

Comment: Hardened flood control channels are in place in the Santa Margarita Region due to the need to protect the lives and property of Riverside County residents from floodwaters. Such channels, and other flood control structures, have been established by the District in accordance with its statutory obligations set down by the Legislature in California Water Code App. § 48-9. In particular, we draw the Board's attention to that section of the Water Code setting forth the power of the District to "control the flood and storm waters of said district" and to save and conserve in any manner all or any of such waters and protect from damage from such flood or storm waters the watercourses, watersheds, public highways, life and property in said district." Water Code App. § 48-9(8).

The Board has no statutory jurisdiction under the MS4 program to alter any flood control structures or channels of the District or to some jurisdiction over the construction or location of such structures or channels. Any such alteration or construction must be done with the cooperation and agreement of the District and in accord with the District's statutory mandate to protect the citizens of Riverside County. Please see changes in redline.

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Finding D.3.c: This finding states in part that "urban streams", whether natural, anthropogenic or partially modified, are considered part of the "MS4" if they are used as a conveyance for runoff.

Comment: The definition of "MS4" does *not* include any natural watercourse. This is evident both from the definition of "MS4" in the federal Clean Water Act regulations and from EPA's comments in the preamble to those regulations. First, the definition of "MS4", in relevant part, states that it consists of "a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, manmade channels or storm drains" "owned or operated by" a municipality "having jurisdiction over disposal of . . . storm water" that is "designed or used for collecting or conveying storm water". 40 CFR § 122.26(b)(8). Nothing in that definition even suggests that natural watercourses are part of the MS4, only improved watercourses.

Second, U.S. EPA, in the preamble to the original MS4 regulations, stated unequivocally that "[t]he Agency also wants to clarify that streams, wetlands and other water bodies that are waters of the United States are not storm sewers for the purpose of this rule". 53 Fed Reg. 49442 (December 7, 1988).¹

Moreover, none of the Copermittees "own" or "operate" a natural stream. Such streams are waters of the State and are "owned" by the people of California.

The authority cited in the Fact Sheet for this finding, a response filed with the State Board in opposition to a petition challenging an MS4 permit issued by the Board to San Diego County, contradicts the federal definition and, under the Supremacy Clause, cannot be employed. Please see changes in redline.

Finding E.1: This finding states that the RWL language in the Tentative Order "requires compliance with water quality standards, which for stormwater discharges compliance is to be achieved through an iterative approach requiring the implementation of improved and better-tailored BMPs over time".

Comment: The District has two comments regarding this finding, one relating to the language of the finding and one relating to the Fact Sheet discussion of the finding. First, the language of State Board Order WQ 99-05, which establishes the RWL language required to be placed in MS4 permits statewide, is not limited to "stormwater" discharges, but rather to all discharges into receiving waters. See State Board Order WQ 99-05. This is consistent also with the requirement that "discharges" from the MS4, not merely stormwater discharges, must be controlled to the MEP and are not required to meet numeric effluent limitations. 33 U.S.C. § 1342(p)(3)(B)(iii). Second, while the language of the finding correctly states that compliance with water quality standards "is to be achieved through an iterative approach", language in the Fact Sheet improperly contradicts this finding by asserting that compliance with the iterative BMP process

¹ EPA saw no need to further clarify this point in the final rulemaking for the MS4 regulations. The absence of any discussion of this point in the final rulemaking does not, contrary to comments made by Board staff in responses to comments on the South Orange County MS4 Permit, Order No. R9-2009-0002, indicate that EPA abandoned this reading of the Act.

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"does not shield the discharger from enforcement actions for continued non-compliance with water quality standards". Fact Sheet, page 91.

Such an interpretation contradicts the plain language of Order WQ 99-05 and appears to represent an "end-run" around the entire iterative process and the concept of MEP, which is a flexible concept, intended to allow the development of site-specific permit conditions based on the judgment of the permit writer. See, e.g., 55 Fed. Reg. 48038. The interpretation is, therefore, not consonant with the requirements of the State Board precedential order and the MS4 regulations and should be deleted from the Fact Sheet.

Finding E.6: This finding purports to determine that the Tentative Order "does not constitute an unfunded local government mandate subject to subvention under Article XIII B, Section(6) of the California Constitution".

Comment: This finding has no place in the Tentative Order. The exclusive jurisdiction over a determination as to whether a mandate constitutes an unfunded state mandate lies with the Commission on State Mandates. The Commission has exclusive authority to determine, in the first instance, whether a requirement constitutes an unfunded state mandate. Government Code §§ 17751 and 17552; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 837; *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1546, 1596-97. The findings of an agency that has no jurisdiction to make those findings are entitled to no weight.

Second, the finding is erroneous on several grounds. It is erroneous in its assertion that the Tentative Order "implements federally mandated requirements under CWA §402". While true, the Order also contains separate state-mandated requirements. As the California Supreme Court has held, NPDES permits (like the Tentative Order) can contain both federal and state requirements. See *City of Burbank, supra*, 35 Cal. 4th at 618, 628. Where those non-federal requirements constitute a new program or higher level of service ordered by the state or exceed federal requirements, those requirements can qualify as a state mandate requiring a subvention of funds. See *Long Beach Unified School District v State of California* (1990) 225 Cal.App.3d 155, 172-73. Even if the requirement derives from federal law, the requirement can still constitute an unfunded state mandate if the state agency has a choice as to whether to impose the requirement on the permittees, e.g., *Hayes*, 11 Cal.App.4th at 1593-94.

Recently, the Commission on State Mandates held that both the Los Angeles County MS4 Permit and the San Diego County MS4 Permit contained requirements that constituted an unfunded state mandate, not required by federal law. *In re Test Claim on Los Angeles Regional Quality Control Board Order No. 01-182*, July 31, 2009; *In re Test Claim on San Diego Regional Water Quality Control Board Order No. R9-2007-0001*, March 26, 2010.

The finding further asserts that the obligations to be imposed on the Copermittees are "similar to, and in many respects less stringent than" obligations on non-governmental discharges. A similar argument was considered and rejected by the Commission in the Los Angeles and San Diego MS4 Permit Test Claims. The District disagrees with this assertion, as there are numerous requirements in the Tentative Order that are uniquely applicable to governmental entities. This is, however, a question that would be addressed by the Commission on State Mandates were a test claim to be filed, the only procedure for the determination of this issue.

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The finding further asserts that Copermittees "have the authority to levy service charges, fees, or assessments to pay for compliance with this Order". This finding is both erroneous on the facts and without any basis in the record. The question of how a state mandate is to be funded is beyond the scope of the Board's expertise and, again, is exclusively within the jurisdiction of the Commission on State Mandates. The finding also asserts that the "Copermittees requested permit coverage in lieu of compliance with the complete prohibition against the discharge of pollutants contained in CWA §301, subdivision (a)". A similar argument was made and rejected in the Los Angeles and San Diego MS4 Permit Test Claims. The finding further asserts that prohibitions against conditions of pollution or nuisance predate the enactment of Article XIII B Section 6 of the California Constitution. The requirements of the Tentative Order far exceed such requirements. And, in any event, whether such requirements predate Article XIII B Section 6 is an issue for the Commission on State Mandates.

The finding is not supported by evidence in the record and is in fact contradicted by controlling legal precedent. Even were it to be included in the Tentative Order, it is entitled to no weight since the Board lacks jurisdiction to make such a finding. For these reasons, the finding and any associated discussion in the Fact Sheet should be deleted. Please see changes in redline.

Directives in Tentative Order:

Section A.1: This directive mandates, among other things, that discharges "into" MS4s that would cause or threaten to cause a condition of "pollution, contamination, or nuisance" in receiving waters of the state are prohibited.

Comment: While the Board in this Order has jurisdiction to prohibit discharges "from" the MS4, it cannot regulate conditions within the MS4, since these are not in fact "receiving waters of the state". In any event, the language is superfluous, since regulation of a discharge from the MS4, which is subject matter of the Tentative Order, accomplishes the same end. Please see the accompanying redline.

Section A.3: This directive both recites the prohibition against discharges that cause or contribute to the violation of water quality standards and introduces the iterative process required by the State Board for MS4 permittees.

Comment: To clarify that the iterative process specifically applies to the Copermittees' compliance requirements in Section A.3, language has been added in the redline.

Section A.3.b: This directive relates to the requirement that the Copermittees repeat the iterative process to comply with receiving water limitations for continuing or recurring exceedances of the limitations.

Comment: Clarifying language changes are requested in the redline.

Section A.3.c: This directive indicates that nothing prevents the Board from enforcing any provision of the Order while the Copermittees are preparing and implementing the receiving water limitation report.

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Comment: Clarifying language changes are included in the redline to make clear that so long as the Copermittees are in compliance with the requirements of Section A.3, they are not in violation of the section.

Section B.2: This section categorizes the types of non-stormwater discharges that are not prohibited from discharge into the MS4, and thus not subject to the "effectively prohibit" requirement in Section B.1. However, this section improperly omits several categories of non-stormwater discharges, landscape irrigation, irrigation water, lawn watering and non-emergency fire fighting flows. In addition, this section states that the Water Board may require controls for "non-anthropogenic sources".

Comment: As discussed above in the District's comment concerning Findings C.14 and C.15, the Board lacks authority to delete an entire category of discharge from the non-stormwater designation. Such authority must be exercised primarily by the Copermittees, based on their evaluation of source-specific facts. And, the ability of the RWQCB to liken such flows to "illicit discharges", apparently authorized by State Board Order No. WQ 2009-0008, is no longer in effect, as that Order has been vacated. Moreover, there is no requirement in the MS4 regulations for controls on "non-anthropogenic sources". Such natural sources are not within the control of the MS4 Copermittees. Moreover, controlling such natural sources as rising groundwater or springs by sealing the MS4 could raise concerns about interference with water rights. Given the natural source of such springs, the incidental presence of pollutants in the waters would have occurred whether an MS4 was in existence or not. Please see the accompanying redline as well as the District's technical comments on this directive.

Section C: This section establishes "non-stormwater dry weather action levels" ("NAL") monitoring and the requirements to be followed when NALs exceedances are identified.

Comment: In addition to the District's technical comments on this part, the District has the following concerns regarding legal aspects of this directive. The District wishes to incorporate its comments on Findings C.14 and C.15, which discuss the requirements applicable to any discharge from an MS4, which is that the Copermittees control pollutants in such discharges to the MEP. Such a requirement applies not only to discharges of stormwater, but also dry weather discharges, which may (as discussed above) include not only non-exempted non-stormwater discharges but also discharges from exempted non-stormwater sources (those identified in Section B.2 of the Order) as well as discharges from sources holding separate NPDES permits. We note that Section C.2.d. requires prompt notice to the RWQCB of a source that may require a separate NPDES permit. The Board must be prepared to address such sources and not require further investigation by the Copermittees.

As also noted above, in the preamble to the MS4 regulations, U.S. EPA indicated that the MEP control requirement would apply to all discharges from MS4s, including "non-stormwater discharges". 55 Fed. Reg. 48052.

Section E.1.a: This directive requires the Copermittees to have legal authority to, among other things, "control the quality of runoff from industrial and construction sites", including sites that have coverage under the general industrial and construction stormwater permits.

Attachment 7: General Legal Comments

Comment: As separate NPDES permits, the general construction and general industrial stormwater permits allow discharge into the MS4 so long as those permits are being complied with. Copermittees do not have authority to contradict the requirements of the general permits. This requirement is vague and ambiguous, and goes beyond the requirements of the MS4 regulations, which require that Copermittees demonstrate that they have legal authority to control discharges into their MS4 systems.

Sections E.1.j and k: These directives require the Copermittees to have legal authority to require the use of BMPs to prevent or reduce the discharge of pollutants into MS4s from stormwater to the MEP and to require documentation on such BMPs.

Comment: The Copermittees are required under the Clean Water Act to control discharge of pollutants *from* their MS4 to the MEP standard. 33 U.S.C. § 1342(p)(3). There is no requirement that discharges *into* the MS4 meet this standard, though the Copermittees are free to impose such a standard voluntarily. These provisions are not required and should either be removed or made optional for the Copermittees. The requirements of these directives are also duplicative of Section E.1.i., which already requires the Copermittees to have the legal authority to require reports from dischargers to the MS4.

Section F.1.h(h): This directive requires that where Priority Development Projects are adjacent to or will modify stream channels, the use of hardscape and other materials is forbidden.

Comment: As noted above, the District has a statutory mandate to protect the lives and property of the citizens of Riverside County from floodwaters. If, in the professional judgment of the District's engineers, hardscape or other engineering improvements are required in a stream channel affected by this directive due to flood control concerns, the District must be allowed to make that judgment. The Board does not have the hydrologic/hydraulic expertise, nor is it authorized by the Legislature to make flood control judgments and presumably would not wish to be a defendant in a lawsuit brought by flood victims whose lives or property was affected by the inability of the District to make necessary flood control decisions.

In making this comment, the District wants to be clear that it is not unwilling to accommodate potential future channel rehabilitation efforts where flood control will not be affected. Please see the accompanying redline for suggested language to address these concerns.

Section F.2.a: This directive requires the Copermittees to update their grading and other ordinances as necessary to comply with the Order and including requirements for implementing all designated BMPs and other measures.

Comment: The drafting and enforcement of ordinances by a municipality is a municipal function that cannot be directed by the Regional Board. Article XI, section 7 of the Constitution guarantees municipalities the right to "make and enforce within [their] limits all local police, sanitary and other ordinances and regulations not in conflict with general laws". Thus, specific requirements as to the content of ordinances cannot be directed by the Board. The redline requests deletion of this directive.

Section F.3.b.(5): This directive requires that the Copermittee stormwater ordinances must contain certain enforcement components.

Attachment 7: General Legal Comments

Comment: The drafting and enforcement of ordinances by a municipality is a municipal function that cannot be directed by the Regional Board. Article XI, section 7 of the Constitution guarantees municipalities the right to "make and enforce within [their] limits all local police, sanitary and other ordinances and regulations not in conflict with general laws". Thus, specific requirements as to the content of ordinances cannot be directed by the Board. The redline requests deletion of this requirement.

Section F.3.c.(4): This directive requires that each Copermittee "must ensure that effective measures exist and are implement or required to be implemented to ensure that runoff within and from common interest developments, including areas managed by associations and mobile home parks, and meets the objectives of this section and Order".

Comment: The Fact Sheet inappropriately states that the Tentative Order "interprets common interest areas as property subject to the codes and ordinance and enforcement mechanisms of the city or county in which it resides and, therefore, holds the local government responsible for the discharge of wastes from storm water conveyance systems located within these areas".

The Tentative Order regulates discharges from the MS4. Drainage systems and the runoff handled *within* a private development or common interest area generally are not part of the Copermittees' MS4, as the Copermittees (unless they actually maintain their MS4 within such areas) have no right to maintain or regulate such internal systems, beyond the enforcement of local ordinances regulating discharges *into* the Copermittees' MS4 or through the requirement to install and maintain BMPs. Discharges from such systems are thus no different than discharges from any other private property within the Copermittees' jurisdiction. The first full paragraph in this section should be deleted because it is merely prefatory language to the specific requirements set forth in the remainder of the section.

Section F.3.c.(5): This directive requires the Copermittees to enforce their ordinances with respect to grading activities on privately owned unpaved roads "so as to prevent impacts to water quality".

Comment: In addition to the general objection to the requirement to regulate unpaved roads, found in a separate white paper and in the general comment letter, this specific directive violates the constitutional requirement that the drafting and enforcement of ordinances by a municipality is a municipal function that cannot be directed by the Regional Board. Article XI, section 7 of the Constitution guarantees municipalities the right to "make and enforce within [their] limits all local police, sanitary and other ordinances and regulations not in conflict with general laws". Thus, specific requirements as to the content of ordinances cannot be directed by the Board. Moreover, the scope of the Order is to address discharges from the MS4, not discharges from non-point or non-MS4 sources that may affect "water quality". The redline requests deletion of this requirement.

Section F.6: This directive includes a description of the purposes of the education program with respect to stormwater and non-stormwater discharges.

Comment: The redline includes revisions that correctly state the requirements of the Clean Water Act.

Attachment 7: General Legal Comments

Section H.1: This directive requires that each "Copermittees must exercise its full authority to secure the resources necessary to meet all requirements of this Order".

Comment: There is no statutory or regulatory authority for this requirement. The MS4 regulations require *only* that the Copermittees submit a "fiscal analysis" of the resources required to accomplish permit program activities, including a description of the sources of funds. 40 CFR § 122.26(d)(2)(vi). Moreover, this requirement is inherently vague and ambiguous and is, therefore, especially troublesome given the economic conditions now faced by the County and the Cities within the Santa Margarita region. This directive should be deleted, or at minimum, revised as shown in the redlines.

Standard Provisions, Attachment B:

In the Standard Provisions, it is stated that the Order "may be modified, revoked and reissued, or terminated for cause", citing 40 CFR § 122.41(f). However, the Standard Provisions do not cite 40 CFR § 122.62 or provide that any such modification, revocation or reissuance may only be carried out upon prior notice and hearing. See Water Code § 13263 (regional board, "after any necessary hearing", may prescribe requirements for waste discharges). The Standard Provisions should make clear that any modification, revocation or reissuance of the Order can only be accomplished at a noticed public hearing, with opportunity for comment.

Attachment 8: District-Specific Comments

DISTRICT-SPECIFIC COMMENTS OF THE RIVERSIDE COUNTY FLOOD CONTROL AND WATER CONSERVATION DISTRICT ON TENTATIVE ORDER NO. R9-2010-0016, WASTE DISCHARGE REQUIREMENTS FOR DISCHARGES FROM THE MUNICIPAL SEPARATE STORM SEWER SYSTEMS (MS4s) DRAINING THE COUNTY OF RIVERSIDE

The following comments are made by the Riverside County Flood Control and Water Conservation District (District) with respect to District-specific issues raised by the above referenced Tentative Order (Order) as the Order pertains to the District. These comments are in addition to the comments made by the District and on behalf of the other Copermittees, the County of Riverside and the Cities of Menifee (to the extent that this City will remain as a Copermittee under the Order), Murrieta, Temecula and Wildomar. We also understand that the County and the individual Cities will be filing comments on the Order under separate cover. These comments are intended to supplement those comments filed by the District on behalf of itself and the other Copermittees.

The District reserves the right to make additional comments on the Order prior to the close of the public hearing to adopt the Order.

The focus of these comments is to apprise Regional Board staff of the limited jurisdiction of the District within the Santa Margarita Region and to suggest language clarifying the requirements of the Order to reflect the District's limited jurisdiction. While aspects of the Order clearly apply to the District as an owner and operator of the Municipal Separate Storm Sewer System (MS4) serving the watershed, because of the limited nature of the District's jurisdiction over land areas within the watershed, many cannot. For example, the District, unlike other Copermittees, does not control activities on land not directly owned by the District, nor does it have ordinances or issue permits governing the use of such land. The District simply does not have statutory authority to govern the activities of the residents within a municipal area, unlike the other Copermittees.

Thus, a number of the provisions in the Order are not applicable to the District in the same manner and some are entirely not applicable. This letter highlights those provisions. The comments noted below also are reflected in the redline of the Order submitted with these and other comment white papers.

Comments on Findings

1. Need for New Finding B.2: Section B in the findings describes the regulated parties. The District requests a new finding B.2, which provides as follows:

The Riverside County Flood Control and Water Conservation District (District) is not a municipality but rather operates various elements of the MS4 system within the San Diego Region in the form of flood control structures, including channels. Such channels and other flood control structures have been constructed and are operated by the District in accordance with its statutory obligations established by the Legislature in California Water Code App. § 48-9, to "control the flood and storm waters of said district" and to save and conserve in any manner all or any of such waters and protect from damage from such flood or storm waters the watercourses, watersheds, public highways, life and property in said district." Water Code App. § 48-9(8). As

Attachment 8: District-Specific Comments

a creature of state law, and not a municipal corporation, the District does not exercise jurisdiction over land areas within the San Diego Region and the activities carried out on those land areas outside of its limited rights-of-way. Please see redline.

2. **Findings, Section D.3:** This section of the Findings referring to "Construction and Existing Development" is of limited applicability to the District, since the only construction projects that would be overseen by the District are of or within its own facilities. The redline sets forth a change to clarify this limited applicability.

COMMENTS ON DIRECTIVES

1. **Section F.1.a:** The District, as a non-municipality, does not prepare a General Plan or equivalent because it does not govern development within a geographical area. Thus, the requirements of this section of the Order are not applicable to it. Please see redline.

2. **Section F.1.d.(4)(a)(iii):** Since the District, as a non-municipality, does not have land use codes, policies and ordinances, this provision, relating to the removal of "barriers to LID implementation," is not applicable to it. Please see redline.

3. **Section F.1.d.(9):** The only Priority Development Projects (PDP) relevant to the District would be the District's owned non-flood control channel projects, since it has no authority to permit private or non-District facilities and exercises jurisdiction over no private land areas within the watershed, and because the construction of flood control channels is subject to the jurisdiction of the U.S. Army Corps of Engineers through the Clean Water Act Section 404 permit program, not the NPDES permit program under Section 402 of the Clean Water Act. Thus, this directive, which requires the verification of compliance by third parties with Standard Stormwater Mitigation Plan (SSMP) requirements, is not applicable to the District. Please see redline.

4. **Section F.1.e:** As noted above, the only PDPs over which the District would have authority are its own projects. Thus, this directive, which requires inspection of BMPs at PDPs constructed by third parties, is not applicable to the District. Please see redline.

5. **Section F.1.g:** Since the District is not a municipality, and does not permit third parties to build development projects, this provision is not applicable to it. (It should be noted that this directive also has been objected to by the District on behalf of itself and the other Copermittees.)

6. **Sections F.2, F.2.a and F.2.f:** These directives require each Copermittee to comply with each of the requirements of the section, to review and update its grading and other ordinances, and implement an enforcement process for Construction sites. These requirements are not applicable to the District in the same manner as the other Copermittees, as the District is not a municipality and does not issue grading or other permits for private land use activities. Please see redline.

7. **Sections F.3.b-c:** These directives, which require the development of commercial/industrial and residential programs, are applicable to a municipality but not to the District, which does not have land area occupied by either commercial/industrial or residential developments. Such requirements may be applicable to the municipal Copermittees, but not to the District, which only operates MS4 within the

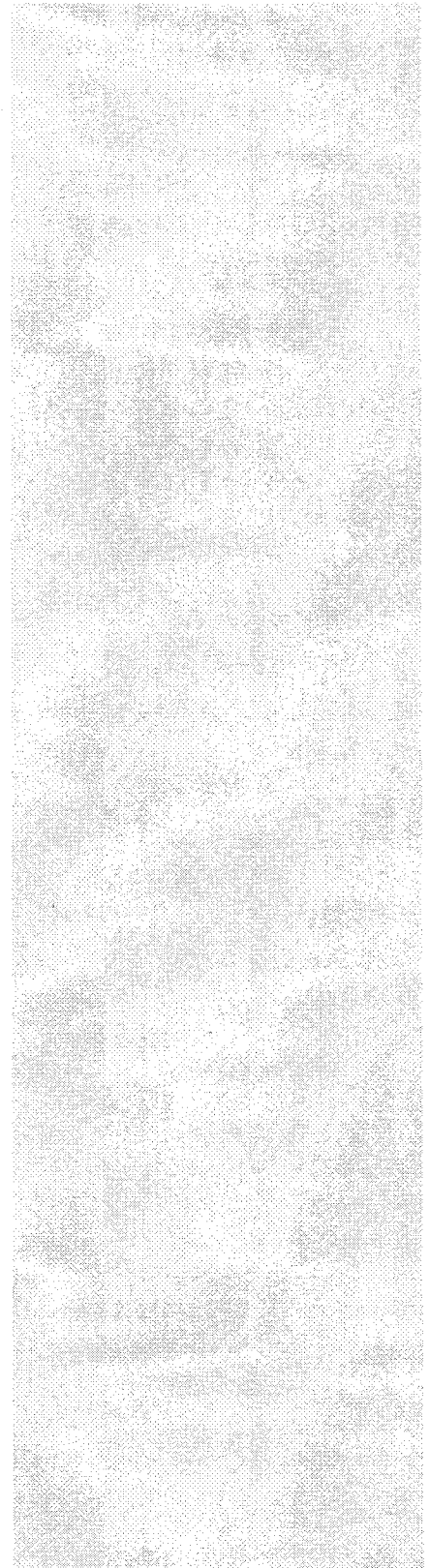
Attachment 8: District-Specific Comments

Permit area. The District's rights-of-way are limited to that which is necessary to properly operate flood control infrastructure. Please see redline.

8. Section F.3.d: This directive requires development of a retrofitting program for "municipal, industrial, commercial and residential" areas of development. The District only maintains MS4 facilities within the Santa Margarita Region, and does not have jurisdiction over other areas of development. The Order should make clear that any retrofitting requirements (which are the subject of separate comments by the District on behalf of other Copermittees) apply only to development with the jurisdiction of the Copermittee. Clarifying changes are set forth in the redline.

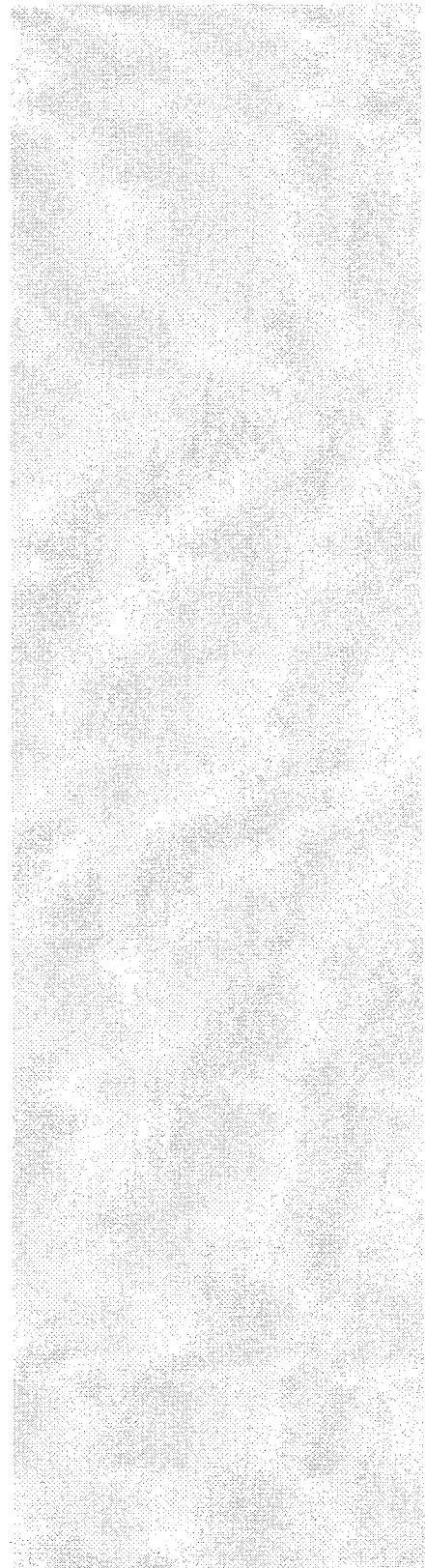
9. Section F.6: This directive contains requirements for education of various target communities, including commercial and industrial owners and operators and residential communities, most of which are not within the jurisdiction of the District. The Order should make clear that such educational programs must be consistent with the jurisdiction of the Copermittees. Clarifying changes are set forth in the redline.

**Attachment 9: Santa Margarita Region MS4
Copermittees Comments on
Tentative Order R9-2010-0016 and Attachment E**



**California Regional Water Quality Control Board
San Diego Region**

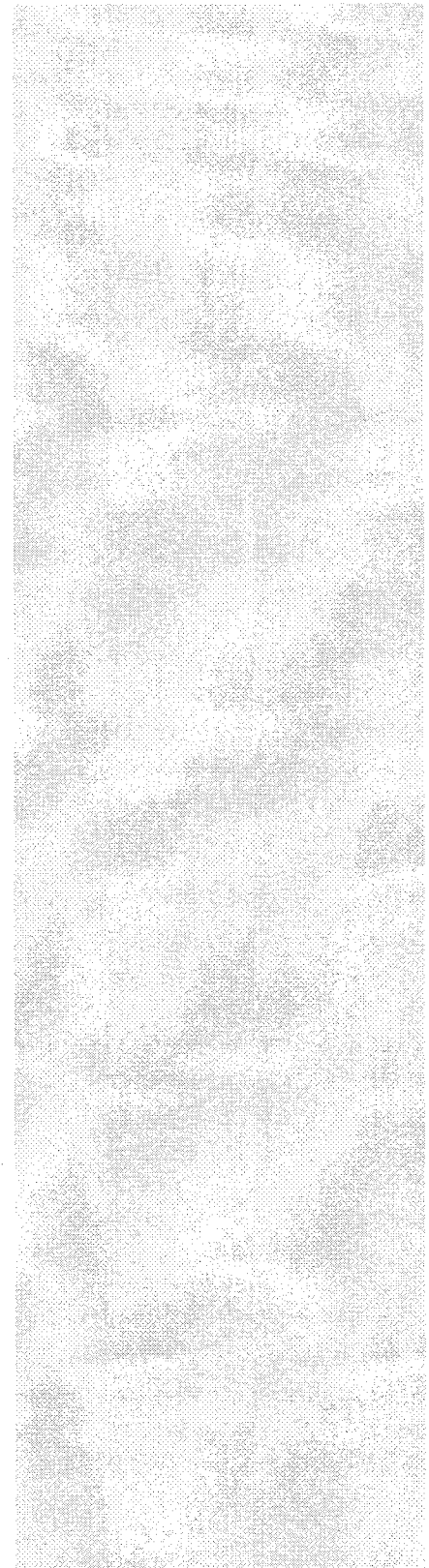
**Waste Discharge Requirements for
Discharges from the
Municipal Separate Storm Sewer Systems (MS4s)
Draining the County of Riverside, the Incorporated
Cities of Riverside County, and the Riverside
County Flood Control and Water Conservation
District within the San Diego Region**



Tentative Order No. R9-2010-0016
NPDES NO. CAS0108740

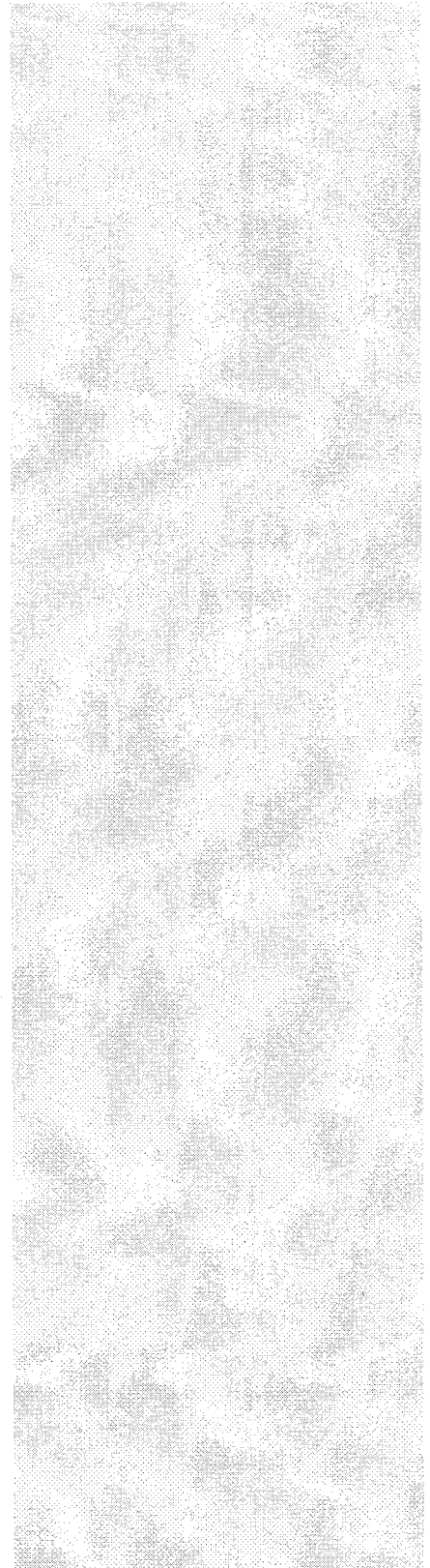
October 13, 2010

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
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To request copies of the Riverside County Municipal Storm Water Permit, please contact Ben Neill, Water Resources Control Engineer at (858) 467 – 2983, bneill@waterboards.ca.gov

Documents also are available at: <http://www.waterboards.ca.gov/sandiego>



**Waste Discharge Requirements for
Discharges from the
Municipal Separate Storm Sewer Systems (MS4s)
Draining the County of Riverside, the Incorporated Cities of
Riverside County, and the Riverside County Flood Control
and Water Conservation District within the San Diego Region**

Adopted by the
California Regional Water Quality Control Board
San Diego Region
on October 13, 2010

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
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STATE OF CALIFORNIA
ARNOLD SCHWARZENEGGER, Governor
LINDA S. ADAMS, Agency Secretary, California Environmental Protection Agency



**California Regional Water Quality Control Board
San Diego Region**

David King <i>Chair</i>	Recreation / Wildlife
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Eric Anderson	Irrigated Agriculture
Wayne Rayfield	Water Quality
George Loveland	Water Supply
Marc Luker	Undesignated (Public)

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Attachment A – Basin Plan Prohibitions

Attachment B – Standard Provisions, Reporting Requirements, and Notifications

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Attachment E – Receiving Waters And MS4 Discharge Monitoring And Reporting
Program No. R9-2010-0016

Attachment F – Data

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The California Regional Water Quality Control Board, San Diego Region (hereinafter San Diego Water Board), finds that:

A. BASIS FOR THE ORDER

1. This Order is based on the federal Clean Water Act (CWA), the Porter-Cologne Water Quality Control Act (Division 7 of the Water Code, commencing with Section 13000), applicable State and federal regulations, all applicable provisions of statewide Water Quality Control Plans and Policies adopted by the State Water Resources Control Board (State Water Board), the Water Quality Control Plan for the San Diego Basin adopted by the San Diego Water Board (Basin Plan), the California Toxics Rule, and the California Toxics Rule Implementation Plan.
2. This Order reissues National Pollutant Discharge Elimination System (NPDES) Permit No. CAS0108766, which was first adopted by the San Diego Water Board on July 16, 1990 (Order No. 90-38), and then reissued on May 13, 1998 (Order No. 98-02). On May 26, 1998, the United States Environmental Protection Agency (USEPA), Region IX, objected to Order No. 98-02 due to concerns regarding Receiving Water Limitations (RWL) language. The USEPA concluded that the RWL language in the permit did not comply with the CWA and its implementing regulations. On April 27, 1999, the USEPA reissued the MS4 permit, which the San Diego Water Board adopted as Addendum No. 1 to Order No. 98-02 on November 8, 2000. On July 14, 2004, the San Diego Water Board adopted the third term MS4 permit, Order No. R9-2004-001. On January 15, 2009, the Riverside County Flood Control and Water Conservation District (RCFCD), as the Principal Copermittee, submitted a Report of Waste Discharge (ROWD) for reissuance of the municipal separate storm sewer system (MS4) Permit.
3. This Order is consistent with the following precedential Orders adopted by the State Water Board addressing MS4 NPDES Permits: Order 99-05, Order WQ-2000-11, Order WQ 2001-15, Order WQO 2002-0014, and ~~Order WQ-2009-0008 (SWRCB/OCC FILE A-1780).~~
4. The Fact Sheet / Technical Report for the Order No. R9-2010-0016, NPDES No. CAS0108766, Waste Discharge Requirements for Discharges from the MS4s Draining the County of Riverside, the Incorporated Cities of Riverside County, and the Riverside County Flood Control and Water Conservation District within the San Diego Region, includes cited regulatory and legal references and additional explanatory information and data in support of the requirements of this Order. ~~This information, including any supplements thereto, and any response to comments on the Tentative Orders, is hereby incorporated by reference into these findings.~~

Comment [CP1]: This order has been vacated and can no longer be referenced

Comment [CP2]: This is inappropriate. The information in the fact sheet is/are not findings, they are explanations. Further a finding cannot be created through a response to comments.

FINDINGS A: BASIS FOR THE ORDER

DRAFT**B. REGULATED PARTIES**

1. Each of the persons in Table 1 below, hereinafter called Copermitees or dischargers, owns or operates an MS4, through which it discharges into waters of the United States (U.S.) within the San Diego Region. These MS4s fall into one or more of the following categories: (1) a medium or large MS4 that services a population of greater than 100,000 or 250,000 respectively; or (2) a small MS4 that is "interrelated" to a medium or large MS4; or (3) an MS4 that contributes to a violation of a water quality standard; or (4) an MS4 which is a significant contributor of pollutants to waters of the U.S.

Table 1. Municipal Copermitees

1. City of Murrieta	4. County of Riverside
2. City of Temecula	5. Riverside County Flood Control and Water Conservation District
3. City of Wildomar	
6. City of Menifee ¹	

The Cities of Murrieta, Menifee and Wildomar also discharge into the waters of the U.S. in the California Regional Water Quality Control Board, Santa Ana Region (Santa Ana Water Board), so are located partially within both the San Diego and Santa Ana Water Board boundaries. As allowed by California Water Code (CWC) §13228, these Cities submitted written requests to be regulated for MS4 purposes under a permit adopted by only one Water Board. As authorized by CWC §13228 and pursuant to a written agreement between the San Diego Water Board and the Santa Ana Water Board, the Cities of Murrieta and Wildomar are wholly regulated by the San Diego Water Board under this Order, including those portions of the Cities jurisdiction not within the San Diego Water Board's region. Similarly, the City of Menifee is wholly regulated by the Santa Ana Water Board under Order No. R8-2010-0033, including those portions of the City of Menifee within the San Diego Water Board's region.¹

2. The Riverside County Flood Control and Water Conservation District (District) is not a municipality but rather operates various elements of the MS4 system within the San Diego Region in the form of flood control structures, including channels. Such channels and other flood control structures have been constructed and are operated by the District in accordance with its statutory obligations established by the Legislature in California Water Code App. § 48-9, to "control the flood and storm waters of said district" and to save and conserve in any manner all or any of such waters and protect from damage from such flood or storm waters the watercourses watersheds, public highways, life and property in said district." Water Code App. § 48-9(8). As a creature of state law, and not a municipal corporation, the District

¹ Until an agreement is finalized, the City of Menifee is included as a Copermitee in this Order.

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~~does not exercise jurisdiction over land areas within the San Diego Region and the activities carried out on those land areas.~~

C. DISCHARGE CHARACTERISTICS

1. Discharges from the MS4 may contain waste, as defined in the CWC, and pollutants that adversely affect the quality of the waters of the State. The discharge of pollutants from an MS4 is a "discharge of pollutants from a point source" into waters of the U.S. as defined in the CWA.
2. MS4 storm water and non-storm water discharges are likely to contain pollutants that cause or threaten to cause a violation of water quality standards, as outlined in the Basin Plan. Storm water and non-storm water discharges from the MS4 are subject to the conditions and requirements established in the Basin Plan for point source discharges.
3. The most common categories of pollutants in runoff include total suspended solids, sediment, pathogens (e.g., bacteria, viruses, protozoa), heavy metals (e.g., copper, lead, zinc and cadmium), petroleum products and polynuclear aromatic hydrocarbons, synthetic organics (e.g., pesticides, herbicides, and PCBs), nutrients (e.g., nitrogen and phosphorus fertilizers), oxygen-demanding substances (decaying vegetation, animal waste), detergents, and trash.
4. The discharge of pollutants and/or increased flows from MS4s may cause or threaten to cause the concentration of pollutants to exceed applicable receiving water quality objectives and/or impair or threaten to impair designated beneficial uses resulting in a condition of pollution (i.e., unreasonable impairment of water quality for designated beneficial uses), contamination, or nuisance.
5. Pollutants in runoff can threaten and adversely affect human health. ~~Human illnesses have been clearly linked to~~ can be caused by recreating near storm drains flowing to receiving waters. Also, runoff pollutants in receiving waters can bioaccumulate in the tissues of invertebrates and fish, which may be eventually consumed by humans.
6. Runoff discharges from MS4s often contain pollutants that cause toxicity to aquatic organisms (i.e., adverse responses of organisms to chemicals or physical agents ranging from mortality to physiological responses such as impaired reproduction or growth anomalies). Toxic pollutants impact the overall quality of aquatic systems and beneficial uses of receiving waters.
7. The Copermitees' MS4 discharges runoff into lakes, drinking water reservoirs, rivers, streams, creeks, bays, estuaries, coastal lagoons, the Pacific Ocean, and tributaries thereto within one of the eleven hydrologic units (Santa Margarita Hydrologic Unit) comprising the San Diego Region as shown in Table 2. Some of

Comment [DB3]: See legal comments in Attachment 8

Comment [CP4]: No link has been demonstrated within this watershed. (Partially due to lack of recreation in receiving waters)

The findings should be accurate for reflective of the specific area the permit is regulating.

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the receiving water bodies have been designated as impaired by the San Diego Water Board in 2009 pursuant to CWA section 303(d).

Table 2. Common Watersheds and CWA Section 303(d) Impaired Waters in the San Diego Region.

Hydrologic Area (HA) or Hydrologic Subarea (HSA) of the Santa Margarita Hydrologic Unit	Major Receiving Water Bodies	303(d) Pollutant(s)/stressor or Water Quality Effect ²
DeLuz Creek HSA (902.21)	De Luz Creek	Iron, Manganese, Nitrogen, Sulfates
Murrieta HSA (902.32)	Long Canyon Creek (tributary to Murrieta Creek)	Chlorpyrifos, E. Coli, Fecal Coliform, Iron, Manganese
Wolf HSA (902.52)	Murrieta Creek	Chlorpyrifos, Copper, Iron, Manganese, Nitrogen, Toxicity
Pauba HSA (902.51)	Redhawk Channel	Chlorpyrifos, Copper, Diazinon, E. Coli, Fecal Coliform, Iron, Manganese, Nitrogen, Phosphorus, Total Dissolved Solids
Gavilan HSA (902.22)	Sandia Creek	Iron, Sulfates
Gertrudis HSA (902.42)	Santa Gertrudis Creek	Chlorpyrifos, Copper, E. Coli, Fecal Coliform, Iron, Phosphorus
Lower Ysidora HSA (902.11)	Santa Margarita Lagoon	Eutrophic
Lower Ysidora HSA (902.11)	Santa Margarita River (Lower)	Enterococcus, Fecal Coliform, Phosphorus, Total Nitrogen as N
Gavilan HSA	Santa Margarita River (Upper)	Toxicity

² The listed 303(d) pollutant(s) do not necessarily reflect impairment of the entire corresponding WMA or all corresponding major surface water bodies. The specific impaired portions of each WMA are listed in the State Water Resources Control Board's 2008 Section 303(d) List of Water Quality Limited Segments.

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Table 2. Common Watersheds and CWA Section 303(d) Impaired Waters in the San Diego Region.

Hydrologic Area (HA) or Hydrologic Subarea (HSA) of the Santa Margarita Hydrologic Unit	Major Receiving Water Bodies	303(d) Pollutant(s)/stressor or Water Quality Effect ²
(902.22)		
Pauba HSA (902.51)	Temecula Creek	Chlorpyrifos, Copper, Phosphorus, Total Dissolved Solids, Toxicity
French HSA (902.33)	Warm Springs Creek (Riverside County)	Chlorpyrifos, E. Coli, Fecal Coliform, Iron, Manganese, Phosphorus, Total Nitrogen as N

8. Trash is a persistent pollutant that can enter receiving waters from the MS4, accumulate, and be transported downstream into receiving waters over time. Trash poses a serious threat to the beneficial uses of the receiving waters, including, but not limited to, human health, rare and endangered species, navigation and human recreation.

9. The Copermittees' water quality monitoring data submitted to date documents persistent violations/exceedances of Basin Plan water quality objectives for various runoff-related pollutants (indicator bacteria, dissolved solids, turbidity, metals, pesticides, etc.) at various watershed monitoring stations. Persistent toxicity has also been observed at some watershed monitoring stations. In addition, bioassessment data indicate that the majority of the monitored receiving waters have Poor to Very Poor Index of Biotic Integrity ratings. In sum, the above findings indicate that runoff discharges are causing or contributing to water quality impairments, and are a leading cause of such impairments in Riverside County.

10. When natural vegetated pervious ground cover is converted to impervious surfaces such as paved highways, streets, rooftops, and parking lots, the natural absorption and infiltration abilities of the land are lost. Therefore, runoff leaving a developed area is can be significantly greater in runoff volume, velocity, and peak flow rate than pre-development runoff from the same area. Runoff durations can also increase as a result of flood control and other efforts to control peak flow rates. Increased volume, velocity, rate, and duration of runoff, and decreased natural clean sediment loads, greatly accelerate the erosion of downstream natural channels. Significant declines in the biological integrity and physical habitat of streams and other receiving waters have been found to occur with as little as a 3-5 percent conversion from

Comment [CP5]: It is only a violation if the pollutant has not been reduced to the MEP in accordance with a Permit.

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natural to impervious surfaces. The increased runoff characteristics from new development must be controlled to protect against increased erosion of channel beds and banks, sediment pollutant generation, or other impacts to beneficial uses and stream habitat due to increased erosive force.

11. Development creates new pollution sources as human population density increases and brings with it proportionately higher levels of car emissions, car maintenance wastes, municipal sewage, pesticides, household hazardous wastes, pet wastes, trash, etc. which can either be washed or directly dumped into the MS4. As a result, the runoff leaving the developed urban area is typically significantly greater in pollutant load than the pre-development runoff from the same area. These increased pollutant loads must be controlled to protect downstream receiving water quality.
12. Development and urbanization especially threaten environmentally sensitive areas (ESAs), such as water bodies designated as supporting a RARE beneficial use (supporting rare, threatened or endangered species) and CWA 303(d)-impaired water bodies. Such areas have a much lower capacity to withstand pollutant loads than other, more sensitive areas. In essence, development that is ordinarily insignificant in its impact on the environment may become significant in a particularly sensitive environment. Therefore, additional controls to reduce storm water pollutants from new and existing development may be necessary for areas adjacent to or discharging directly to an ESA.
13. Although dependent on several factors, the risks typically associated with properly managed infiltration of runoff (especially from residential land use areas) are not significant. The risks associated with infiltration can be managed by many techniques, including (1) designing landscape drainage features that promote infiltration of runoff, but do not "inject" runoff (injection bypasses the natural processes of filtering and transformation that occur in the soil); (2) taking reasonable steps to prevent the illegal disposal of wastes; (3) protecting footings and foundations; (4) ensuring that each drainage feature is adequately maintained in perpetuity; and (5) pretreatment.
- ~~14. Non-storm water (dry weather) discharge from the MS4 is not considered a storm water (wet weather) discharge and therefore is not subject to regulation under the Maximum Extent Practicable (MEP) standard from CWA 402(p)(3)(B)(iii), which is explicitly for "Municipal ... Stormwater Discharges (emphasis added)" from the MS4. Rather, non-storm water discharges into the storm sewers, per CWA 402(p)(3)(B)(ii), are to be effectively prohibited. Such dry weather non-storm water discharges have been shown to contribute significant levels of pollutants and flow in arid, developed Southern California watersheds and are to be effectively prohibited under the CWA.~~
15. Non-storm water discharges to the MS4 granted an influent exception [i.e., which are exempt from the effective prohibition requirement set forth in CWA section 402(p)(3)(B)(ii)] under 40 CFR 122.26 are included within this Order. Any exempted

Comment [DB6]: See legal comments in Attachment 7. Discharges of pollutants from the MS4, of whatever source, are subject to the MEP standard. The MEP standard applies to municipal discharges, not to only municipal storm water discharges.

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discharges identified by Copermitees as a source of pollutants are subsequently required to be *addressed* (emphasis added) as illicit discharges through prohibition and incorporation into existing IC/ID programs. Furthermore, the USEPA contemplates that permitting agencies such as the San Diego Water Board may also identify exempted discharges as a source of pollutants required to be addressed as illicit discharges (See VOI. 55 Fed. Reg. 48037). ~~The San Diego Water Board and the Copermitees have identified landscape irrigation, irrigation water and lawn water, previously exempted discharges, as a source of pollutants and conveyance of pollutants to waters of the U.S.~~

46.14.

Comment [CP7]: This is a false statement – the Copermitees have not made this determination (or 'identification'). See also comments within the letter and attachments thereto

D. RUNOFF MANAGEMENT PROGRAMS**1. General**

- a. This Order specifies requirements necessary for the Copermitees to reduce the discharge of pollutants in storm water to the MEP. However, since MEP is a dynamic performance standard, which evolves over time as runoff management knowledge increases, the Copermitees' runoff management programs *must continually* be assessed and modified to incorporate improved programs, control measures, best management practices (BMPs), etc. in order to achieve the evolving MEP standard. Absent evidence to the contrary, this continual assessment, revision, and improvement of runoff management program implementation is expected to ultimately achieve compliance with water quality standards in the Region. However, it is recognized that there are other sources of pollutants into the receiving waters other than the Copermitees' MS4, and there are certain activities and sources that generate pollutants present in MS4 discharges may be beyond the ability of Copermitees to prevent or eliminate. Examples of these activities and sources include, but are not limited to: emissions from internal combustion engines, brake pad wear and tear, atmospheric deposition, bacteria and wildlife and leaching of naturally occurring nutrients and minerals from local soils. This Order is not intended to address these background or naturally occurring pollutants or flows.
- b. The Copermitees have generally been implementing the jurisdictional runoff management programs (JRMPs) required pursuant to Order No. R9-2004-001 since July 14, 2005. Prior to that, the Copermitees were regulated by Order No. 98-02, since May 13, 1998. MS4 discharges, however, continue to cause or contribute to violations of water quality standards as evidenced by the Copermitees' monitoring results.
- c. This Order contains new or modified requirements that are necessary to improve Copermitees' efforts to reduce the discharge of pollutants in storm water runoff to the MEP and achieve water quality standards. Some of the new or modified requirements, such as the revised Watershed Water Quality Workplan (Watershed Workplan) section, are designed to specifically address high priority