

## **Comments Regarding Some Changes Suggested at the Public Hearing on the Adoption of Tentative Order R9-2002-0001**

- 1. The Copermittees requested additional time to develop and implement the Jurisdictional Urban Runoff Management Program (Jurisdictional URMP) Document. Several of the municipalities have only recently incorporated and may not have the resources to comply with all of the requirements of the Tentative Order within 365 days.**

The relevant sections of the Tentative Order are B.3.c, B.4, and D.2 (timed to coincide with the submittal of the Jurisdictional URMP Document), F.1.b.2, G, H.2.d, O.4, O.5.a, O.5.b.i, O.5.b.j, and the corresponding entries in Tables 5 and 6.

The current deadline for development and implementation of the Jurisdictional URMP Document specified in Tentative Order R9-2002-0001 was based upon the deadline in the San Diego Municipal Storm Water Permit, which was extended by the Regional Board from 180 days to 365 days in response to comments on the Tentative Order from the San Diego Copermittees that 180 days was not sufficient to complete the project. The San Diego County Copermittees report that they will comply with the 365 day deadline for the submittal and implementation of the Jurisdictional URMP Document.

Many of the requirements of the Jurisdictional URMP are required in the existing program. For example, the Copermittees were required to develop and implement or require the implementation of BMPs for residential, commercial, industrial, construction, and municipal land uses and activities. Implicitly, the Copermittees have inventoried and prioritized construction, industrial, municipal, residential, and commercial sites for implementation of these BMPs. The Copermittees are also required to perform inspections of construction and industrial sites and facilities. The Copermittees have also been required under the Federal NPDES Storm Water Regulations (40 CFR 122.26(d)(2)(iv)(A)), Order No. 90-38, and section 7 of the 1993 DAMP to describe and implement structural and source control measures to reduce pollutants from runoff from residential and commercial areas.

Deferral of implementation of requirements required since 1990 will also defer water quality improvements expected from implementation of the Order. With respect to municipalities that have recently incorporated, these municipalities have assumed the responsibility for municipal storm water management within their jurisdictions previously held by the County of Orange. In most cases these municipalities are not developing entirely new programs, but reviewing, revising and implementing existing programs.

**2. Many commenters argued that the Non-Storm Water Discharge Prohibitions (section B) are too stringent and should exempt residential driveway washing.**

The relevant sections of the Tentative Order are B.1 and B.2. Section D.1.a lists examples of illicit discharges for which the Copermittees must certify they have the legal authority to prohibit.

The prohibitions and requirements in section B of the Tentative Order are mandated by the Clean Water Act and Federal NPDES Storm Water Regulations. The Federal NPDES Regulations specifically identify certain discharge categories as de-minimis discharges that may be excluded from regulation unless they are determined to be significant sources of pollutants. The list of excluded discharges does not include wash water from driveway washing. Substances and materials that may be washed off driveways can have an acute or cumulative impact on receiving waters (e.g. automotive fluids, sediment, landscape clippings, and acids or detergents used to whiten driveways, etc). Although municipal storm water permits adopted elsewhere in the State do provide a mechanism for adding new de-minimis discharge categories, Federal NPDES Regulations do not provide discretion for the RWQCB to add new discharge categories to the list of de-minimis discharges.

Attached are the relevant sections of the Code of Federal Regulations (40 CFR 122.26(d)(2)(i)(B-F) and 40 CFR 122.26(d)(2)(iv)(B).

**3. Some commenters described the Tentative Order as discouraging restoration of streams and wetlands and restricting the use of constructed or artificial wetlands as treatment BMPs for urban runoff.**

The relevant sections of the Tentative Order are Finding 8 and Finding 11.

In conformance with the Clean Water Act and Federal NPDES Storm Water Regulations, the Tentative Order requires that the prevention and reduction of pollutants in urban runoff to the MEP standard must occur prior to discharge into receiving waters. Appropriation of wetlands or streams as the treatment site for urban runoff may, in fact, result in the waiver of the MEP standard and the loss of beneficial uses of those water bodies. Moreover, the Tentative Order is not intended to authorize the modification of streams or natural wetlands to treat pollutants in urban runoff. Rather the Tentative Order is intended to provide a framework for BMP programs to prevent and reduce to the MEP pollutants to protect streams and wetlands with beneficial uses.

Nonetheless, the Tentative Order does not discourage restoration of wetlands or streams where such activities restore streams and wetlands to a more natural, pre-development condition. Restoration of modified, lost, or damaged aquatic habitats may provide a “buffer” against excursions above water quality objectives through the concomitant restoration of the assimilative capacity of such areas. The restoration of these areas into healthy, robust ecosystems can facilitate the assimilation of pollutants or contaminants in

runoff flows, for which BMPs have already been implemented to the MEP standard, without the loss of the biological, chemical, and physical integrity the Tentative Order is intended to protect. However, use of assimilative capacity in receiving waters for the reduction of wastes in discharges is restricted by the Porter-Cologne Act and the Basin Plan and must include a consideration of the treatment standard applicable to urban runoff.

Some of the issues surrounding the use of artificial wetlands as treatment BMPs for urban runoff are broader than the scope of the Tentative Order and should be addressed at a policy level in the Water Quality Control Plan (Basin Plan) for the San Diego Region. There is a question as to what (if any) beneficial uses and water quality objectives should apply to artificial wetlands used to treat urban runoff. In addition, artificial wetland systems will periodically require maintenance that in some cases may require a Clean Water Act section 404 permit from the Army Corps of Engineers. In some cases, these activities may have a significant water quality impact to downstream areas and may adversely impact threatened or endangered species that utilize these areas.

Furthermore, the use of natural streams and wetlands as treatment sites for urban runoff raises additional issues. If streams and wetlands are modified to enhance the removal of pollutants, to what degree must these water bodies continue to support beneficial uses? Should water quality objectives continue to apply to these water bodies and their tributaries following modification? That is, if whole segments of streams are modified to accommodate urban runoff or if streams and wetlands in the immediate vicinity of storm drain outfalls are considered to be analogous to “mixing zones,” at what point does the entire stream (and its tributaries) constitute a mixing or treatment zone in which beneficial uses are not supported and water quality objectives no longer apply? These and other issues need more careful study and should be addressed at a policy level in the Basin Plan.

The Administrative Record for the Tentative Order provides sufficient discussion of the role of restoration of lost, damaged, or modified habitat and the role of assimilative capacity in receiving waters in compliance with receiving water quality objectives by municipal storm water permittees.

Prior to the development of a policy or policies regarding the use of artificial or natural wetlands for the treatment of urban runoff, wetlands where these issues are raised will have to be evaluated on a case by case basis.

### **3. Several commenters requested deletion of the “into the MS4” language throughout the Tentative Order.**

The Tentative Order was previously revised to conform to the changes in Order No. 2001-01 ordered by the SWRCB in Order WQ 2001-15 regarding the requirements to control discharges into the MS4.

The use of the “into” language in the following sections conforms to SWRCB and USEPA guidance and is required to satisfy the minimum directives of the Clean Water Act, Federal NPDES Storm Water Regulations, and the San Diego Region Water Quality Control Plan:

- Discharge Prohibitions (sections A.1);
- Non-Storm Water Discharge Prohibitions (section B.1);
- Legal Authority (sections D.1, D.1.a, D.1.c, D.1.d, D.1.e, D.1.g, D.1.h, D.2);
- Illicit Discharge Detection and Elimination Component (section F.5.a, F.5.e, F.5.f, F.5.g, and F.5.i); and
- Submittal of Jurisdictional URMP Document (H.1.a.7.f and H.1.a.7.j)

In some sections of the Tentative Order the “into” language is not necessarily mandated, but is strongly supported by USEPA and SWRCB guidance regarding source identification and pollution prevention. The relevant sections of the Tentative Order are D.1.i, section E (Table 3), F.1.a.2, F.3.a.5, F.3.a.6, F.3.c.2.w, F.3.c.3.b, F.3.d.2, F.3.d.3, and F.6.b. In addition, the following sections in F.1 include language that could be interpreted as applying to both discharges into and from the MS4: F.1.a.8, F.1.b, F.1.b.1, F.1.b.2, F.1.b.2.b, and F.1.b.2.b.xiv.

Deletion of the requirement to address discharges into the MS4 would severely limit the effectiveness of the Tentative Order to achieve the reduction of pollutant loadings to receiving waters from MS4 discharges. In very few cases are discharges into MS4s treated prior to discharge into receiving waters. In addition, historic development has made use of urban streams as components of the MS4. The pollution prevention and source control requirements of the Tentative Order are strongly supported by the USEPA and the SWRCB. The SWRCB, in its review of Order No. 2001-01 stated “in most cases it is more practical and effective to prevent and control pollution at its source. [...] It is important to emphasize that dischargers into MS4s continue to be required to implement a full range of BMPs, including source control. In particular, dischargers subject to industrial and construction permits must comply with all conditions in those permits prior to discharging storm water into MS4s.”

#### **5. Some of the Copermittees stated they should not be required to inspect construction and industrial facilities.**

The relevant sections of the Tentative Order are Findings 19, 22, D.1.h, E (Table 3), F.2, F.2.g, F.3.b, and F.3.b.6.

The requirements for the Copermittees to inspect and require implementation of BMPs to the MEP for all discharges for industrial and construction facilities is addressed at length in the Fact Sheet/Technical Report and the Response to Comments Document. These requirements are mandated by the Federal NPDES Storm Water Regulations.