

**Building Industry Legal Defense Foundation  
 Building Industry Association of Greater Los Angeles and Ventura Counties  
 Major Issues and Comments on the  
 12/27/06 Draft NPDES MS4 Permit for  
 Ventura County, Ventura Watershed Protection District, and Incorporated Cities**

General Issues	Specific Requirements/Concerns	Comments
		<p>SWRCB or RWQCB has formally approved BMPs, they will become the primary mechanism for meeting water quality standards. While compliance with BMP requirements cannot excuse a violation of water quality standards, the RWQCBs may rely on their implementation of BMPs to demonstrate compliance with standards.” p. 56. Thus, the incorporation of MALs in this fashion in the <i>Draft Permit</i> is inconsistent with the State Board NPS program.</p> <ul style="list-style-type: none"> <li>• Moreover, the State Board has ruled that the iterative approach to BMP implementation and adjustment, focusing on timely improvement of BMPs, is appropriate for stormwater quality control, and the State Board has determined that it is generally not appropriate to require compliance with numeric effluent limitations. <i>State Water Resources Control Board, Order WQ 2001-15, p. 8.</i></li> <li>• The Phase II Regulations similarly emphasize focused attention to requiring implementation of BMPs, rather than imposition of numeric effluent limits in stormwater permits. See cases and regulations cited in Comment 6 above.<sup>3</sup></li> </ul>

<sup>3</sup>In addition to the authority discussed in comment 6, the Phase II Municipal Storm Water Regulations provide that if an MS4 operator “implements the six minimum control measures in § 122.34(b) and the discharges are determined to cause or contribute to non-attainment of an applicable water quality standard, the operator needs to expand or better tailor its BMPs within the scope of the six minimum control measures. EPA envisions that this process will occur during the first two to three permit terms.” Federal Register, Vol. 64, No. 235. (Wednesday, December 8, 1999). This suggests an iterative approach where if exceedances are determined to exist that additional BMPs are to be implemented as opposed to finding that exceedances are violations of the *Draft Permit*. Incorporating MALs as set forth in the *Draft Permit* goes beyond the mandate of the federal Clean Water Act and its

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		<ul style="list-style-type: none"> <li>• Incorporating the MALs in the manner set forth in the <i>Draft Permit</i> is inconsistent with the Blue Ribbon report, a proper interpretation of the MEP Standard, EPA's Phase II regulations, and State Board policy for storm water permits. The current MAL provisions also improperly preempt the State Board's policy making function regarding incorporation of numeric effluent limits into storm water permits based upon the Blue Ribbon report. Therefore, MALs, if they are retained, should be reconstituted as true action levels. As recommended by the Geosyntec memo, the action levels should solely trigger review and implementation of more effective BMPs, to the extent that more effective BMPs are available. This type of an approach would be consistent with the approach recommended in the Blue Ribbon Panel Report and would be consistent with law and policy guidance. To the creation of <i>action levels</i>, rather than numeric limits, provisions of the <i>Draft Permit</i> stating that exceedances of the MALs constitute a violation of the permit and/or receiving water standards must be deleted, and the Regional Board should expressly limit the consequences of MAL exceedances to triggering new BMPs, to the extent that such BMPs are available.</li> <li>• <b>Comment:</b> The currently proposed MAL values are inappropriately derived and fail to comply with the recommendations of the Blue Ribbon Report. The currently</li> </ul>

implementing regulations to the extent that the *Draft Permit* applies to small MS4s. Since the permit provisions are not severable, the *Draft Permit* should be revised to implement the Phase II regulations with respect to all MS4s regulated.

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		<p>proposed MALs are based upon the median end-of-pipe discharge concentrations observed for the various pollutants derived from the National Stormwater Quality Database (NSQD). There are three problems with this approach to setting action levels. First, the Blue Ribbon Panel Report specifically concludes that action levels should be “upset values” for pollutant concentrations that are “above normal variability.” p. 8. The MAL values in the <i>Draft Permit</i> are median values that do not represent pollutant concentrations that are “upset values” or “above normal variability,” and they are therefore inappropriately low for purposes of establishing an action level. Second, the Blue Ribbon Panel Report recommends that action levels should start in the upper 10<sup>th</sup> percentile for each pollutant concentration. p. 9. The median value is therefore also inappropriately low, as it represents the 50<sup>th</sup> percentile. Third, the MALs are improperly derived from a national database, populated by data that do not correlate with or represent conditions in Ventura County. Therefore, the action limits chosen are not consistent with the Blue Ribbon Report recommended methodology for determining action levels, and should be recalculated to represent the upper 10<sup>th</sup> percentile pollutant concentration based on a database that is representative of local conditions. Options are the Zone 6 data, which is a subset of the NSQD database. Alternatively, data collected pursuant to local storm water monitoring programs should be used. That is the very purpose underlying the storm water program monitoring requirements. Absent the use of local data, the MAL values in the <i>Draft Permit</i> are not</p>

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		<p>appropriately tailored to runoff conditions in Ventura County and are too low to be useful. See analysis of MAL values in the Geosyntec memorandum.</p> <ul style="list-style-type: none"> <li>• <b>Comment:</b> As set forth above, the Blue Ribbon Panel Report concluded that incorporation of numeric effluent limits into municipal storm water permits is not technically feasible for a number of reasons. p. 8. The Regional Board has not provided any information or documentation that would support a determination that compliance with such limits is feasible and evidence presented and analyzed by experts convened by the State Board to look specifically at this issue concluded that in fact such an action was infeasible at this time and that a number of facts must be considered prior to the incorporation of such limits into storm water permits.</li> <li>• <b>Comment:</b> The approach of the <i>Draft Permit</i> with respect to MALs constitutes the imposition of flawed numeric effluent limitations on stormwater discharges. As a result, the <i>Draft Permit</i> does not comply with the recommendations of the Blue Ribbon Report, is technically flawed, and is technically infeasible to implement. Accordingly, as written, the <i>Draft Permit</i> provisions regarding MALs are an improper application of the MEP standard, are arbitrary and capricious, and violate Cal. Water Code Section 13263(a). To address these flaws, the <i>Draft Permit</i> provisions must be revised as recommended in the Geosyntec memorandum.</li> </ul>

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<p>11. Incorporation of numeric limit -- Waste Load Allocations (WLAs)</p>	<p>Contrary to <i>Draft Permit</i> Finding § F.3, p. 21, the <i>Draft Permit</i> merely incorporates numeric receiving water limits as WLAs for particular pollutants/waterbodies, instead of, and without specifying implementation measures. <i>See, e.g., Draft Permit</i>, Part 3, § A, Part 6 §§ 3, 4, pp 91-94.</p>	<ul style="list-style-type: none"> <li>• <b>Comment:</b> 33 U.S.C. § 1342(1)(1) and (p)(3)(B)(iii) and EPA Phase II Municipal Stormwater Regulations require implementation of treatment technologies to meet the MEP standard. Pursuant to these regulations and the federal Clean Water Act, the Regional Board is to provide tools to meet water quality standards and those tools should appear in the <i>Draft Permit</i>.</li> <li>• The Phase II Municipal Storm Water Regulations provide that if an MS4 operator “implements the six minimum control measures in § 122.34(b) and the discharges are determined to cause or contribute to non-attainment of an applicable water quality standard, the operator needs to expand or better tailor its BMPs within the scope of the six minimum control measures. EPA envisions that this process will occur during the first two to three permit terms.” Federal Register, Vol. 64, No. 235.</li> <li>• The State Board “Policy for Implementation and Enforcement of the Non-Point Source Pollution Control Program” (May 2004) provides that a “Key Element” of a NPS program is inclusion of “a description of the MPs and other program elements that are expected to be implemented to ensure attainment of the implementation program’s stated purposes(s).” p. 12. Thus, the focus of the State Board NPS program is on development and implementation of BMPs as part of an iterative process, as opposed to incorporation of specific numeric limits into regulatory programs established to deal with NPS pollution.</li> </ul>

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		<ul style="list-style-type: none"> <li>• In addition, the State Board “<i>Non-Point Source Program Strategy and Implementation Plan, 1998-2013</i>” (January 2000) provides, “RWQCBs will generally refrain from imposing effluent requirements on dischargers who are implementing BMPs in accordance with a waiver of WDRs, an approved MAA, or other SWRCB or RWQCB formal action. Once the SWRCB or RWQCB has formally approved BMPs, they will become the primary mechanism for meeting water quality standards. While compliance with BMP requirements cannot excuse a violation of water quality standards, the RWQCBs may rely on their implementation of BMPs to demonstrate compliance with standards.” p. 56. Thus, the incorporation of numeric limits in this fashion in the <i>Draft Permit</i> is inconsistent with the State Board NPS program.</li> <li>• Contrary to <i>Draft Permit</i> Findings, §F.3, there are no BMPs specified for several of the TMDL WLAs incorporated into the order that “translate” the WLA numeric targets into MS4 requirements that are consistent with assumptions and requirements of the TMDLs.</li> <li>• As a result, these WLA implementation provisions are insufficient under federal law and State Board NPS policy because no mechanisms are provided in the <i>Draft Permit</i> so as to allow the regulated communities to meet the WLAs. Identification of appropriate implementation actions for MS4 operators to meet numeric WLAs is particularly important because (i) all of the WLAs incorporated into the permit are <i>receiving water</i> targets, rather than <i>discharge</i> targets as</li> </ul>

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		<p>envisioned by section 303(d) of the Clean Water Act and the federal regulations, 33 U.S.C. § 1313(d), and (ii) neither the <i>Draft Permit</i> nor the TMDL provisions as incorporated into the <i>Draft Permit</i> currently contain implementation measures applicable to MS4s. The <i>Draft Permit</i> must be amended to incorporate BMPs, management measures and other implementation tools to achieve WLAs to comply with state and federal law, particularly where those tools are not provided in the TMDL implementation plans or the <i>Draft Permit</i>.</p> <ul style="list-style-type: none"> <li>• <b>Comment:</b> The specification of numeric WLAs without identification of BMPs or management measures that will “translate” those WLAs into MS4 Permit requirements are inconsistent with the proper implementation of the MEP standard because there are no <i>available</i>, technologically feasible or cost effective measures specified to implement the WLAs. Therefore adoption of these provisions of the <i>Draft Permit</i> is inconsistent with a proper application of MEP.</li> </ul>
12. Incorporation of numeric limits -- Dewatering	The <i>Draft Permit</i> specifies numeric discharge limitations for dewatering treatment BMPs prior to discharge “into” MS4 systems. Numeric discharge limits are specified for discharges from BMP maintenance addressing 13 pollutants,	<ul style="list-style-type: none"> <li>• <b>Comment.</b> See comment above regarding the invalidity of regulating pollutants discharged “into” storm drains.</li> <li>• <b>Comment:</b> The <i>Draft Permit</i> states that the limits are based upon Basin Plan water quality objectives and EPA Parameter Benchmark Values, but in fact the limits do not appear to be based on these sources. Therefore, the discharge</li> </ul>

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	including bacteria, metals, nutrients, and conventional parameters such as TDS and TSS. <i>See, e.g., Draft Permit Part 4 § G.6.g.3., pp 79-80.</i>	<p>limits chosen are not supported by substantial evidence, and are arbitrary and capricious.</p> <ul style="list-style-type: none"> <li>• <b>Comment:</b> The limits are too stringent a requirement for dewatering treatment BMPs, and therefore this provision of the <i>Draft Permit</i> is an improper application of the MEP standard. See Geosyntec technical memorandum.</li> <li>• <b>Comment:</b> To cure the deficiencies in the <i>Draft Permit</i>, these provisions need to be revised as recommended in the Geosyntec memorandum to specify a feasible BMP that can be used to control discharges from BMPs during maintenance activities.</li> </ul>
13. Incorporation of Infeasible "Zero" Pollutant Limits	The <i>Draft Permit</i> prohibits certain categories of runoff unless <i>all</i> pollutants are eliminated from such runoff. <i>Draft Permit</i> , Part 1 § B.2 and 3 and Footnote 2.	<ul style="list-style-type: none"> <li>• <b>Comment.</b> It is not technically feasible or realistic to mandate removal of all pollutants from runoff, as required to comply with the prohibition as drafted. While BMPs and combinations of BMPs can be designed to eliminate appreciable concentrations and loads, they cannot eliminate all pollutants, nor is it necessary to eliminate all concentrations and loads to meet receiving water standards. As a result, these provisions, as written, constitute an improper application of MEP, and violate Water Code section 13262(a), which requires adoption of conditions <i>reasonably</i> required to protect beneficial uses and implement water quality objectives.</li> <li>• <b>Comment.</b> The <i>Draft Permit</i> should be revised to preclude discharges that are significant contributors of pollutants to receiving waters, as contemplated by federal regulations implementing the Clean Water Act. 40 CFR 122.26(a)(v).</li> </ul>

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<p>14. Hydromodification Controls –Mandatory Low Impact Development</p>	<ul style="list-style-type: none"> <li>• Imposition of LID requirements on <i>all</i> New Development (any land disturbing activities; structural development, including construction or installation of a building or structure, creation or replacement of impervious surfaces; and land subdivision) and Redevelopment Projects (creation, addition or replacement of 5,000 square feet or more of impervious surface on an already developed site). <i>Draft Permit</i>, Part 4, §§ E.1. f. and E.1.1., pp. 50-51.</li> <li>• The <i>Draft Permit</i> provides that LID is primarily a source control strategy and <i>minimizes the need</i> for large sub-regional and regional treatment control BMPs. <i>Draft Permit</i>, Part 4, §§ I.1., p. 51.</li> </ul>	<ul style="list-style-type: none"> <li>• <b>Comment.</b> There is not substantial evidence in the SCCRWP study, other documents cited in the <i>Draft Permit</i> (<i>See</i>, Finding 18, p. 18), or in the scientific literature (<i>See</i> Geosyntec memorandum), supporting the assertion that small scale (rather than sub-watershed or watershed scale) infiltration or application of LID practices is necessary to avoid degradation and prevent water quality impacts. Further, there is no evidence that LID techniques applied on a project-by-project basis to even the smallest projects are more effective for controlling hydromodification impacts than the implementation of IWRM strategies or vegetated regional BMPs. There is evidence that LID alone cannot fully mitigate hydromodification impacts, particularly when applied to very small, infill and redevelopment projects that discharge to hardened or substantially degraded channels, and/or which are located in largely impervious sub-watersheds.</li> <li>• <b>Comment:</b> There is no evidence or discussion of the water quality benefits that will result from project-by-project, very small scale application of LID requirements. In fact, these requirements may actually preclude certain storm water conservation and reuse BMPs, and would prevent regional BMP solutions that benefit existing untreated development storm water. In circumstances where sites discharge to waterbodies that are not subject to destabilization (concrete channels, large lakes, bays estuaries), these measures will provide only a very small incremental water quality benefit, and will therefore not be cost effective. At the same time,</li> </ul>

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		<p>there are extraordinary costs associated with these requirements. According to work done in San Diego, the additional costs associated with imposition of stringent LID requirements on a lot-by-lot basis for infill and redevelopment projects with land constraints, particularly when combined with application of the other hydromodification standards set forth in the <i>Draft Permit</i>, results in significant land-take, and can result in costs averaging \$30,000 to \$50,000 per lot, for those projects where implementation of the standards is even technically feasible. For many types of projects, the application of standardized LID and other hydromodification control requirements will be technically infeasible based on local soils conditions, infiltration restrictions, groundwater conditions and similar physical parameters.</p> <ul style="list-style-type: none"> <li>• <b>Comment:</b> The bias in the <i>Draft Permit</i> provisions against regional application of volume reduction BMPs eliminates tools that should be available to co-permittees and project applicants to address hydromodification control, and creates internal inconsistency in the <i>Draft Permit</i> as it is inconsistent with <i>Draft Permit</i>, Finding 15, p. 17.</li> <li>• <b>Comment:</b> Stringent application of LID principles on a lot-by-lot scale are technically infeasible for a variety of sites, including small new development infill sites, most redevelopment sites, and sites with high groundwater, or contaminated groundwater that should not be impacted.</li> <li>• <b>Comment:</b> The <i>Draft Permit</i> LID requirements are technically infeasible, are not cost effective, and/or are</li> </ul>

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		<p>ineffective in controlling water quality and hydromodification impacts, as outlined by the Geosyntec memorandum. Therefore, these requirements constitute an improper application of MEP, are arbitrary and capricious, and violate Water Code § 13262(a), which requires WDR requirements shall be those <i>reasonably</i> required to protect beneficial uses and implement water quality objectives.</p> <ul style="list-style-type: none"> <li>• <b>Comment:</b> The balancing of these provisions in light of the Cal. Water Code section 13241 and State Board recommended factors in properly determining the MEP standard is especially critical with respect to standardized LID and hydromodification requirements, which would apply on a ‘one-size fits all’ basis throughout the County. See Cal. Water Code § 13241(b) (“Environmental characteristics of the hydrographic unit under consideration...”). Failure to engage in such balancing, which takes into account local conditions, including the need for housing and economic considerations and the degree to which a particular development constitutes infill and therefore is consistent with LID at a watershed scale, violates the state and federal provisions applicable to the Regional Boards exercise of permitting authority under its federally delegated powers. <i>See</i> Comments 2 and 3 above.</li> <li>• <b>Comment:</b> Application of LID to redevelopment projects is poor policy because (1) it will discourage infill because in many situations the requirements will not be capable of being met without reserving a great deal of project site area in newly created open space, (2) the costs of</li> </ul>

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		<p>implementation will not provide significant water quality benefit since most redevelopment and infill sites will discharge to already concrete flood control channels and/or are located in substantially built-out and impervious watersheds, and (3) lot-by-lot application of the requirements prevents adoption of IWRM and other more regional solutions that would better benefit water quality, particularly in the context of redevelopment, by providing some volume reduction BMPs for existing development that isn't served by BMPs. There are some types of LID techniques that can be implemented on small sites, such as planter boxes; however, for many redevelopment projects meeting a broad mandate to incorporate significant site design and LID practices will be technically and/or economically infeasible. Further, improving water quality of runoff from one lot that is being redeveloped will not substantially improve overall water quality unless the adjacent lots are also redeveloped. And so in this case, lot-by-lot imposition of these requirements do not make policy sense and do not result in substantial water quality improvements, but will result in substantial compliance costs.</p> <ul style="list-style-type: none"> <li>• <b>Comment:</b> The <i>Draft Permit</i> provides that the LID requirements are based on the State and Federal Antidegradation Policies (see C.19). However, the State and Federal Antidegradation Policies do not clearly support the imposition of the LID and hydromodification control requirements imposed in the <i>Draft Permit</i>. This finding does not clearly describe the connection between antidegradation requirements and the proposed LID requirements. <i>See</i></li> </ul>

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		<p>Geosyntec memorandum. As a result, this finding is legally insufficient and is not supported by substantial evidence</p> <ul style="list-style-type: none"> <li>• <b>Comment:</b> The <i>Draft Permit</i> should be revised to limit application of LID requirements to projects of sufficient size, and with acceptable site and groundwater conditions to allow for feasible and beneficial implementation of site design BMPs and LID technologies. Further, LID requirements should be implemented at the planning and sub-watershed planning scale, and not on a lot-by-lot basis, and the bias against regional volume and treatment control BMPs should be eliminated from the <i>Draft Permit</i>. In addition to these revisions, we recommend replacing the LID and other hydromodification control standards proposed in the <i>Draft Permit</i> with the approach recommended in the Geosyntec memorandum. See summary description of potentially appropriate hydromodification control approach as recommended by Geosyntec in comment 15 below.</li> </ul>
<p>15. Numeric Hydromodification Criteria Pre- and Post-development volume, flow and duration matching and hydrograph matching</p>	<ul style="list-style-type: none"> <li>• The <i>Draft Permit</i> provides all New Development and Redevelopment (see above for definitions) must implement that hydrologic controls shall <i>minimize</i> changes in post-development flow rates, velocities and duration by <i>maintaining</i> the project's pre-development storm water runoff flow rate and durations. <i>Draft Permit</i>, Part 4, § E.II.1(a), p. 52.</li> <li>• The <i>Draft Permit</i> further</li> </ul>	<ul style="list-style-type: none"> <li>• <b>Comment:</b> The provision requiring flow rate and duration matching for all events is inconsistent with other provisions of the <i>Draft Permit</i> that allow some limited increases in post-development volume and flow duration, so long as, for example, an <math>E_p=1</math> is maintained or Effective Impervious Area is limited to less than 5% of project area. Therefore, the <i>Draft Permit</i> is internally inconsistent, and the inconsistent provisions would be invalid.</li> <li>• <b>Comment:</b> Unlike other provisions of the <i>Draft Permit</i> which allow some limited post-development increases</li> </ul>

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	<p>recommends an “interim hydrologic control “for projects less than 50 acres requiring pre- v. post- development hydrograph (flow, volume and duration) matching for the 2-years, 24 hour storm event. <i>Draft Permit</i>, Part 4, § E.II.1.(e)(1), p. 53.</p>	<p>in volume, the flow rate and duration matching provision precludes any increase in volume for any storm event, or requires 100% infiltration or capture and re-use of all increased runoff volume, since that is the only way to <i>maintain</i> pre-development runoff flow rates and duration in the post-development conditions. A variety of sites will be unable to infiltrate or capture and reuse 100% of post-development increases in runoff volume due to soils conditions, groundwater conditions and/or land constraints. Therefore, in a variety of situations, compliance with this standard will be technically infeasible. .</p> <ul style="list-style-type: none"> <li>• <b>Comment:</b> In the limited situations in which flow rate and duration matching might be technically feasible, the costs associated with the land requirements necessary to provide sufficient infiltration and/or water storage to meet the requirements will be substantial. Therefore, economic infeasibility is a significant issue, particularly for infill and redevelopment project with significant land area constraints.</li> <li>• <b>Comment:</b> The <i>Draft Permit</i> appears to proposed the duration and flow matching standard as both a long-term and an interim ‘one-size-fits all’ hydromodification standard. As such, the standard is inconsistent with the recommendations of the scientific community for hydromodification control, which generally advocate an approach to hydromodification control that involves appropriate assessment and evaluation of local factors pertinent to channel destabilization at a sub-watershed level, including amount of impervious surface in a tributary</li> </ul>

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		<p>area, soils characteristics, runoff characteristics, channel characteristics, and project size.</p> <ul style="list-style-type: none"> <li>• <b>Comment:</b> Available scientific literature, such as the SCCRWP Study and Santa Clara Valley Urban Runoff Pollution Prevention Program (SCVURPPP) Hydromodification Management Report, indicate that flow and duration matching is not appropriate because some level of duration and flow increase is tolerated even by channels subject to destabilization, so pre- and post- development matching is not reasonably tailored to protect water quality as indicated by the best available science.</li> <li>• <b>Comment:</b> There is no evidence in the record that such a stringent standard is necessary to protect water quality and receiving water beneficial uses, particularly for sites that are (i) located in largely built-out and impervious watersheds, or (ii) that discharge into already degraded channels, pipes, concrete channels or other receiving waters that are not susceptible to material further destabilization, erosion and sedimentation due to their size, configuration, or geomorphological regime (including "reset" systems).</li> <li>• <b>Comment:</b> The <i>Draft Permit</i> sets forth an interim hydromodification standard for small projects (less than 50 acres) that requires hydrograph (flow, volume and duration) matching for the 2-year, 24-hour event. The Geosyntec memo raises serious concerns about the inadequacy of the interim standard for purposes of hydromodification control. As a result, implementing this hydromodification control standard</li> </ul>

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		<p>could do more harm than good to natural drainage,</p> <ul style="list-style-type: none"> <li>• <b>Comment:</b> Application of flow, duration and hydrograph matching requirements to infill and redevelopment projects is poor policy because (1) it will discourage infill because in many situations the requirements will not be capable of being met without a great deal of land take , (2) the costs of implementation will not provide significant water quality benefit since most redevelopment and infill sites will discharge to already concrete flood control channels and/or are located in substantially built-out and impervious watersheds, and (3) lot-by-lot application of the requirements prevents adoption of IWRM and other more regional solutions that would better benefit water quality, particularly in the context of redevelopment, by providing some volume reduction BMPs for existing development that isn't served by BMPs.</li> <li>• <b>Comment.</b> As a result, these provisions are not based on the recommendations of scientific literature, and fail to consider technical feasibility, economic feasibility and effectiveness in light of substantial costs. As such, they are poor policy, an improper application of the MEP standard, are arbitrary and capricious, and violate Water Code 13262(a), which requires WDR requirements shall be those <i>reasonably</i> required to protect beneficial uses and implement water quality objectives. These standards should be therefore be eliminated from the <i>Draft Permit</i> as both interim and long-term requirements.</li> </ul>

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**12/27/06 Draft NPDES MS4 Permit for**  
**Ventura County, Ventura Watershed Protection District, and Incorporated Cities**

General Issues	Specific Requirements/Concerns	Comments
		<ul style="list-style-type: none"> <li>• <b>Comment:</b> The <i>Draft Permit</i> provision should be revised to eliminate the requirements for pre- v. post-development flow rate, duration and hydrograph matching for purposes of interim and long-term hydromodification control. Instead, as discussed in the Geosyntec memorandum, the <i>Draft Permit</i> should rely on development by co-permittees and/or larger project applicants of (i) an appropriate and geomorphically referenced local interim hydromodification control tool for application on a sub-watershed basis, and (ii) the development of a long-term hydromodification control standard based upon completion of the SMC study process (as currently recommended in the <i>Draft Permit</i>). Consistent with the approach recommended by Geosyntec, the Regional Board should cure the current deficiencies in the <i>Draft Permit</i> by providing for the co-permittees and/or larger project applicants to develop appropriate, local interim hydromodification control tools, applicable on a sub-watershed basis to all Development and Redevelopment projects within the sub-watershed to have the potential for substantial hydromodification impacts. These tools should be developed by preparing an HAS. As recommended by Geosyntec, the HAS should include an appropriate evaluation of pertinent local conditions on a sub-watershed basis, including total area of impervious surface, soils conditions, runoff characteristics, in-stream conditions and erosive flow potential and should apply the following protocol: First, an assessment of the physical sensitivity of the downstream system in light of tributary area characteristics should be conducted. If the</li> </ul>

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		<p>downstream areas are not sensitive to destabilization due to their configuration, the existing condition of impervious surface within the tributary watershed, the size of potential projects in the tributary watershed, in-stream conditions, erosive flow potential, or other pertinent factors, hydromodification control requirements should not be applicable to development within the related watershed. Second, for those sub-watersheds susceptible to destabilization as determined in step one, a tool should be developed for sizing hydromodification control BMPs pending completion of the SMC study process. This tool should be based on the relationship between percent impervious area soils type (infiltration rates) and runoff characteristics. The tool will then be applied to appropriate development and redevelopment projects in identified sensitive sub-watersheds to guide sizing of hydromodification control BMPs. Appropriate projects would then implement the tool to determine appropriate sizing for hydromodification control BMPs necessary to protect sensitive down-stream systems from destabilization as a result of changes in flows. In addition to co-permittee HAS programs to develop such interim hydromodification control tools and standards, larger projects (sub-watershed or watershed scale) should be allowed to prepare their own HAS documents meeting similar requirements and using a similar protocol to that described above, allowing preparation by projects of sufficient scale of appropriate interim hydromodification control requirements. HAS studies prepared by co-permittees and other applicants should be</p>

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		provided streamlined review by the Regional Board staff, without public review and comment, to maximize implementation of hydromodification controls during the interim period. See Comment 18 below regarding review and approval issues.
16. Numeric Hydromodification Criteria -- 5% limit on effective impervious surface area.	All New Development and Redevelopment (see above for definitions) – must reduce the % of effective impervious area to 5% of total project area. <i>Draft Permit</i> , Part 4 § E.1(b).	<ul style="list-style-type: none"> <li>• <b>Comment:</b> There is no evidence in the record that this 5% maximum effective impervious area prescriptive standard is required to protect receiving waters susceptible to de-stabilization. The SCCRWP study and other cited documents do not recommend this prescriptive standard. <i>See</i> discussion in Geosyntec memorandum. The Regional Board has not provided substantial evidence to support that the 5% limit is necessary or reasonably tailored to avoid impacts to beneficial uses – why 5% as opposed to 10 or 15%? Therefore, the standard is arbitrary and capricious and violates Water Code § 13262(a) which requires WDR requirements shall be those <i>reasonably</i> required to protect beneficial uses and implement water quality objectives.</li> <li>• <b>Comment:</b> There is no evidence or discussion offered by the Regional Board that the 5% standard is necessary to protect water quality where sites discharge to waterbodies that are not subject to de-stabilization (concrete channels, large lakes, bays, estuaries, and large waterbodies subject to a “reset” geomorphological regime). In these situations, these measures will provide only a very small incremental water quality benefit. At the same time, there are extraordinary costs associated with the land necessary to these requirements,</li> </ul>

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		<p>particularly for constrained infill and redevelopment projects, creates major economic feasibility issues. Therefore, the standard as proposed is not cost-effective.</p> <ul style="list-style-type: none"> <li>• <b>Comment:</b> Application of this standard to infill and redevelopment projects is poor policy because (1) it will discourage infill because the requirements can't be met without a significant land take to accommodate infiltration and/or storage, (2) the costs of implementation will not provide significant water quality benefit since most redevelopment and infill sites will discharge to already concrete flood control channels, and (3) lot-by-lot application of the requirements prevents adoption of other more regional solutions that would better benefit water quality, particularly in the context of redevelopment, by providing some volume reduction BMPs for existing development that isn't served by BMPs.</li> <li>• <b>Comment:</b> The standard is duplicative, and potentially inconsistent with other numeric and narrative standards for hydromodification control set forth in the <i>Draft Permit</i>, such as maintaining a certain erosion potential (Ep). This creates internal inconsistency in the <i>Draft Permit</i>, which invalidates the inconsistent provisions. The inconsistency further assures that regulated parties will be unable to clearly establish compliance with the <i>Draft Permit</i>.</li> <li>• <b>Comment:</b> In light of the foregoing deficiencies, including technical and economic infeasibility, these provisions are an improper application of the MEP standard, constitute poor policy, are arbitrary and capricious, and violate</li> </ul>

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		<p>Water Code 13262(a), which requires WDR requirements shall be those <i>reasonably</i> required to protect beneficial uses and implement water quality objectives.</p> <ul style="list-style-type: none"> <li>• <b>Comment:</b> The <i>Draft Permit</i> provision should be revised to eliminate the 5% limitation on impervious surface, and should rely instead on the approach to hydromodification control outlined in the Geosyntec memorandum and summarized in comment 15 above.</li> </ul>
17. Numeric Hydromodification Criteria—Ep = 1	<p>The <i>Draft Permit</i> specifies that “hydrologic control in natural drainage systems shall be achieved by maintaining the Erosion Potential (Ep) in streams at a value of 1, unless an alternative value can be shown to be protective of the natural drainage systems from erosion, incision and sedimentation that can occur as a result of flow increases from impervious surfaces and damage stream habitat.” <i>Draft Permit</i>, Part 4 §1.II.</p>	<ul style="list-style-type: none"> <li>• <b>Comment:</b> The approach for this criteria is more appropriately targeted than the other standards, in that it applies to sites discharging to natural drainage systems, but it should be further limited by specifying that it applies to natural drainage systems that are susceptible to destabilization, erosion or sedimentation, since not all natural systems are subject to those influences (<i>e.g.</i>, certain lakes, bays, estuaries, large rivers with a “reset” geomorphological regime).</li> <li>• <b>Comment:</b> There is no evidence in the record that maintaining an Ep=1 is required to protect receiving waters susceptible to de-stabilization. The SCCRWP study and other documents cited by the <i>Draft Permit</i> do not recommend this prescriptive standard. The Regional Board has not provided substantial evidence to support that Ep=1 is necessary to avoid impacts to beneficial uses – why Ep=1 instead of Ep = 1.5? The Regional Board has provided no documentation or information allowing evaluation of technical feasibility of implementing, or costs of complying with such a standard.</li> <li>• <b>Comment:</b> Requiring a single EP=1 standard to be met</li> </ul>

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		<p>by all Development and Redevelopment projects is unrealistic. See Geosyntec memorandum. In developing the SCVURPPP hydromodification control program, the report, Chapter 3 found "it is unrealistic to believe that stream channels will behave such that a single Ep threshold value can be specified that, if exceeded, would always result in unstable channel conditions, or, conversely if less than would always be stable." As a result, the current standard is technically infeasible and is not effective or reasonably tailored.</p> <ul style="list-style-type: none"> <li>• <b>Comment:</b> Application of the Ep standard to infill and redevelopment projects is poor policy because (1) it will discourage infill because in many situations the requirements will not be capable of being met without a great deal of land take, (2) the costs of implementation will not provide significant water quality benefit since most redevelopment and infill sites will discharge to already concrete flood control channels and/or are located in substantially built-out and impervious watersheds, and (3) lot-by-lot application of the requirements prevents adoption of IWRM and other more regional solutions that would better benefit water quality, particularly in the context of redevelopment, by providing some volume reduction BMPs for existing development that isn't served by BMPs.</li> <li>• <b>Comment:</b> In light of the foregoing issues, the "one-size-fits all" application of a single prescriptive, uncritically determined Ep standard constitutes is technically and economically infeasible, and therefore an improper application</li> </ul>

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		<p>of MEP, is contrary to scientific recommendations, is arbitrary and capricious and violates Water Code 13262(a) which requires WDR requirements shall be those <i>reasonably</i> required to protect beneficial uses and implement water quality objectives.</p> <ul style="list-style-type: none"> <li>• <b>Comment:</b> The <i>Draft Permit</i> provision should be revised to eliminate the requirement for Ep=1, and to implement the approach to hydromodification control outlined in the Geosyntec memorandum and summarized in comment 15 above.</li> </ul>
<p>18. Requirements for Best Management Practice Substitutions</p>	<p>The <i>Draft Permit</i> sets up several hurdles to approval of site-specific BMP programs or regional storm water mitigation programs in two different provisions:</p> <ul style="list-style-type: none"> <li>• BMP substitution Programs can be approved if (a) they will meet or exceed the objectives of the original BMP program in reduction of storm water pollutants, (b) there is evidence that the original program would be substantially more costly, and (c) the proposed alternative BMP program will be implemented within a similar period of time. The programs cannot be approved until public notice has been issued. <i>Draft Permit</i>, Part 4 § A.2.</li> </ul>	<ul style="list-style-type: none"> <li>• <b>Comment:</b> The distinction between BMP substitution programs and storm water mitigation programs is unclear, but appears to be immaterial. Both types of programs should be subject to the same approval process and standards. Like the BMP substitution program, storm water mitigation programs are programs to substitute in part or wholly for on-site post-construction BMP requirements. To avoid complexity and confusion, and to streamline implementation and encourage development of regional storm water mitigation plans, which can better benefit water quality, the procedures should be the same for approval of both types of programs, they should be simplified, and they should also be applicable to approval of HAS studies designed to develop interim hydromodification control measures and standards. Specifically, for all three of these programs, the <i>Draft Permit</i> should be revised as follows: <ul style="list-style-type: none"> <li>○ Approval of the alternative programs by the Executive Officer should be sufficient. The</li> </ul> </li> </ul>

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	<ul style="list-style-type: none"> <li>• Regional and Redevelopment Area Storm Water Mitigation programs must be approved by the Regional Water Board (rather than the Executive Officer), if the program will (a) result in equivalent or improved storm water quality; (b) protect stream habitat, (c) promote cooperative problem solving, (d) be fiscally sustainable and have secure funding, and (e) be complete in four years, including construction. <i>Draft Permit</i>, Part 4 §E.7.</li> </ul> <p>In addition to these hurdles, the <i>Draft Permit</i> as written fails to include provisions allowing for the preparation and approval of HAS studies by co-permittees and project applicants for purposes of determining appropriate interim hydromodification control measures that should be applicable to particular subwatersheds within jurisdictions.</p>	<p>Executive Officer and Regional Board staff have the experience and are competent to approve programs and determine their sufficiency in light of MS4 permit requirements, and are vested with responsibility for implementing all other provisions of the permit.</p> <ul style="list-style-type: none"> <li>○ Public notice and review of substitute programs is unnecessary, and is costly. The <i>Draft Permit</i> requires consideration of BMP programs, hydromodification impacts, and water quality mitigation during the CEQA process, (p. 62), and, as a practical matter, these programs will primarily be developed in the context of CEQA review. CEQA already provides ample opportunity for public review and comment on storm water mitigation, hydromodification control, and BMP programs.</li> <li>○ Since large landowners and developers of sites greater than 50 acres must prepare special HAS studies, they should be able to independently propose and apply for Regional Board approval of alternative BMP and hydromodification control programs independently of the co-permittee.</li> <li>○ The only measuring stick for approving alternative BMP programs should be whether the programs meet or exceed the requirements set forth in the MS4 permit. Comparison to the original BMP program is irrelevant. As long as a particular</li> </ul>

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		<p>program meets or exceeds all requirements of the MS4 permit, it will have the same water quality benefit as site-by-site compliance and should be approved by the Regional Board.</p> <ul style="list-style-type: none"> <li>○ The maximum time limit for implementation of a regional program (4 years) should be eliminated, and instead, the time limit for implementation should be tied to construction phasing. The projects that will most benefit from regional storm water mitigation programs are large projects with long-term development horizons (typically far greater than 4 years). The key requirement for timing of implementation is to assure that treatment BMPs and hydromodification controls are in place before storm drains are connected to outfalls. Therefore, the <i>Draft Permit</i> should provide that alternative BMP and hydromodification control programs must be implemented in a manner so as to assure construction and operation of BMPs and treatment of runoff prior to connection of storm drains.</li> </ul>
19. Seasonal grading prohibitions	No grading allowed between October 1 – April 15 for construction projects in areas of high erosivity or receiving water impairment or sensitive habitat (hillsides with slopes 20% or steeper prior to land disturbance, projects directly discharging to waterbody listed on 303(d) list for siltation or sediment	<ul style="list-style-type: none"> <li>● <b>Comment:</b> Under State law and guidance, the State Board sets policy and regulation for discharges from construction sites in the General Construction Permit, for purposes of establishing a consistent approach to water quality on a statewide basis. It is inappropriate for the Regional Board to adopt additional regulations for such sites that create different standards that are more expensive to comply with,</li> </ul>

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	<p>and projects within or adjacent to ESA).  <i>Draft Permit, Part 4., F.1.</i></p>	<p>and thereby create competitive disadvantages for construction within a particular jurisdiction.</p> <ul style="list-style-type: none"> <li>• <b>Comment:</b> If these additional requirements for construction site runoff are imposed, they must be imposed via a proper exercise of discretion and consideration of all factors relevant to achievement of MEP. Therefore, the Regional Board must evaluate economic and technical feasibility of the proposed measures, and cost-effectiveness of the measures before they are imposed in the MS4 permit. <i>See</i> Comments 2 and 3 above.</li> <li>• <b>Comment:</b> The Regional Board also must analyze adverse environmental impacts of these measures. <i>See</i> next Comment and the Comment regarding CEQA above.</li> <li>• <b>Comment:</b> There is no evidence provided that a seasonal grading restriction is required to protect water quality from construction site runoff during the wet season. The Regional Board seems to be making the unsupported assumption that projects will not implement adequate SWPPPs. This is an unreasonable assumption that is not supported by available documentation and evidence upon which to base this requirement. There is no reference to an unusual number of NOV's issued as a result of wet season grading, and no indication that wet season grading contributes in a material way to sediment loads in receiving waters in wet weather, particularly in the very alluvial systems of Ventura County, which are naturally subject to heavy sediment loads during the rainy seasons in a baseline condition, regardless of</li> </ul>



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		<p>seasons. As a result of these deficiencies, the proposed grading restrictions are an improper application of the MEP standard, are arbitrary and capricious in and violate Water Code § 13262(a) which requires WDR requirements shall be those <i>reasonably</i> required to protect beneficial uses and implement water quality objectives.</p> <ul style="list-style-type: none"> <li>• <b>Comment:</b> The General Construction Permit already requires an effective combination of sediment and erosion control measures, and other BMPs must be deployed taking into account site specific conditions, project activities <i>and weather conditions</i>. As a result, under the General Construction Permit, more stringent BMPs should be deployed during the wet season to protect receiving water quality. As recommended in the Geosyntec memorandum, the <i>Draft Permit</i> should be revised to expressly reinforce the importance during the wet season of (i) deploying more stringed pollutant controls, (ii) increasing wet weather inspection frequency, (iii) reducing the amount of time allowed for corrective action and follow up inspections to assure prompt corrective action in the wet season, and (v) limiting the amount of area left exposed and un-stabilized for an extended period of time during periods of predicted rain.</li> </ul>
20. Numeric Limits -- Construction Sediment limits	The <i>Draft Permit</i> provides that a "Grading Variance" allowing wet season grading on certain sites can be obtained only if the Permittee can demonstrate that runoff will not contain TSS greater than 100 mg/L, or turbidity greater than 50 NTU. <i>Draft</i>	<ul style="list-style-type: none"> <li>• <b>Comment:</b> To obtain a grading variance, the applicant must show that a particular construction site is unlikely to contribute sediment to receiving water in excess of stated numeric restrictions. Contrary to the Blue Ribbon Report, this approach amounts to banning grading unless certain numeric</li> </ul>

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	<p><i>Permit, Part 4 § F.1(b)(1), p. 64.</i></p> <p>To the extent that these MALs can only be met by using polymers, as the Blue Ribbon Panel Report suggests, and polymers result in alteration of natural loads, then the MALs are in derogation of the federal Clean Water Act, which defines "pollution" as the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of the water. 33 U.S.C. § 1362(19). The introduction of polymers and resulting "pollution" of the waters also runs contrary to the section 13241 balancing factors in that it actively corrupts the physical integrity of the waters.</p>	<p>limitations can be met, fails to perform recommended studies regarding baseline sediment production and discharge under natural conditions. Depriving highly alluvial systems of all sediment in runoff can create "hungry" water that results in greater erosion impacts in natural stream channels, and therefore numeric limits should not be mandated without reference to existing sediment discharge conditions.</p> <ul style="list-style-type: none"> <li>• <b>Comment:</b> To the extent that these MALs can only be met by using Advanced Treatment (polymers), as the Blue Ribbon Panel Report suggests, these chemical substances result in alteration of natural loads in derogation of the federal Clean Water Act, which defines "pollution" as the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of the water. 33 U.S.C. § 1362(19). The introduction of polymers and resulting "pollution" of the waters also is an improper application of MEP in that it runs contrary to the section 13241 balancing factors in that it actively corrupts the physical integrity of the waters.</li> <li>• <b>Comment:</b> The imposition of numeric TSS and turbidity limits seeking a wet season prohibition variance are contrary to the findings and recommendations of the Blue Ribbon Panel Report, which set forth at least 5 pre-requisite studies and conditions that need to precede imposition of numeric limits on construction site runoff, including consideration of issues associated with toxicity associated with active treatment systems, issues associated with long-term use of chemicals and consideration of runoff flow and peak</li> </ul>

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		<p>volume. See <i>Blue Ribbon Report</i>, p. 16-17. None of these prerequisite studies or conditions have been performed by the Regional Board, and therefore the imposition of numeric limits is inappropriate and contrary to State Board policy and the findings and recommendations of the Blue Ribbon Panel.</p> <ul style="list-style-type: none"> <li>• <b>Comment:</b> An effective set of erosion and sediment control BMPs could accomplish this goal without requiring advanced treatment; however, based on the way that the <i>Draft Permit</i> is written, that option, even if it would be adequately protective of water quality, taking into account background levels, would not be permitted. Therefore, we recommend the Regional Board cure this arbitrary and capricious provision by implementing the recommendations of the Geosyntec memorandum for construction site runoff water quality controls.</li> </ul>
21. Seasonal Paving Restrictions	Paving and repaving activities are prohibited during periods of rainfall or <i>predicted rainfall</i> .	<ul style="list-style-type: none"> <li>• <b>Comment:</b> This language is too vague to be complied with, and therefore violates substantive due process requirements. Because paving and repaving are restricted even when the smallest chance of rain is predicted (<i>e.g.</i>, 1%), the restriction is not reasonably tailored as necessary to protect water quality in violation of Cal. Water Code section 13263(a). Recommended BMPs for incorporation into construction site SWPPPs already require consideration of precipitation conditions before conducting this activity, so this requirement in the <i>Draft Permit</i> should be eliminated. The <i>Draft Permit</i> deprives the regulated community of due process when the conditions and requirements are so vaguely stated that its</li> </ul>

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		<p>provisions do not provide the regulated community with adequate notice of what is required to comply with the <i>Draft Permit</i>, and, conversely, fails to provide adequate notice as to what may constitute a violation of the <i>Draft Permit</i> once it is adopted.</p> <ul style="list-style-type: none"> <li>• It is a basic concept of law that “Notice is fundamental to due process.” 7 Witkin § 638 (10<sup>th</sup> ed. 2006). The lack of an adequate definition constitutes improper notice to the regulated community in violation of due process. Cal. Const. Art. I, §§ 7, 15; Cal. Gov. Code § 11340 <i>et seq.</i> A “standard that has no content is no standard at all and is unreasonable.” <i>Wheeler v. State Bd. of Forestry</i> 144 Cal.App.3d 522, 527-528 (1983). Thus, in order to provide the regulated community with sufficient notice of what is required to comply with the <i>Draft Permit</i> and what will constitute a violation of the <i>Draft Permit</i> so as to satisfy basic due process standards, the Revised <i>Draft Permit</i> should be revised to provide further clarification regarding a number of terms and conditions.</li> <li>• See also comments above regarding seasonal grading restrictions and potential impacts on air quality and the nesting/breeding season of certain avian species.</li> </ul> <p>As a result of these deficiencies, the provisions constitute and improper application of the MEP standard, are arbitrary and capricious and are not reasonably tailored to protect water quality in violation of Cal. Water Code §13263(a). To cure these deficiencies, we recommend revising these provisions as recommended in the Geosyntec memorandum.</p>

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<p>22. BMP requirements for very small lots and/or projects</p>	<ul style="list-style-type: none"> <li>• All development or redevelopment projects equal to 1 acre or greater of disturbed areas must implement post-construction treatment controls. <i>Draft Permit, Part 4, E.III.1.(b).</i></li> <li>• All industrial parks and commercial strip malls with 5,000 (rather than 100,000) ft<sup>2</sup> of surface area must implement post-construction BMPs. <i>Draft Permit, Part 4 §e.III. I.(c).</i></li> <li>• During construction of single-family hillside homes (property located in an area with known erosive soil conditions, where the development contemplates grading on any natural slope that is 20% or greater and where grading contemplates cut or fill slopes), homeowners must take measures to conserve natural areas, protect slopes and channels, provide storm drain stenciling and signage, divert roof runoff and surface flow to vegetated areas before discharge unless such diversion would promote slope instability. <i>Draft Permit, Part 4, § E. III. 1 (a).</i></li> </ul>	<ul style="list-style-type: none"> <li>• <b>Comment:</b> EPA stormwater regulations determined that regulation of small grading projects less than one acre is typically not necessary for adequate protection of water quality. 40 CFR 122.26. There is no evidence in the documents provided that control of such small construction sites, is necessary to protect water quality. As a result, the requirements are arbitrary and capricious and violate Water Code § 13263(a) which requires WDR requirements shall be those <i>reasonably</i> required to protect beneficial uses and implement water quality objectives. Further, it is unclear why certain sites, like strip malls, are subject to these requirements while other sites that have similar characteristics are not subject to these requirements. The Regional Board has failed to adequately provide why certain sites are subject to these requirements while other are not. As a result, the requirements are arbitrary and capricious in and violate Water Code § 13262(a) which requires WDR requirements shall be those <i>reasonably</i> required to protect beneficial uses and implement water quality objectives.</li> <li>• <b>Comment:</b> The imposition of such requirements is not an effective approach to storm water regulation of these types of sites because important site-specific considerations are not taken into account, and these conditions will impose significant costs as compared to the water quality benefits. A better approach to regulation of these types of sites is through ordinances that require preparation of an erosion control plan.</li> </ul>