E. Overreaching Hydromodification Mitigation Requirements

The Draft Order assumes that all development and redevelopment projects will have a detrimental effect on erosion and on the peak flow and duration of the receiving water. However, in Ventura County, some development projects have little to no effect on the receiving waters pre-development hydrograph due to the size of the natural watershed upstream of the development. For example, the 235 square mile Ventura River Watershed is less than five-percent urbanized. Most of the watershed, and a disproportionately large amount of the rainfall, are within the National Forest. In these cases, the natural storm flow in the rivers is many times greater than storm drain discharges and the timing and flows are dictated by the natural flows that occur long after the storm drain discharges takes place. In other cases, developments discharge through storm drain systems directly to the ocean, without the potential to impact a natural channel or riparian habitat.

These types of analyses should be considered when developing thresholds for hydro modification requirements. The Draft Order be revised to include the rationale for the 50 acre threshold contained in the Interim Criteria in Part (e) of Page 53, and should consider additional exemptions based upon the hydrology of Ventura County Watersheds, rather than the assignment of a size of project.

In practice, it is not possible to exactly match a hydrograph in both peak flow, volume and duration at the same time. Depending on the watershed and the project's hydrologic characteristics, the concept of attempting to equalize pre- and post-project peak flows and/or volume may or may not be appropriate and effective in minimizing erosion effects. The concept of matching flow duration and/or volume may or may not be critical for habitat and ecology, depending on the hydrologic characteristics of the watershed and the project. The Draft Order should allow flexibility based upon the watershed characteristics and erosion protection, habitat and ecology needs. The Draft Order should be revised to provide flexibility or provide the Permittees with engineering methodologies that would allow the exact matching of flow, volume and duration at the same time. Although the comment period has not allowed time to develop and present draft suggested engineering criteria that would protect our watersheds and their habitat. The Permittees are willing to work with you toward this interim criteria.

And finally, the Hydromodification Analysis Study (HAS) also appears similar in scope to CEQA sections (biology, hydrology/water quality/ geology/soils) that determine impacts of a project. The Draft Order needs to be prepared to avoid duplication with the CEQA studies and process.

VII. STORMWATER RECHARGE VS. GROUNDWATER PROTECTION

Groundwater is the single most important source of water in Ventura County. Collectively, groundwater accounts for approximately 67% of the total water demand for the County's agricultural and domestic use. The protection and quality of this important resource are of paramount interest and concern to the residents of Ventura County. We

do agree the use and recharge of uncontaminated stormwater can be an important component of integrated regional water management. However, we are not in agreement with the universal proposal to percolate and infiltrate all stormwater through implementation of LID and other BMPs. This "one size fits all approach" does not take into account Ventura County's site specific and variable conditions such as local geology/hydrogeology and soils. Furthermore, this type of approach might have the unattended consequence of attempting to fix one environmental problem and consequently creating another. A good example of the above happened recently with this the State Air Resources Board mandating oxygenate fuels (MTBE) in gasoline to solve one of its air quality issues, resulting in a much bigger and costlier issue of groundwater contamination and remediation statewide.

U.S. EPA lists the following on its website, warning of potential additional hurdles and requirements for recharging groundwater with stormwater: *"When stormwater is used to recharge ground water - Discharges to ground water may be subject to local, state or federal requirements. Specifically, discharges via subsurface fluid distribution systems or other subsurface infiltrative devices may be subject to the federal underground injection control (UIC) requirements. The UIC program, authorized pursuant to the U.S. Safe Drinking Water Act, exists to prevent the endangerment of underground sources of drinking water. Stormwater injection wells need to be listed on state or federal inventory lists, and should not be used for the disposal of fluids other than storm water. To limit the potential for ground water contamination, EPA recommends that stormwater injection wells be constructed with spill catchment, and not be constructed to intersect the water table." (U.S EPA website.)*

Several communities in Ventura County have underlying unconfined or semi-confined aquifers (along the Santa Clara River), sole sources aquifers, and/or have highly venerable and sensitive recharge areas (e.g. the Oxnard forebay) that cannot use infiltration BMPs for fear of contaminating the community's only drinking water supply. Communities with high groundwater (e.g. Simi Valley) may experience potential flooding with these BMPs, and in other communities with clay or impermeable soils these BMPs will not physically work. The Draft Order should provide provisions to ensure full protection of our limited groundwater resources.

VIII. SUMMARY/CONCLUSION

In closing, the Ventura County Watershed Protection District and the Ventura Countywide Stormwater Program Co-Permittees have very real and very significant concerns about the Draft Order as currently proposed.

Of great concern to the Permittees is the significant incongruity and apparent lack of coordination in the regulatory methodologies being implemented by the State Water Resources Control Board and its Regional Boards. This lack of equity and consistency is apparent both externally in programs and actions taken from Regional Board to Regional Board but now particularly evident between initiatives and programs directed from within the departments of the Los Angeles Regional Board to the regulated community.

The 303(d) impairment identification and subsequent TMDL implementation process in Ventura County has been an exemplary model of a successfully adopted and implemented non-point source, pollution control program focused on the specific constituents that inhibit beneficial uses. This program has been implemented in an allied, co-operative, coordinated manner with the Regional Board serving as a full-partner. This approach has resulted from a unified effort by Regional Board staff with a fully comprehensive body of stakeholders (including the US-EPA, municipalities, the County, major water suppliers, Caltrans, the U.S. Navy, the Ventura County Farm Bureau and other agriculture and environmental interests). These initiatives, implementation schedules and goals will result in tangible water quality improvements, compliance with Basin Plan objectives and protection of beneficial uses for Ventura County watersheds with respect to bacteria, salts, nutrients, metals, pesticides and trash. The TMDL programs are focused by reach, pollutant specific and directed to protecting the identified beneficial uses in the Basin Plan.

In direct contrast to the Calleguas Creek TMDL process, the Draft Order presents an adversarial, 'command and control' methodology aimed at a smaller sub-set of same stakeholders with less of an ability to affect the overall surface water quality in Ventura County. Yet this Draft Order dictates discharge limitations (MALs, which are inconsistent with previously Board adopted TMDLs and NPDES discharge limits) while demanding implementation and installation specific controls. Additionally, this direction includes how such limitations are to be achieved without any discretionary flexibility as to how these controls are to be implemented or applicability adjustments as to the pollutants of concern. Many significant elements in the proposed permit are unfocused, counter-productive and contrary to the progress and good-faith efforts established in the TMDL process.

As stewards of scarce and limited public funds and the municipal trust, we must demand that the actions and expenditures driven by and determined by state regulators are consistent with each other, are cost-effective and capable of achieving the goals for which those expenditures are intended. As noted throughout these comments, this Draft Order is inconsistent with those goals.

Finally, although we fundamentally disagree with the proposed approach being used by the Regional Board staff, we are in agreement with the need to continue and enhance our award-winning stormwater management program that will lead to water quality protection and enhancement, and provide for adequate accountability. We look forward to working with the Regional Board to craft a revised Draft Order that supports this need.

In order to move towards the development of an appropriate Draft Order, we request a meeting with you at your earliest convenience. We also look forward to a formal written response to each of the comments contained in this letter and its attachments. If you have any questions, please contact me at 805-654-5051 or Gerhardt.Hubner@ventura.org.

Sincerely,

Gerhardt J. Hubner, Chair
Ventura Countywide Program
Stormwater Management Committee

Attachments

A. Additional Legal and Policy Comments
B. Permittee' Combined Technical Comments for Ventura County MS4 Permit Draft Order, dated December 27, 2006
C. Comparison of Discharge Characterization Data with Municipal Action Levels

Cc: Xavier Swamikannu, Senior - Storm Water Permitting, Los Angeles Regional Water Quality Control Board
Ventura Countywide Program Permittees
Jeff Pratt, Director, Ventura County Watershed Protection District
Ron Coons, Public Works Director, County of Ventura

ATTACHMENT A
ADDITIONAL LEGAL AND POLICY COMMENTS
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

The following comments are provided in order as the issue appears in the Draft Ventura County Municipal Separate Storm Sewer System Permit (Draft Order).

COMMENTS ON FINDINGS

Finding B.16 (p. 7) – The Draft Order contains a finding regarding atmospheric deposition of pollutants into surface waters located within Ventura County. The Permittees agree that atmospheric deposition can be a major contributing source of pollutants into the waterways of Ventura County. The Permittees are concerned that they may be held responsible (now or in the future) for pollutants that enter the waterways through atmospheric deposition. The Permittees recommend that the Draft Order be amended to delete the finding regarding atmospheric deposition. In the alternative, the Draft Order should clarify that the Permittees are not responsible for pollutants that are atmospherically deposited into the surface waters.

Finding E.6 (p. 13) – The finding refers to the July 2003 303(d) list as the most recently adopted list of impaired waterbodies. This reference is incorrect. The state adopted a newly updated list in 2006. The finding should be revised to reflect the State Water Resources Control Board's (State Board) most recent action on this issue.

Finding E.9 (p. 14) – The second part of this finding refers to the State Board's *Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays and Estuaries in California* (SIP). The reference to this finding implies that this policy applies to stormwater discharges in California. That is not correct. The SIP specifically excludes application of the policy to stormwater discharges and is not relevant. (SIP (2005) fn. 1, p. 3.)

Finding E.18 (p. 18) – Finding 18 incorrectly characterizes the state and federal antidegradation policies in several ways. The finding claims that "[b]oth, state and federal antidegradation policies acknowledge that an activity that results in minor water quality lowering, even if incrementally small, can result in violation of Antidegradation Policies through cumulative effects, for example, when the waste is cumulative, persistent, or bioaccumulative pollutant." We disagree with the implication of this finding.

This statement does not accurately reflect applicable law and policy with regards to the two anti-degradation policies. The primary purpose of the state and federal antidegradation policies is to protect *high quality waters* that *already* support and

maintain existing beneficial uses and adopted water quality objectives (emphasis added).[1] The finding implies that any discharge that lowers water quality violates the state and federal antidegradation policies or that the policies contain specific terms related to minor changes in water quality. This is not true. Both the state and federal antidegradation policies allow for a lowering of water quality upon meeting certain conditions and "minor" change is routinely permitted. The U.S. Supreme Court found that EPA's decision to allow some de minimus degradation is not inconsistent with the federal Clean Water Act. (*Arkansas v. Oklahoma* 503 U.S. 91 at 113 and 107, respectively.)

A violation of the state and federal antidegradation policies would only occur if there is degradation below applicable water quality standards and the agency is unable to find that it is for the maximum benefit to the people of the state, or is necessary to accommodate important economic or social development in the area. The state's policy "does not absolutely require that existing high quality water be maintained; rather, any change must be both consistent with maximum benefit and not unreasonably affect beneficial uses." (SWRCB Order No. 86-8 at p. 15.) Similarly, the federal policy "is not an absolute bar to reductions in water quality" as long as existing, in-stream beneficial uses will not be impaired, no Outstanding National Resource Waters (ONRW) will be affected; and, the reductions in water quality are "justified as necessary to accommodate important and social economic development." (Federal Antidegradation Policy, Memorandum to Regional Board Executive Officers from William R. Attwater, Chief Counsel, State Water Resources Control Board (Oct. 07, 1987) at pp. 2-3.)

Finally, we are not familiar with any state or federal antidegradation policy positions that discuss or address the cumulative effects of discharges, especially with regard to bioaccumulative pollutants. At most, APU 90-004 encourages Regional Boards to apply stricter scrutiny to "non-threshold pollutants" when determining if it is necessary to conduct a simple antidegradation analysis or a complete antidegradation analysis. (APU 90-004, pp. 2-3.) Non-threshold pollutants are described as carcinogens, mutagens, and teratogens. To the extent that a bioaccumulative pollutant may also be a non-threshold pollutant, the Regional Board should consider this factor in determining the appropriate level of antidegradation analysis to apply when there may be a lowering of high quality water caused by the proposed activity. The determination of what level of analysis to conduct is not akin to a violation of the antidegradation policies. The determination of violation would occur after the antidegradation analysis is conducted.

Finding E.19 (p. 18) – Finding 19 of the Draft Order states that the hydromodification control and low impact development (LID) provisions of the Draft Order are "intended to promote the State Water Board and federal Antidegradation policies by preventing water quality and habitat (beneficial) degradation." The Draft Order's proposed connection between the hydromodification controls and LID provisions is misplaced for several reasons.

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[1] SWRCB Resolution No. 68-16 states that "it is the intent and purpose of this Board that such higher quality shall be maintained to the maximum extent possible consistent with the declaration of the Legislature." Federal Regulation 40 CFR § 131.12 states that "existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected."

First, the Regional Board has no basis for this finding as the state and federal antidegradation policies do not apply to the adoption of this Draft Order. As proposed, the Draft Order does not authorize a reduction in water quality as compared to the last Ventura County MS4 permit and therefore application of the antidegradation policies has not been triggered. "If the Regional Board has no reason to believe that existing water quality will be reduced due to the proposed action, no antidegradation analysis is required." (APU 90-004, Antidegradation Policy Implementation for NPDES Permitting, p. 2.) Likewise, the federal antidegradation policy is only applied if the activity will reduce existing water quality. "The first step in analyzing the requirements of the federal antidegradation policy as applied to a particular activity is to determine if the activity will lower surface water quality; only if there is reduction in water quality must the three-part test be applied to determine if the activity may be permitted." (Federal Antidegradation Policy, Memorandum to Regional Board Executive Officers from William R. Attwater, Chief Counsel, State Water Resources Control Board (October 7, 1987) at p. 3.) In particular, the federal antidegradation policy is usually triggered "by new discharges or expansion of existing facilities." (*Id.* at p. 5.)

In this case, the proposed action is the adoption of a renewed NPDES permit, which is "reasonably expected to reduce the discharge of pollutants via storm water runoff into receiving waters, and to meet the Waste Load Allocations (WLAs) for municipal storm water adopted by the Regional Water Board." (Draft Order, Finding B.1 and Finding F.2 p. 2. and p. 20.) Thus, the Regional Board does not anticipate the proposed action to lower surface water quality.

Second, the Draft Order attempts to equate LID and hydromodification controls to meeting best practicable treatment and control (BPTC) requirements as contained in the state's antidegradation policy. BPTC is required when there is a discharge that may degrade existing high quality waters. (SWRCB Resolution 68-16.) BPTC is not required when the Regional Board has not identified a discharge that may degrade existing high quality waters. In other words, before applying the BPTC standard for meeting waste discharge requirements, the Regional Board would need to find that discharges covered by the stormwater permit may degrade waters that already meet water quality standards. To make this determination, the Regional Board would need to establish the baseline quality of the receiving water, which is a pollutant specific determination. (APU 90-004, p. 4.) In addition, to determine what is BPTC, one must consider a number of factors including "water quality achieved by other similarly situated dischargers and the methods used to achieve that water quality." (SWRCB Order WQO 2000-07, *In re San Luis Obispo Golf and County Club*, pp. 10-11.) Also relevant is "information concerning alternatives and costs of alternatives." (*Id.* at p. 11.)

The Draft Order does not contain any of the required findings or information to determine that 1) there is degradation of an existing high quality water based on a constituent-by-constituent analysis; 2) BPTC must be applied to meet waste discharge requirements for the individual constituents impacted; and 3) LID and hydromodification controls are the appropriate BPTC after considering water quality achieved by others and the cost of

alternatives. Thus, finding E.19 is inappropriate and must be removed from the Draft Order.

Finding E.23 (p. 19) – The finding regarding the application of aquatic pesticides to waterways is irrelevant and has no application to the Draft Order and its provisions. Furthermore, the case cited within the finding has been addressed by a recently issued federal regulation that was adopted in 2006. Thus, this finding should be removed from the Draft Order.

Finding F.7 (p. 22) – Finding F.7 claims that all requirements contained in the Draft Order are prescribed to be consistent with federal law and therefore economic considerations need not be considered in the adoption of this Draft Order. We disagree with this statement. Under federal law, municipal stormwater discharges must comply with section 402(p) of the Clean Water Act, which requires that cities reduce stormwater to the maximum extent practicable. (33 U.S.C. § 1342(p)(3)(B)(iii).) "Congress did not require municipal storm sewer discharges to comply strictly with [water quality standards]." (*Defenders of Wildlife v. Browner* (1999) 191 F.3d 1159, 1166.) Whenever a Regional Board imposes pollutant restrictions in a wastewater discharge permit *more stringent* than what federal law requires, California law requires the board to take into account the public interest factors of Water Code section 13241, which includes economic factors and the cost of compliance. (*City of Burbank v. State Water Resources Control Board* (2005) 35 Cal.4th 613, 627.) Thus, if the Regional Board seeks to impose any requirements that go beyond those set forth in section 402(p), the Regional Board must evaluate the public interest factors in Water Code section 13241 prior to permit adoption.

Whether or not they are within the state's discretion, numerous provisions of the Draft Order exceed the requirements of federal law. One example, as stated in the attached letter, is that the use of MALs to define MEP is more stringent than federal law. Other requirements are described throughout the comments of the Permittees. Permittees again emphasize that an order issuing a permit must explain how its conclusions are reached. The Permittees find no logic in the Draft Order that would support a conclusion that each requirement is required by federal law.

In addition, a very specific issue of concern is the prescriptive requirements pertaining to land use. In particular, land use is a matter of local control, and the federal government has no role in land use decisions or policies. "Regulation of land use [is] a function traditionally performed by local governments." (*Hess* v. *Port Authority Trans-Hudson Corporation,* 513 U.S. 30, 44, (1994).) The Regional Board lacks the authority to infringe on local land use decisions, on which the Legislature has declared the state should impose "only a minimum of limitation in order that counties and cities may exercise the maximum degree of control over local zoning matters." (*DeVita v. County of Napa,* 9 Cal.4th 763, 782-783 (1995).) Assuming for the sake of argument that the Regional Board does have the power to interfere with local land use policy, such authority cannot be derived from federal law. When enacting the Clean Water Act, Congress chose to "recognize, preserve, and protect the primary responsibilities and rights of States . . . to

plan the development and use . . . of land and water resources . . . ." (33 U.S.C. § 1251(b); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers,* 531 U.S. 159, 174 (2001).)

Finding F.14 (pp. 23-24) – Finding F.14 and implementing provision Part 4.G.1 of the Draft Order would require the Permittees to implement a number of provisions related to sanitary sewer systems. These provisions are outside the scope of a municipal stormwater permit and should be removed. In May 2006, the State Board adopted WQ 2006-03, Statewide General Waste Discharge Requirements for Sanitary Sewer Systems. All publicly owned collection systems with one mile or more of sewer pipe were required to enroll for coverage under the General WDR by November 2, 2006. The statewide WDR requires all collection system agencies to report SSOs to a statewide online database and to develop, among other detailed requirements, overflow response plans and comprehensive sewer system management plans.

The scope of this Draft Order is the regulation of the municipal separate storm sewer systems operated by the co-permittees. The collection systems, like the wastewater treatment plants and water recycling programs operated by individual co-permittees, are subject to regulation under a separate enforceable permitting mechanisms. It is neither necessary nor justified to duplicate and overlay the requirements set forth in WQ 2006-03 in the stormwater permit.

Finding F.16 (p. 24) – The Permittees object strenuously to the claim made in finding F.16 that the "Order may have incremental effect on costs required for compliance." As discussed in the body of the main cover letter, the requirements contained within the Draft Order will be costly to implement. Furthermore, the Permittees also object to the statement that the Regional Board is not required to consider costs in preparing the Draft Order. As the Draft Order contains provisions that are more stringent than federal law, the Regional Board is required to consider the public interest factors of Water Code section 13241, including cost. (*City of Burbank v. State Water Resources Control Board* at 627.) Consequently, the Regional Board must prepare and consider the costs associated with implementing the provisions contained within the Draft Order that are not specifically required by federal law.

COMMENTS ON PART 1 – DISCHARGE PROHIBITIONS

Part 1, B.4 (p. 29) – The Permittees understand that the prohibitions contained in Part 1, B pertain to the discharge of non-storm water discharges into the MS4. However, provision B.4 would require the Regional Board Executive Officer to consider the state and federal antidegradation policies before authorizing or prohibiting other categories of non-storm water from discharging to the MS4. The state and federal antidegradation policies apply to discharges into waters of the state and the U.S., respectively. Antidegradation policies do not apply to discharges into the MS4, but only to discharges to the waters of the state and the U.S. Thus, this provision must be revised to clarify the intent of its application by the Regional Board's Executive Officer.

COMMENTS ON PART 2 – RECEIVING WATER LIMITATIONS

Part 2, 1 (p. 29) – Receiving water limitation provision 1 is in actuality a prohibition that is already contained in Part 1 of the Draft Order. The presence of a prohibition in this section of the Draft Order is confusing, duplicative and not reflective of a receiving water limitation.

Part 2, 2 (p. 29) – Like provision 1, receiving water limitation provision 2 is contained in Part 1 of the Draft Order. Inclusion in this section is duplicative and not necessary.

Part 2, 3(a) (p. 29) – As currently drafted, this provision does not clarify that the determination with regards to discharges applies to discharges "from the MS4," and not discharges in general. The Permittees are legally responsible for discharges from the MS4 and not all discharges in general. Thus, this provision needs to be amended to clarify that the application of this determination is made on discharges from the MS4.

Part 2, 4 (p. 30) – Provision 4 would provide that members of the public can petition the Regional Board Executive Officer to review alleged receiving water limitations "within 60 days to determine if Part 2 of this Order was violated." This term is improper and should be deleted for a number of reasons. Waste discharge requirements are adjudicatory orders defining rights and obligations of Permittees. It is inappropriate in any such order to define rights in third parties. Nor does the Regional Board have the authority to create rights in third parties. That is the province of the Legislature. If the provision were merely a restatement of current statute and regulations, it would be unnecessary. But it is not. There are many thousands of permits containing waste discharge requirements throughout the state. If the Regional Board desires to make recommendations to the Legislature to enact a petition process by statute, or to the State Board to prescribe such a process by regulation, it may do so. But the term, as it appears in this Draft Order, is not proper or lawful and must therefore be removed.

Part 2, 6 (p. 30) – Provisions 3 and 5 of Part 2 collectively establish a procedure for complying with receiving water limitations utilizing an iterative best management practice approach, which is appropriate for stormwater. However, provision 6 of this part undermines this process by stating that the Regional Board is not prevented from enforcing *any* provision contained within the order (emphasis added). As drafted, this language means that the Permittees could follow the process outlined in provision 3 when a water quality objective is exceeded and still receive an enforcement action from the Regional Board for exceeding the same water quality objective. The Draft Order's failure to provide a safe harbor against enforcement when the Permittees are following the procedures contained in provision 3 negates the purpose for these provisions. Provision 6 must be amended to protect the Permittees from enforcement when the Permittees are following the procedures contained in provision 3.

COMMENTS ON PART 3 - STORM WATER QUALITY MANAGEMENT PROGRAM IMPLEMENTATION

Part 3, B.3 and B.4 (p. 33) – B.3 requires each Permittee to update its Storm Water Quality ordinance no later than 6 months from the adoption date of the Draft Order. B.4, on the other hand, requires each Permittee to submit no later than 180 days after adoption of a statement that the Permittee has obtained and possesses all necessary legal authority to comply with the Order through the adoption of ordinances and/or municipal code notifications. There appears to be an inconsistency between the two provisions. B.4 does not clarify if the "180 days after adoption" applies after adoption of the Draft Order or the ordinance, which is required by B.3. The Permittees assume that B.4 applies after the Permittees have adopted updated stormwater ordinances in accordance with B.3, and that notification should then be provided to the Regional Board within 180 days after the updated stormwater ordinance has been adopted. However, the provision should be amended to clarify the timing requirement that is contained in B.4.

Part 3, C.1 (p. 33) – Provision C.1 states that the Permittees "shall allocate all necessary funds to implement the activities required to comply with the provisions of this Order." The Draft Order purports to enumerate the sources of funds that the Permittees may use for compliance, and requires that a "stormwater budget" be submitted annually the Regional Board. (*Id.* and fn. 3.)

This requirement goes beyond the Regional Board's purview as a water quality regulatory agency, ignores constitutional constraints on both state power and local government fee authority, and is inappropriate, unlawful and unwarranted.

Water Code section 13000 charges the Regional Board with regulating the quality of the waters of the state "to attain the highest water quality that is *reasonable*." The Regional Board is to prescribe requirements "as to the nature of" any discharge, which shall implement relevant water quality control plans. (Water Code § 13263(a).) In prescribing such requirements, the Regional Board may not specify "the particular manner with which compliance shall be had with that requirement," including placing itself in the role of judging whether the amount of local revenue that is to be devoted to permit compliance comports with its notion of the amount "necessary" to do so. (*See* Water Code § 13360(a).) The Regional Board does not possess unfettered authority to involve itself in matters of municipal affairs or to dictate the fiscal policy of local governments.

Local government budgeting is a municipal legislative function. There is no state statutory requirement that cities adopt budgets, and courts are without power to interfere in the budgeting process. (*Scott v. San Bernardino* (1996) 44 Cal.App.4th 684, 698.) In this Draft Order, the Regional Board proposes to assume a supervisory role over local budgeting that is superior to that of either the Legislature or the judiciary. Moreover, this provision ignores very real constraints on the Permittees' revenue raising authority. The first and most obvious of these is Proposition 218, which prohibits a local government from imposing a fee for stormwater related services without a vote of the electorate. (Cal. Const. Art. XIID, § 6.c.; *Howard Jarvis Taxpayers Association v. City of Salinas* (2002)

98 Cal.App.4th 1351.) A fee may not be imposed on a subset of the community (such as property owners) for a general government service available to the general public. (Cal. Const Art. XIID, § 6.b.) The California Attorney General has deemed a stormwater fee invalid on this basis. (81 Cal.Opp. Atty Gen. 104 (1998).) Other fees included in the Draft Order's laundry list, such as those for plan review, permits and industrial commercial users, may not exceed the reasonable cost of providing service to the payer. (*Sinclair Paint Co. v. State Board of Equalization* (1997) 15 Cal.4th 866.)

Thus, provision C.1 creates an unfunded mandate that must be removed from the Draft Order.

Part 3, D.1 (p. 34) – The time requirement contained in provision D.1 appears to be inconsistent with the ordinance provision contained above in B.3. In addition, 90 days is not a practical time frame for the Permittees to modify storm water programs, protocols, practices and municipal codes to be consistent with a permit is well over 100 pages. If the Draft Order is adopted as is, the Permittees would likely need at least a year to modify current programs to comply with all of the provisions contained within therein.

COMMENTS ON PART 4 – SPECIAL PROVISIONS (BASELINE)

Part 4, B.1 (p. 36) – Provision B.1 requires the principal Permittee (i.e. Ventura County Watershed Protection District) to participate in a number of watershed management planning meetings. Although the Permittee is supportive of the various watershed programs identified and intends to participate in most, or not all, of the programs identified, the Draft Order does not state how the Regional Board would determine compliance with this provision. Furthermore, it is inappropriate for the Regional Board to mandate in a stormwater permit provision participation in voluntary watershed programs. Such a requirement well exceeds the Regional Board's authority as there is nothing in the Water Code that allows the Regional Board to mandate watershed program participation. At most, the Regional Board can require the Permittees to prepare and submit technical and/or monitoring reports. (Water Code § 13267.) The Regional Board's authority under this provision does not extend to requiring participation in voluntary watershed management programs.

Part 4, D (pp. 41-49) – The Draft Order would require the Permittees to inventory and inspect a number of industrial and commercial facilities. While the Permittees are responsible for inspecting industrial and commercial sites within their jurisdiction for compliance with local municipal codes and ordinances, the Regional Board is responsible for inspecting and enforcing compliance with the State's General Permit for Industrial Activities. (*City of Rancho Cucamonga v. Regional Water Quality Control Board-Santa Ana Region* (2006) 135 Cal.App.4th 1377, 1390.) The provisions contained in Part 4, D appear to expand beyond ensuring compliance with local municipal codes and ordinances. For example, the introductory language for this section states that the minimum requirement is for the Permittees to track, inspect and ensure compliance with municipal ordinances. (Draft Order at p. 41.) This language suggests that the requirements contained in the Draft Order exceed the minimum. In particular, the Draft

Order would require the Permittees to determine if an industrial facility is implementing certain source control BMPs that may or may not be part of a local agencies municipal code or ordinance. (Draft Order at p. 47.) This type of a requirement is beyond the Permittees obligations to ensure compliance with municipal codes and ordinances. The Permittees recommend that the Industrial/Commerical Facilities Program requirements be substantially scaled down to reflect that the Permittees obligations are related to ensuring compliance with local municipal codes and ordinances.

Part 4, D.3(a) & (b) (p. 48) – Provisions D.3(a) and (b) both treat municipal action levels (MALs) as if they are water quality objectives. Please refer to earlier comments on this issue.

Part 4, E.III.12(a) (p. 62) – The California Environmental Quality Act (CEQA) requires an agency to consider if a project will cause a significant environmental impact. (Pub. Res. Code §21080 et seq.) The language contained in at Part 4 would require the Permittees to consider "potential" impacts. As proposed, this language may be inconsistent with CEQA laws and regulations for it requires consideration of only a "potential" impact and not a "significant environmental impact." To avoid conflicting with CEQA laws and regulations, the CEQA provisions in the Draft Order need to be revised to be consistent with CEQA's requirements and be tied to considerations of significant environmental impacts.

Part 4, E.III.13(a) (p. 63) – The State's planning laws require the "Conservation Elements" of a general plan to address conservation of natural resources including water and its hydraulic force. Likewise, the "Open Space Element" is required to identify strategies to preserve open space land with corresponding benefits to water quality and quantity. Thus, both elements are already required to include considerations regarding stormwater – making the requirements contained in the Draft Order to be unnecessary. Also, each general plan element must carry equal weight and be internally consistent. It is therefore unnecessary to require storm water quality and quantity management considerations in the Housing and Land Use Elements of the general plan. Because these provisions are not necessary, the Permittees recommend that they be removed from the Draft Order.

Part 4, F.1(a)(1)(B) (p. 63) – Provision F.1(a)(1)(B) effectively requires the Permittees to prohibit discharges into waterbodies listed on the CWA section 303(d) list from October 1 through April 15 that would occur due to grading activities. Such an activity amounts to a discharge prohibition. The Regional Board must adopt discharge prohibitions through appropriate procedures of the Water Code. (Water Code § 13243.) It is not an activity that the Regional Board can delegate to the Permittees through the Draft Order.

Part 4, F.5 – F.10 (p. 67-71) – The Draft Order contains a number provisions related to tracking and inspections of construction activities that are also subject to the state's General Permit for Construction Activities. As discussed above, the Regional Board must retain responsibility for determining compliance with the state's General Permit. (*City of*

Rancho Cucamonga v. Regional Water Quality Control Board at 1390.) To the extent that the provisions in Part 4 obligate the Permittees to take on Regional Board's responsibilities, the Draft Order should be revised. At the most, the Permittees are responsible for ensuring compliance with their own municipal codes and ordinances. Requirements beyond such activities are outside of the Permittees jurisdiction and must be removed from the Draft Order.

Part 4, G.1 (p. 72) – As discussed above with finding F.14, Draft Order's requirements regarding sewage system maintenance, overflow and spill response plan properly falls under the ambit of the State Board's General Waste Discharge Requirements for Sanitary Sewer Systems. (WQO Order No. 2006-0003.) It is not appropriate for the Regional Board to include requirements related to sanitary sewer systems within the scope of the MS4 Draft Order.

Part 4, G.5(a) (pp. 76-77) – Provision G.5 requires the Permittees to use pesticides in a specified manner. In California, pesticides are regulated by the California Department of Pesticide Regulation (DPR). (CA Food and Ag. Code § 11454.) The DPR's primary purposes include 1) providing for the proper, safe, and efficient use of pesticides essential for production of food and fiber; 2) protecting public health and safety; 3) protecting the environment; 4) protecting agricultural and pest control workers; 5) assuring consumers and user that pesticides are properly labeled; and 6) encouraging the development and implementation of pest management systems that stress application of biological and cultural pest control techniques with selective pesticides when necessary. (CA Food and Ag. Code § 11501.) In 1984, the California Legislature declared that "matters relating to (pesticides) are of a statewide interest and concern and are to be administered on a statewide basis by the state unless specific exceptions are made in state legislation for local administration." (Statutes of 1984, Chapter 1386.) To ensure that the state maintained sole jurisdictional authority over the regulation of pesticides, the California Legislature adopted a state statute that vested complete control and regulation of pesticides including the registration, sale, transportation, or use of pesticides to the state, and DPR in particular. (CA Food and Ag. Code § 11501.1.)

Although the state has preempted local authority with regard to the regulation and use of pesticides, it is understood by the DPR that local governing bodies may "pass ordinances that regulate or restrict pesticide use in their own operations." (*Regulating Pesticides: The California Story, A Guide to Pesticide Regulation in California*, published by the California Department of Pesticide Regulation (October 2001) at p. 9.) However, the Regional Board is not vested with the authority to require local agencies to regulate or restrict pesticide use. The Draft Order requires the Permittees to implement jurisdictional wide integrated pest management programs, adopt and implement policies that require the minimization of pesticide use, and include commitments in newly adopted ordinances to reduce and eliminate the use of pesticides. (Draft Order, Part 4 provision 5 at pp. 76 and 77.) As the statutes indicate, DPR is vested with the authority to regulate and restrict the use of pesticides in California. The Regional Board's authority is limited to matters that pertain to water quality. (Water Code § 13225.) It does not include the authority to direct local agencies with regard to its pesticide applications, storage and use records.

Thus, the requirements in the Draft Order that direct the Permittees with regards to pesticide use are unlawful and must be removed.

Part 4, G.5(b)(2) (p. 77) – Provision G.5(b)(2) would require the Permittee to comply with the provisions of WQO No. 2004-0008-DWQ. However, WQO No. 2004-0008, which is a General NPDES permit for the application of aquatic pesticides to surface waters, is no longer necessary. In 2006, the federal EPA issued a new rule that clarified federal regulatory requirements as they apply to the application of aquatic pesticides to surface waters. Basically, the federal regulations state that the application of aquatic pesticides to waters of the U.S. to control pests is not a discharge subject to NPDES permit requirements. (40 CFR § 122.3(h) amended Nov. 27, 2006, 71 Fed. Reg. 68483.) With EPA's regulation, WQO No. 2004-0008 is no longer relevant. The State Board has not yet rescinded the Order due to pending litigation. (*New Pesticide Regulation*, Memorandum to Tom Howard, Acting Executive Director, from Michael A.M. Lauffer, Chief Counsel, Office of Chief Counsel (January 2, 2007), p. 5.) However, the State Board has publicized the new EPA regulation and has created a notice of termination procedure for those that wish to terminate coverage. (*Id.* at p. 5.) Because of the new federal regulation and the tenuous nature of WQO No. 2004-0008, the Regional Board should not require compliance with WQO No. 2004-0008 for the application of aquatic pesticides.

COMMENTS ON PART 7 – DEFINITIONS

Authorized Discharge – The definition of authorized discharge needs to be expanded to incorporate discharges authorized pursuant to state issued permits and conditional waivers. As currently drafted, the definition is limited only to those discharges that are authorized under federal law.

Effluent Limitation – The Draft Order does not include effluent limitations as defined. Thus, this definition is unnecessary and should be deleted.

Maximum Extent Practicable – The definition contained in the Draft Order is not a proper definition for Maximum Extent Practicable (MEP). As provided, the definition is a mere recitation of the law to meet MEP. It does not actually define MEP. The definition of MEP needs to be revised.

Runoff – The definition of runoff contains the statement "[i]t is typically comprised of nuisance flows contaminated with pollutants." The Draft Order has no basis for including this statement as part of the definition of runoff. The broad generality is not backed by any scientific evidence or known study. Thus, this portion of the definition needs to be deleted from the Draft Order.

COMMENT ON TIME SCHEDULES

The implementation schedules for most of the program provisions are unrealistic and will lead to poor execution and the misdirection of resources. It seems that when the Draft

Order was drafted and where there was an opportunity to provide an implementation schedule it was arbitrarily decided that 180 days was the appropriate time frame. But when all the implementation provisions are put together, the Draft Order creates an impossible schedule. For example, the following requirements stipulate time frames that when combined are impracticable.

1. Modification of SWMP, policies, codes, etc. within 90 days (Draft Order at p. 34)
2. Education strategy developed within 180 days (Draft Order at p. 38)
   - In school effectiveness strategy within 180 days (Draft Order at p. 39)
   - Behavioral change assessment strategy w/in 180 days (Draft Order at p. 39)
   - Pollutant of Concern outreach program w/in 180 days (Draft Order at p. 39)
   - Install trash excluders on all CBs w/in 180 days (Draft Order at p. 78)

The Draft Order must be modified to provide for an overall, practical and realistic schedule.