Comments Received on draft Ventura County MS4 Permit
December 27, 2006

From: Gerhardt J. Hubner, Chair
Ventura Countywide Stormwater Quality Management Program

To: RWQCB-LA

Date: March 6, 2007

Ventura Countywide Stormwater Quality Management Program

Participating Agencies

Camarillo

County of Ventura

Fillmore

Moorpark

Ojai

Oxnard

Port Hueneme

San Buenaventura

Santa Paula

Simi Valley

Thousand Oaks

Ventura County Watershed Protection District

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CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD LOS ANGELES REGION

March 6, 2007

Mr. Jonathan Bishop
Executive Officer
Los Angeles Regional Water Quality Control Board
320 4th Street, Suite 200
Los Angeles, CA 90013

SUBJECT: **DRAFT VENTURA COUNTY MUNICIPAL SEPARATE STORM SEWER SYSTEM PERMIT (NPDES No. CAS004002) FOR THE VENTURA COUNTY WATERSHED PROTECTION DISTRICT, COUNTY OF VENTURA AND THE INCORPORATED CITIES**

Dear Mr. Bishop:

We are in receipt of your December 27, 2006, Draft Waste Discharge Requirements for Storm Water Discharges from the Municipal Separate Storm Sewer System (MS4) within the Ventura County Watershed Protection District, County of Ventura and the Incorporated Cities therein (Draft Order) (NPDES Permit No. CAS004002). On behalf of the entire Ventura Countywide Stormwater Program (Ventura Program), including the Cities of Oxnard, Thousand Oaks, Simi Valley, San Buenaventura, Camarillo, Moorpark, Santa Paula, Port Hueneme, Fillmore, Ojai, Ventura County Incorporated Areas and the Ventura County Watershed Protection District ("Permittees") we appreciate the opportunity to provide comments on the Regional Water Quality Control Board's (Regional Board) administrative draft as prepared and distributed by the Regional Water Board staff.

As you know, the Ventura Program is a successful collaborative stormwater management program in existence since 1992 and under an NPDES permit since 1994. Our program is currently structured to be comprehensive and flexible to accommodate the diverse needs of the Watershed Protection District, the County and the ten cities in the Ventura Program and the local water quality issues. This letter and its attachments contain the collective comments of the Permittees on the Draft Order. In addition, many of the individual cities will provide comments on the Draft Order's impact to their individual agencies and communities.

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Overall, the Draft Order would place undue financial and technical requirements, and risks on the Ventura Program. In many cases the requirements contained in the Draft Order are more restrictive than existing Basin Plan and total maximum daily load (TMDL) requirements. In addition, the resulting stormwater program may not result in achieving the water quality improvements that we and the Board are seeking to obtain. In fact, the current Draft Order does not adequately capture the relevant water quality issues in Ventura County. In lieu of the Regional Board issuing the Draft Order as a tentative order, the Permittees would prefer to work closely with the Regional Board staff to develop a new Draft Order that provides for accountability, supports on-going water quality efforts (i.e. TMDLs) and receives broad public support. In the meantime, we submit the collective comments of the Permittees.

Due to the size of the Draft Order and the large number of concerns we have with its content, we provided comments on most major issues of concern within the body of this letter. In addition, we provided three attachments that contain additional comments. Attachment A includes comments on additional legal and policy issues that have not been included in the cover letter. Attachment B includes technical comments and suggested language on specific requirements contained within the Draft Order. Attachment C is the Municipal Action Levels data

I. VENTURA PROGRAM IS AN AWARD WINNING STORMWATER PROGRAM

The Ventura Program is a mature and comprehensive stormwater management program. Initiated in 1992, the Ventura Program, like other MS4 programs began with the framework established in the federal regulations (40 CFR Part 122). With time, the Ventura Program was modified through the iterative process to better reflect the conditions and needs of the Permittees and local water quality issues. The NPDES permits issued in 1994 and 2000 reflected these insights and the efforts of the Permittees.

The logical, proactive approach taken in implementing the stormwater program was recognized by the Regional Board by winning the prestigious H. David Nahai Water Quality Award for Water Quality Conservation in 2001, and in 2003 winning the United States Environmental Protection Agency's (U.S. EPA) National Clean Water Act (CWA) Recognition Award for Phase I MS4 Storm Water Management Excellence. The intent of U.S. EPA award was to "recognize municipalities and industries that are demonstrating their commitment to protect and improve the quality of the nation's waters by implementing outstanding, innovative and cost-effective Storm Water control programs and projects". The award reflects the Program's commitment to improve and protect water quality in Ventura County through a comprehensive and constructive best management practice (BMP) based program using the iterative process to guide our efforts.

II. CHARACTERISTICS OF VENTURA COUNTY ARE UNIQUE

A close review of the Draft Order shows it to be oriented toward large communities and a more urban environment as might be found in Los Angeles County and not Ventura County. Ventura County is different both in magnitude and distribution of people served and in land uses. The Ventura Program serves four Phase I (populations > 100,000) and seven Phase II (populations < 100,000) communities. The seven Phase II communities in the Program include Port Hueneme (22,388), Moorpark (35,801), Camarillo (64,034), Fillmore (15,180), Santa Paula (29,133), and Ojai (8,156) and County Incorporated (95,602). The total population of the entire County as of January 1, 2006 is 817,346 persons (versus over 10 million persons in Los Angeles County). Although not required by the federal stormwater regulations, coordination between the Phase I and II communities in the Ventura Program has allowed for more consistent program implementation. In particular, the coordination has helped to use local resources efficiently for public outreach efforts and new development program elements. Rather than have Phase I and Phase II municipalities separate out and establish their own Stormwater programs, the Regional Board should recognize the uniqueness of our Program. However, an alternative is to create a tier permitting approach for both Phase I and Phase II Co-permittees.

Virtually the entire north half of Ventura County is within the Los Padres National Forest although there are in-holdings scattered throughout the Forest area. Residential, agricultural and business uses comprise the southern portion of the Region. The County has a total area of 1,199,748 acres (1,843 square miles), of which some 550,211 acres are in the National Forest. There are 42 miles of coastline.

Of the estimated 330,000 acres of agricultural land in the Region, there are approximately 125,000 acres of irrigated land. The Calleguas Creek Watershed contains the highest number of irrigated acres (roughly 60,000), followed by the Santa Clara River Watershed (approximately 50,000) and Ventura River Watershed (approximately 15,000). The Region encompasses three major Watersheds, six smaller Watersheds, and twenty-six groundwater basins. There are ten cities, three wholesale water agencies, over 170 retail water purveyors, two groundwater management agencies, and five sanitary districts.

The total area covered under the Ventura Program is approximately 220 square miles, which is 12 percent of the total land area of Ventura County. Land use delineations for the County are summarized in Table 1.

Table 1. Land Use Delineations of Ventura County

Land Use	Area (Sq. Miles)	Percentage
Urban (subject to NPDES SW permit)	219	12%
Rural	14	.008%
Open	1441	79%
Agriculture	147	8%

Federal lands	11	.006%
Harbor(s)	0.5	.0003%
Total	1833	100%

The land use designations throughout the County show the relative contributions that the urban areas may have on water quality as compared to the other land uses.

Growth potential beyond the present urban areas of the County is limited. From 1995-2002, the residents of Ventura County adopted "Save Open-Space and Agricultural Resources" (SOAR) initiatives. Generally, the County and Cities' SOAR ordinances and initiatives establish "City Urban Restriction Boundary" (CURB) lines around each city and require city voter approval before any land located outside the CURB lines can be developed under the city's jurisdiction for urban purposes.

Under SOAR, rural, open-space areas of the County cannot be developed without voter approval. Thus, the urban areas of Ventura County are unlikely to expand significantly at least over the next 13 years. The County SOAR ordinance requires countywide voter approval of any change to the County General Plan involving the "Agricultural," "Open Space" or "Rural" land use map designations, or any change to a General Plan goal or policy related to those land use designations.

Moreover, in order to maintain the integrity of separate, distinct cities and to prevent inappropriately placed development between city boundaries, some cities and the County have entered into joint *greenbelt agreements.* These agreements protect open space and agricultural lands and reassure property owners located within these areas that land will not be prematurely converted to uses which are incompatible with agriculture or open space uses. The *greenbelt agreements* reinforce the County *Guidelines for Orderly Development. Greenbelt agreements* have been adopted for the following areas: Between the cities of Ventura and Santa Paula; between the cities of Santa Paula and Fillmore; between Fillmore and the Los Angeles County Line (excluding the Community of Piru); between the cities of Ventura and Oxnard westerly of Oxnard to Harbor Blvd; Between the cities of Oxnard and Camarillo; East of the City of Camarillo for the westerly portion of the Santa Rosa Valley, and Tierra Rejada Valley.

In other words, the characteristics of Ventura County are significantly different from the other, more urbanized counties (i.e. Los Angeles County) being regulated by the Regional Board. Thus, the Draft Order for Ventura County should reflect the rural, open space nature of the County and recognize the limited area that is actually subject to the jurisdiction of the Permittees.

III. VENTURA COUNTY IS A LEADER IN WATERSHED BASED PLANNING

We would submit that the current Draft Order does not reflect the ongoing watershed planning and protection activities of the County. Agencies and organizations in Ventura County have a long history of working together to address water resources issues, dating

back to the early 1970s. In the past 35 years numerous water supply and conservation, water quality, wetland restoration and reclamation projects have been planned and implemented. Many individuals and agencies have worked together to assure effective management of local water resources and protection of water-dependent environmental resources and species habitats. These entities include local retail and wholesale water districts, cities, sanitary districts, the County of Ventura, environmental and non-profit organizations, the Association of Water Agencies, State and Federal agencies and many others. Multi-jurisdictional and coordinated efforts are taking place on a watershed and/or countywide basis as noted below.

Watersheds Coalition of Ventura County (WCVC)
In April 2006 the Ventura County Integrated Regional Water Management Plan (VCIRWMP) Group and the Calleguas Creek Steering Committee agreed, by resolution to form the Watersheds Coalition of Ventura County (WCVC) for purposes of consolidating integrated regional water management plans (IRWMPs) and for submittal of grant applications for the Proposition 50, Chapter 8 Implementation Grant and other applicable future funds. This consolidated IRWMP is the result of the collaboration of agencies through the new WCVC. The WCVC meets monthly to guide development of the consolidated plan and to address critical water management issues facing the Region. Its success is evident by its recent award of $25 million by the State Water Resources Control Board. Other examples of successful Ventura County Watershed Groups include the Calleguas Creek Watershed Management Plan Steering Committee, the Santa Clara River Watershed Committee and the Ventura River Watershed Council.

IV. PERMIT COMPLIANCE STRUCTURE IS FUNDAMENTALLY FLAWED

The Permittees are very concerned with the primary compliance structure contained within the Draft Order. The Draft Order proposes to use municipal action levels (MALs) for assessing compliance with the technology-based standard of maximum extent practicable (MEP). The use of MALs to determine MEP compliance is flawed for a number of reasons both legally and technically.

A. The Use of MALs Constitutes the Adoption of a Numeric Effluent Limitation.

First, the use of MALs to determine compliance with the MEP standard actually results in the adoption of numeric effluent limitations. The Draft Order attempts to disguise its use of numeric effluent limitations by characterizing them as MALs. It goes as far to bury this major substantive requirement in a finding and a footnote. (Draft Order at fn. 1, p. 29.) If a Permittee exceeds the MALs (as shown in Attachment C of the Draft Order) two or more times at an "end-of-pipe" compliance point, the Regional Board will presume the Permittee has violated the MEP provisions of the Draft Order. (Draft Order at p. 29.).

Federal law defines effluent limitations as "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources ...." (33 U.S.C. § 1362(11).) The Draft Order does not include a definition for MAL; however, Attachment C of the Draft Order provides tables of the MALs, which are expressed as water column concentrations for various pollutants. (Draft Order at p. C.1.) Stormwater discharged by the Permittees must meet the MALs as established in the Draft Order at an "end-of-pipe" compliance point. If discharged stormwater exceeds the concentration levels twice as contained in the Draft Order, the Permittees are presumed to be in violation of the Draft Order. The MALs thus appear to match closely with the federal definition of effluent limit, as they are restrictions on the concentration of various pollutants discharged from the Permittees' stormwater conveyance system.

While the use of numeric effluent limits for stormwater regulation may be legally possible, it is not preferred and has questionable technical viability.[1] First, EPA has long expressed its preference of regulating stormwater through the use of BMPs. "In regulating stormwater permits the EPA has repeatedly expressed a preference for doing so by way of BMPs, rather than by way of imposing either technology-based or water quality-based numerical limitations." (*Divers' Environmental Conservation Organization v. State Water Resources Control Board* (2006) 145 Cal.App.4th 246, 256.)

Second, the State Board recently posed the question, "[i]s it technically feasible to establish numeric effluent limitations or some other quantifiable limit for inclusion in storm water permits" to a panel of stormwater experts. In response to this question, the State's Panel issued a report in June of 2006. The Panel's report clearly states that "[i]t is not feasible at this time to set enforceable numeric effluent criteria for municipal BMPs and in particular urban discharges ...." (State's Storm Water Panel Recommendations to the California State Water Resources Board, ("Report") (June 2006) at p. 8.)

Based on federal U.S. EPA's long preferred preference of using BMPs and the questionable technical viability of using numeric effluent limitations as expressed by a state panel of experts, the use of MALs to determine compliance with MEP is not appropriate. As stated earlier, the MALs expressed in the Draft Order are clearly meant to act as effluent limitations as they are numeric concentrations applied at the "end-of-pipe." If the Regional Board's true intent is to use numeric effluent limitations on stormwater discharges, then the Regional Board must adopt them as such and make the findings necessary to accompany such a decision.

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[1] In *Building Industry Association of San Diego County v. State Water Resources Control Board ("BIA") (2004) 124 Cal.App.4th 866,* the Court of Appeal found that the language of CWA section 402(p)(3)(B) allows the EPA and/or a state approved program the discretion to impose permit limitations that are more stringent than those that come within the definition of maximum extent practicable. (*BIA* at p. 883.) While a more stringent limitation does not necessarily mean only a numeric effluent limitation, it does not preclude the inclusion of a numeric effluent limitation.

B. The Use of MALs is Inconsistent with the MEP Standard

Section 402(p) (3) (B) of the federal Clean Water Act (CWA) provides that "permits for discharges from municipal storm sewers ... shall require controls to reduce the discharge of pollutants to the maximum extent practicable ... ." (33 U.S.C. § 1342(p)(3)(B)(iii).) The Draft Order states that the provisions contained in the order are "intended to develop, achieve, and implement a timely, comprehensive, cost-effective storm water pollution control program to reduce the discharge of pollutants in storm water to the MEP and achieve water quality objectives for the permitted areas in the County of Ventura." (Draft Order, at p. 36.) It also goes further, contending that its requirements are "necessary" to implement MEP. (*Id.*, at p. 22.) However, the Draft Order goes well beyond the legal understanding of what constitutes MEP. In all, this is inconsistent with both the CWA and various requirements of state law.

While the CWA does not specifically define MEP, the EPA has described MEP as a flexible, site-specific standard. (National Pollutant Discharge Elimination System—Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 64 Fed. Regs. 68722, 68732, 68754 (Dec. 8, 1999).) "The pollutant reductions that represent MEP may be different for each [municipal stormwater discharger] given the unique local hydrological and geological concerns that may exist and the differing possible pollutant control strategies." (*Id.* at 68754.) The Draft Order has taken a completely opposite approach by using national data to establish MEP, which is defined by compliance with the MALs.

California also has not specifically defined MEP for its permitting purposes. However, the state has relied upon other federal programs to guide its understanding of MEP. In particular, the state relied upon the term as used in Superfund legislation and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). (SWRCB Order No. 2000-11 at p. 20.) Using these statutes, the state concluded "MEP requires Permittees to choose effective BMPs, and to reject applicable BMPs only where other effective BMPs will serve the same purpose, the BMPs would not be technically feasible, or the cost would be prohibitive." (*Id.* at p. 20.)

The state also provided the following guidance to a task force that published the California Best Management Practice manual on the definition of MEP:

> Although MEP is not defined by the federal regulations, use of this manual in selecting BMPs should assist municipalities in achieving MEP. In selecting BMPs which will achieve MEP, it is important to remember that municipalities will be responsible to reduce the discharge of pollutants in storm water to the maximum extent practicable. This means choosing effective BMPs will serve the same purpose, the BMPs would not be technically feasible, or the cost would be prohibitive. (Memorandum to Archie Matthews, Division of Water Quality, State Water Resources control Board, from Elizabeth Miller Jennings, Senior Staff Counsel,

> Office of the Chief Counsel, State Water Resources Control Board (Feb. 11, 1993) at p. 4.)

Thus, the U.S. EPA and the state have long interpreted the term "maximum extent practicable" to mean and include the use of BMPs that rely on an iterative approach for addressing impacts caused by stormwater. For example, in the recently litigated "San Diego Stormwater Permit," the term MEP is broadly defined in the permit to be a "highly flexible concept that depends on balancing numerous factors, including the particular control's technical feasibility, cost, public acceptance, regulatory compliance, and effectiveness." (*Building Industry Association of San Diego County v. State Water Resources Control Board ("BIA")* (2004) 124 Cal.App.4th 866, 889.)

In contrast, the Draft Order proposes to define "maximum extent practicable" as:

> [t]he standard for implementation of storm water management programs to reduce pollutants in storm water. CWA § 402(p)(3)(B)(iii) requires that municipal permits "shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants." Also, see State Board Order WQ 2000-11, page 20 and *Browner* decision (*Defenders of Wildlife v. Browner* (1999) 191 F.3d 1159).

(Draft Order, at p. 100.)

The Draft Order's proposed definition does not properly define or implement the term "maximum extent practicable" but instead recites the CWA and its requirements for stormwater permits. The Draft Order's definition also improperly cites the *Browner* decision, implying that that decision helps to define the term MEP. *Browner* does not further define MEP. In fact, in relevant part, *Browner* focuses more on the Congressional intent related to the phrase "and such other provisions" as contained in CWA section 402(p)(3)(B). In *dicta*, the *Browner* court determined that this language of section 402 gives the EPA discretionary authority to impose controls that are stricter than MEP. (*Browner*, 191 F.3d at p. 1166.) The language "and such other conditions" is further evaluated in the *BIA* case. (*BIA*, at 866.) The *BIA* case goes beyond *Browner* by evaluating the statutory construction of the language contained in section 402(p)(3)(B)(iii). Based on its analysis, the Court of Appeal rejected the BIA's argument that "and such other provisions" was meant to identify examples of "maximum extent practicable" controls. (*BIA* at p. 881.) The court found that "such other provisions" means that EPA can require controls in addition to those that come within the definition of "maximum extent practicable." (*BIA* at pp. 882-883.) Thus, "such other provisions" is not part of the definition of MEP.

As discussed previously, the definition of MEP is considered to include the use of BMPs and site specific and flexible controls. The use of numeric MALs to determine

compliance with MEP does not rely on BMPs, is not site specific and is not flexible. The MALs are not themselves management practices or controls, and an exceedance of two creates a violation of MEP, thereby negating any iterative approach.

Furthermore, the use of MALs to define MEP imposes a non-flexible and non-iterative program on the Permittees. MS4s that are required to meet MALs will be forced to implement treatment control BMPs at stormwater outfalls. By forcing MS4s to install treatment controls, MS4s will need to redirect resources away from source control BMPs. However, in addition to forcing the installation of treatment controls, the Draft Order would mandate prescriptive source control requirements on the Permittees (e.g. street sweeping, new development and redevelopment controls, etc.). As a result, the Permittees will be forced to implement treatment and source control BMPs without consideration of feasibility or cost, which are both important factors in determining compliance with MEP.

Finally, the Draft Order has not considered if the practices necessary to meet the MALs are feasible, effective and not cost prohibitive. Nor are there findings to explain why, if they could otherwise be, the specifically identified MALs in fact define MEP for the Permittees. Consequently, the MALs as used in the Draft Order are inconsistent with state and federal policies interpreting MEP and should not be used to determine compliance with MEP.

C. The MALs Contained in the Draft Order Are Not Supported by SWRCB Blue Ribbon Panel Findings and Recommendations

Besides being inappropriate to define MEP in general, the specific MALs contained in the Draft Order are not technically supported or valid. There are no findings to support their use for the Draft Order's purpose. The State's Blue Ribbon Panel recommended that "action levels" be used to identify circumstances when it might be appropriate to take action. In this case, the action level comes into play when the stormwater is clearly above the normal observed variability. (Report at p. 8.) To develop an appropriate action level, the State's Blue Ribbon Panel suggested various options, which included: (1) consensus based approach; (2) ranked percentile distribution; and, (3) statistically based population parameters.

The Draft Order claims to use a statistical approach that used the central tendency of the dataset and accounting for data variability. (Draft Order, at p. 23.) In its actual calculation, the Draft Order took the median value of a national data set and multiplied it by the coefficient of variation. There is no basis for this approach in establishing action levels. This calculation actually reflects the variability of the data (measured as the standard deviation) and does not account for central tendency of the dataset). The Draft Order's approach is not consistent with the State's Blue Ribbon Panel suggestion for a statistically relevant calculation.

In addition, the Draft Order's use of the national database (Draft Order at p. 23) is not appropriate to generate the MALs. The State's Blue Ribbon Panel noted that there is

greater opportunity to use various data sets for establishing the MALs. Three options proposed in the Report, in order or preference, are:

- Local urban stormwater monitoring data (the Panel even notes the existence of such data sets from Los Angeles County, Orange County and other California MS4 programs)
- Combine municipal permit monitoring datasets if there is a lack of data for specific constituents in any one location
- National database

In this case, the Draft Order selects the least preferred option to generate the MALs even though there are local stormwater data sets available. In fact, California MS4s have more comprehensive data sets than any MS4s in the country. Thus, there is ample opportunity to use local, regional, and statewide data sets to establish action levels and no need to rely on a national dataset.

Furthermore, the derivation and use of action levels as envisioned by the State's Blue Ribbon Panel reflects an approach to identify the "bad actors." (Report at p.8) The use of MALs in the Draft Order establishes hard and fast compliance end points for MEP, regardless of the efforts made by the local agencies to implement effective BMPs. This is not legally justified or supported by the Draft Order or the findings of the Blue Ribbon Panel.

D. The Use of MALs Creates a Permit Term More Stringent than Required by Federal Law

When permit terms are more stringent than federal law, the adopting agency must consider the public interest factors contained in Water Code section 13241. (*City of Burbank v. State Water Resources Control Board* 35 Cal.4th at p. 618.) Section 13241, in turn, requires consideration of economics, site-specific conditions, the need to develop housing in the region, and other factors. The Regional Board must consider and balance such factors to determine if the requirements are reasonable. (Water Code § 13241; Water Code §13263.)

The Draft Order's use of MALs is more stringent than federal law requires. As discussed above, MEP is a highly flexible approach that balances a number of factors, which includes the use of BMP. MEP is not intended to include numeric limitations. Numeric limitations are considered to fall under the "and such other provisions" of CWA section 402(p)(3)(B). (*Browner,* 91 F.3d at p. 1166*; BIA* at p. 881.). The "and such other provisions" are independent of MEP and do not modify MEP. (*BIA* at p. 881.)

Thus, the use of MALs to define MEP exceeds the requirements of federal law. Therefore, the Regional Board must consider the public interest factors as contained in Water Code section 13241 before adopting the Draft Order. The Draft Order suggests that costs required for compliance with provisions contained within the Order have been considered. (Draft Order, p. 24.) However, upon close review of the noted reference, the incremental costs apply only to Los Angeles and do not specifically apply to the

provisions contained within the Draft Order that would apply to the Ventura Program. In other words, the cost considerations currently referenced in the Draft Order do not meet the requirements of section 13241 and therefore are not a substitute for the Regional Board's obligations under section 13241.

E. The Draft Order Lacks Findings And Rationale to Support the Use of MALs

The MAL requirements of the Draft Order are not supported by the findings or logic within the findings. The Regional Board must support decisions with specific findings and must relate evidentiary findings to the ultimate order. The mere recitation of facts is not sufficient. In particular, the Regional Board must "set forth findings to bridge the analytical gap between the raw evidence and the ultimate decision or order." (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515; see also *In Re Petition of the City and County of San Francisco, et al.*, SWRCB Order 95-4, 1995 WL 576920 at pp. 4-5.)

The Draft Order does not satisfy these requirements. It does not, for example, explain why exceedance of MALs would be presumed to be inconsistent with MEP standards of the permit or why other provisions are required as MEP. By way of other examples, Findings Nos. 15 and 16 recite that the Regional Board has "considered" the need for housing, and costs of implementation. (Draft Order at p. 24.) However, there are no findings that actually spell out what the Regional Board considered with regards to housing and the costs of implementation. The Draft Order also fails to explain how these findings are related to the provisions contained therein. Thus, the Regional Board has not properly bridged the analytical gap between the facts and the ultimate requirements that would be imposed under the Draft Order.

F. MALs are More Restrictive than Basin Plan and TMDLs

The proposed MALs are actually more stringent than Basin Plan water quality objectives that have been adopted into the Basin Plan as part of a TMDL. As an example, the Draft Order addresses the TMDL requirements for Malibu Creek and Lagoon, and Calleguas Creek. (Draft Order at p. 88.). Waste load allocations are identified and noted for a number of constituents including copper, nickel, and zinc. As recommended by federal TMDL guidance, numeric targets have been developed to ensure compliance with water quality standards and adopted into the Basin Plan as water quality objectives. A comparison of the MALs with the TMDL targets as approved in the Basin Plan is shown below in Table 2.

Table 2 - Comparison of MALs v. TMDL Adopted Targets

Constituent [3]	Municipal Action Levels[1]	Basin Plan[2]
Copper (dissolved, ppb)	12.8	26.3-41.6
Nickel (total, ppb)	9.6	74-1292[3]
Zinc (dissolved, ppb)	104	90-324

1. Attachment C to Draft Ventura Stormwater Order.
2. Attachment A to Resolution No. R4-2006-012.
3. Measured as dissolved.

A review of the table demonstrates that the MALs are considerably more restrictive than the water quality based targets used to comply with water quality standards. In addition, the Draft Order differs from the approved TMDL provisions with regard to implementation schedules and monitoring requirements. The provisions of the Draft Order need to accurately reflect the requirements of the approved TMDL (and as stated in the Basin Plan), including implementation requirements and monitoring. To do otherwise is inappropriate, and creates an inconsistency between two regulatory programs, and goes beyond actions and requirements being imposed on other dischargers listed in the TMDL.

In conclusion, the Draft Order's use of MALs to define MEP is ill conceived as it is inconsistent with state and federal policies, is technically flawed, results in requirements more stringent than federal law, and creates limits that are more restrictive then adopted water quality objectives contained in the Basin Plan.

V. WATER QUALITY BENEFITS VS. COSTS

In addition to our concerns regarding the substantive, prescriptive provisions contained within the Draft Order, we are also concerned that the Draft Order establishes a countywide program that has little connection with the pollutants of concern (POC) as identified by the Permittees. Over the course of the last five years the Ventura Program has spent considerable resources on identifying the pollutants that warrant special attention. In some cases the POC focus complements what the Draft Order specifies and in other cases there is no relationship (e.g. installation of trash excluders on all catch basins even though trash is not listed as a POC).

To better understand the Permittees' liability in meeting the Draft Order provisions, we have compiled our monitoring data for the last 4-5 years for both the land discharge sites and mass emission sites. These data were compared to the MALs which are summarized in Attachment C. A review of the attachment demonstrates that the Permittees are subject to non-compliance and will be required to construct treatment control BMPs to meet the MALs. To further assess the Permittees' exposure, we have estimated the cost for complying with the Draft Order. Our costs reflect a program required to meet the new baseline program element provisions, an enhanced program which includes the baseline program plus the installation and maintenance of trash excluders, and a compliance program which consists of baseline, enhanced, and the cost for constructing BMPs to comply with MALs. We initially developed the cost for the City of Camarillo and expanded it to the Ventura Program. To further put these costs in perspective we compared these costs to the study referenced in Finding No. 16 of the Draft Order. This comparison is shown below:

Summary of Ventura Program Costs Impacts

Program	Annual Cost $/Household			
	Current Effort	Draft Order Baseline[3]	Enhanced[4]	Compliance[5]
Statewide Study[1]				
Range	18-46	--	--	--
Mean	29	--	--	--
Ventura County				
Range	18-44[2]	--	--	--
Mean	35	60	87	213

[1] NPDES Stormwater Cost Survey, Prepared by Office of Water Programs for State Water Board, Jan '05. Reflects Annual Budgets for 02/03.
[2] Based on 03/04 budget submitted in Ventura Countywide 2004/05 Annual Report.
[3] Reflects an increase in Permittee staff to meet Draft Order baseline requirements.
[4] Reflects baseline requirements (see note 3) and installation and maintenance of trash excluders.
[5] Reflects costs for baseline, enhanced and retrofit (infiltration, wetlands) of outfalls to meet MALs. Treatment BMP costs were based on the Office of Water program NPDES Stormwater Cost Survey (attachment H).

A review of this table demonstrates that the typical household costs will increase approximately six fold for the full compliance option.

In addition, the new requirement under the Planning and Land Development program will result in increases in housing costs. These additional costs impact local affordability and the economic viability of the communities.

VI. PROPOSED PERMIT IS OVERREACHING IN EXPANDED COVERAGE AND SCOPE

Additional major issues of concern for the Permittees are the Draft Order's attempts to expand stormwater permit coverage beyond the jurisdictional boundaries of the Permittees, individually and collectively, and the Draft Order's inclusion of certain requirements that are beyond the scope of the Regional Board's authority as it relates to water quality controls.

A. Improperly Expands Land Use Area Subject to Permit Requirements

The Draft Order attempts to require the Permittees to provide control over pollutant generating activities outside of the limited jurisdictional boundaries that are actually covered by the Ventura Program. For example, the Draft Order attempts to exempt "agricultural lands" and "forest lands." However, the exemption is incomplete and unclear. At a minimum, the exemption needs to be expanded to include open space lands

that are not subject to urbanization. Thus, the exemption should read "agricultural lands, forest lands, and open space lands not subject to urbanization."

Additionally, regulating all "areas undergoing urbanization" will result in the unnecessary regulation of many remote and *non-urbanized* areas within Ventura County boundaries. Ventura County has vast areas that are sparsely populated and should not be considered to be undergoing urbanization. The Draft Order's proposed regulation of "areas undergoing urbanization" is beyond the scope of an NPDES permit for MS4 discharges. The Draft Order should more appropriately apply MS4 permit coverage to "Urban Areas" as defined in the most recent U.S. Census Survey. Thus, activities that occur outside of the jurisdictional municipal boundaries of the municipalities (i.e. Urban Areas), individually and collectively, are beyond the scope of the Ventura Program and should be removed from requirements contained within the Draft Order.

B. Improperly Expands Monitoring Requirements

The Permittees believe whole heartedly that an effective stormwater monitoring program is an important tool to assess the impacts of urban runoff and potentially measure the effectiveness of the management program. However, the highly prescriptive monitoring requirements in the Draft Order would not provide the Permittees with useful feedback to make appropriate improvements in the Permittees' stormwater program. (Draft Monitoring Program—No. CI7388.) For example, the Permittees would be required to collect a significant amount of data on pollutants from non-MS4 sources. The Permittees would then be responsible for preparing plans and corrective actions to remedy problems discovered through the monitoring program. Many of these plans and corrective actions may be for pollutants that are discharged into the receiving waters from non-MS4 sources, therefore depleting valuable local agency resources as to which the local agencies have no jurisdiction.

In addition, there exists in California a Model Monitoring Program for Municipal Separate Storm Sewer Systems in Southern California. This document was developed by the Southern California Stormwater Monitoring Coalition (SMC), represented by three Regional Boards (including the Los Angeles region), municipal Permittees representing six counties, Heal the Bay and the Southern California Coastal Water Research Project. The basic philosophy on environmental monitoring discussed in this document is "Monitoring should be focused on decision making; data not helpful in making a decision about clearly defined regulatory, management, or technical issues should not be collected." As a model monitoring program developed for Southern California, the Regional Board should incorporate the tenets and philosophy of this program into the monitoring program contained in the Draft Order.

Unfortunately, the monitoring program prescribed in the Draft Order does not follow the philosophy contained in the model program. It is overly broad. The proposed monitoring program would require sampling throughout the watersheds for all storms, regardless of the actual impacts that may be caused by the Permittees. The Permittees contend that such an expansive program in Ventura County would not yield credible information. The

whole of Ventura County includes vast open space and agriculture areas that are intermingled amongst the urban areas. In reality, the MS4s make up only a small percentage of each watershed. (*See* Table 1.) To be useful for program management, the Ventura Program's limited monitoring resources need to be focused on collecting information specific to the MS4 programs.

Furthermore, state law requires monitoring programs imposed by the Regional Water Board to "bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports."(Water Code § 13267(b)(1).) In addition, the Regional Board must explain the need for reports and identify the evidence that supports requiring a specific discharger to provide the reports. The expansive monitoring requirements contained in the Draft Order clearly do not bear a reasonable relationship to the Permittees' activities as it requires monitoring in areas that are probably not impacted by municipal stormwater discharges, and requires monitoring for constituents that may not be of issue.

For example, the draft monitoring program would require the Permittees to monitor up to 18 tributary sites in one watershed for pyrethroid insecticides. (Draft Order, at p. F-19.) However, there does no information on the presence of pyrethroids in the main stem receiving waters or the tributaries. Until evidence exists that pyrethroids may be a concern, the Regional Board does not have sufficient basis to require such an extensive pyrethroid insecticides study.

Finally, the proposed monitoring requirements in the Draft Order overlook the watershed monitoring efforts that the Permittees, in cooperation with other dischargers, are already implementing to address and identify urban runoff impairments in Ventura County. The Calleguas Creek monitoring program (the only watershed with a clear urban runoff signature in the mass emission station) extensively monitors receiving waters, tributaries, agriculture, POTWs, and stormwater. This is done with cooperation and commitment from the major stakeholders in the watershed. Any increase in requirements to the MS4's monitoring program needs to be considered in the context of the larger monitoring efforts underway to prevent duplication of effort and to further the cooperative stakeholder agreements already in place to continue this monitoring.

Thus, monitoring requirements that extend beyond collecting useful information relevant to the MS4 program are not justified by the Draft Order and therefore must be removed. As an alternative to the prescriptive monitoring requirements contained in the Draft Order, the Permittees and Regional Board staff should work to develop a locally designed MS4 monitoring program that furthers the objectives of the stakeholder monitoring program and provides useful information regarding the Permittees' stormwater programs.

C. Improperly Requires Ecological Restoration Planning and Implementation

Part 5 of the Draft Order requires the Permittees to develop and implement Watershed Ecological Restoration Plans (ERP) for all watershed management areas that have

obtained poor scores, as determined by the bioassessment monitoring program that is also required. The Regional Board's justification for this requirement contained in Finding B.9 is primarily to "reestablish insofar as possible the ecological integrity of degraded aquatic ecosystems." (Draft Order p. 4.) However, the Regional Board fails to indicate how ERP is required for the Permittees to meet MEP or any specific legal requirement or standard. The Regional Water Board's authority to require compliance with water quality standards does not extend to requiring watershed wide ecological restoration planning.

Furthermore, ERPs are required under the Draft Order when bioassessment data for a tributary shows that the reach evaluated is rated as poor or very poor. The bioassessment data and the reach evaluation do not identify potential sources or causes of the poor conditions within the watershed. Under the Draft Order, the Permittees would be responsible for restoring the ecological conditions in the watershed regardless of the Permittees' role in causing the condition. The Permittees should only be responsible for water quality conditions related to discharge from their respective MS4s. Agricultural areas, other NPDES permitted dischargers, nonpoint and natural sources such as invasive species have the potential to contribute to a low index of biological integrity. Additionally, stream segments can be on private property where Permittees have no authority to make improvements and cannot legally spend public funds to do so, as such an improvement may constitute an illegal gift of public funds. (Cal. Const. Art. 16, §6) Because the Regional Board does not have the authority to issue requirements related to watershed wide ecological restoration, and because the Regional Board cannot provide evidence of a causal link between the Permittees' activities and the bioassessment rating of a stream, the ERP requirements must be removed from the Draft Order. Ecological Restoration Planning and implementation of those plans is more correctly conducted through the stakeholder processes such as the IRWMP and WCVC.

D. Improperly Expands Land Development Requirements

1. Smart Growth v. Urban Sprawl

The Permittees applaud a stormwater permit that promotes low-impact development and redevelopment strategies and recognizes the water quality benefits of smart growth. (Draft Order, p. 21.) Many of the Permittees are already choosing high-density, infill development and redevelopment as an alternative to urban sprawl. Smart growth strives to mix land uses, take advantage of compact building design, and create walk able communities. Development pressure on open space, environmental habitat and farmland is diminished by using smart growth practices.

The Draft Order cites to hydromodification and low impact development requirements as provisions within the Draft Order that support smart growth. (Draft Order, p. 21.) However, the specific requirements in the draft permit relating to hydromodification and the restriction of imperviousness are much more easily accomplished in typical urban sprawl developments. Urban sprawl has more room to implement stormwater retention strategies. For example, many smart growth strategies include high-density development

(e.g. subterranean parking garage, retail/office/work space on street level and residential above) that usually results in the entire property being covered by the development and therefore less opportunity for stormwater infiltration. High-density and infill development and redevelopment projects incur water quality benefits in a different way, and these benefits should be recognized and rewarded.

The Permittees are concerned that the Draft Order would in fact hinder smart growth and reward urban sprawl. We request the opportunity to collaborate with you on the specific requirements on land development and redevelopment to assure that they are achievable for high-density, infill projects.

2. Local Land Use Authority

Land use decisions are a local government function. The Draft Order claims that "Permittees retain authority to make the final land-use decisions and retain full statutory authority for deciding what land uses are appropriate at specific locations within each Permittee's jurisdiction. This Order and its requirements are not intended to restrict or control local land use decision-making authority." (Draft Order, p. 22.) The Draft Order, however, contains several requirements that infringe upon local government control over land use planning.

Local land use authority includes mitigating and conditioning the authorized land uses to ensure protection of public health and safety, as well as protection of the environment. (*Berman v. Parker* (1954) 348 U.S. 26; *Associated Home Builders, Inc. v. City of Livermore* (1976) 16 Cal.3d 582; Gov. Code, §§ 65302, 65800-65912.) When including such conditions as part of a land use entitlement process, local government decisions must be made within the context of the applicable General Plans, zoning ordinances, and other local codes. (*Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553.) Thus, local land use decisions must be consistent with General Plans, zoning ordinances and local codes, and must not create land use inconsistencies with neighboring lands. (*Ibid.*)

The Draft Order requires application of specific land use strategies to address stormwater issues, without any consideration of applicable General Plans, zoning ordinances, or other local codes. (Draft Order at pp. 50-54.) In particular, the Draft Order requires specific limitations on impervious surfaces (Draft Order at p. 50), use of Low Impact Development (LID) strategies (Draft Order at p. 51), and hydromodification mitigation (Draft Order at p. 52) for all New Development and Redevelopment, as defined. Implementation of specific limitations on impervious surfaces, LID and hydromodification strategies are specific land use decisions that are within a local government's discretion. These methods of controlling stormwater discharges are certainly within the tools a local agency can use when addressing stormwater discharges associated with development. The Draft Order, however, requires implementation of these strategies for all new development and redevelopment, regardless of circumstances and without consideration of applicable local agency regulations. The Draft Order,

therefore, undermines a local agency's authority to regulate land uses within its jurisdiction.

Indeed, the Draft Order goes so far as to specify the order of priority for certain land use strategies to address stormwater: LID, Integrated Water Resources Management Strategies, Multi-benefit Natural Feature BMP, Prefabricated/Proprietary Treatment Control BMPs. (Draft Order at p. 50.) This prescription of mandatory land use strategies unlawfully impairs local government's discretion to implement land use strategies that are consistent with existing local government plans and policies, and ignores a local agency's obligation to consider a broader spectrum of issues and options when making land use decisions. (Gov. Code, §§ 65302, 65800-65912; see also Pub. Resources Code, § 21000 et seq.) In fact, the Draft Order appears to restrict a primary strategy used by many municipalities within California to address stormwater, which is the development and construction of stormwater detention basins.

To the extent a project in issue is subject to the California Environmental Quality Act (CEQA), the Draft Order's requirements regarding LID, hydromodification and others are also inconsistent with CEQA's requirement to evaluate project impacts based on evaluation of the whole of the project and consideration of all the potential impacts of the project. (Pub. Resources Code, § 21000 et seq.; see Pub. Resources Code, §§ 21060.5, 21080; 14 Cal. Code Regs., tit. 14, §§ 15003, 15063-15065, 15070.) CEQA requires identification and adoption of feasible mitigation measures for significant impacts of a proposed project, taking into account the specific characteristics of the project in question and the affected environment. (Pub. Resources Code, §§ 21002, 21081; 14 Cal. Code Regs., tit. 14, §§ 15021, 15041.) The blanket application of the identified land use strategies and priorities may not be appropriate in all cases. Yet, the Draft Order would limit a local agency's ability to require implementation of more appropriate land use strategies. Thus, the blanket application of the required land use strategies could have unintended environmental consequences that can only be identified through appropriate environmental review, and which must be evaluated on a project-specific basis.

Similarly, the Draft Order specifically directs periods of time when grading shall be prohibited in certain areas. (Draft Order at p. 63.) This specific requirement is clearly within a local agency's land use authority and the Regional Board has no authority to prescribe what type, when, or how certain land uses should be implemented or allowed.

Thus, the provisions within the Draft Order that require LID, hydromodification controls and others must be revised. The Draft Order may encourage the consideration of such strategies by the Permittees who have land use authority; however, the decision to implement such strategies must be left to the individual Permittees.

Also, the Draft Order specifies BMPs and applies them universally. This approach will lead to many problems. For example the Regional Board is requiring trash excluders on all storm drains inlets rather than other trash mitigation measures which may in turn cause increased flooding in some locations. Homes and businesses will be flooded that are not currently flooded with subsequent liability issues.