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*Submitted Via Email to:* [3rddraftVCMS4@waterboards.ca.gov](mailto:3rddraftVCMS4@waterboards.ca.gov)

***Original Hand-Delivered***

Xavier Swamikannu, Storm Water Permitting  
320 W. Fourth Street  
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Los Angeles, California 90013

Re: Comments from Construction Industry Representatives Concerning the April 2008 Draft Tentative NPDES Permit No. CAS004002 – Ventura MS4.

Dear Mr. Swamikannu:

This letter is in response to the April 2008 draft tentative Waste Discharge Requirements for Municipal Storm Water Discharges within the Ventura County Watershed Protection District, County of Ventura and the Incorporated Cities Therein (hereinafter, the “3rd Draft Permit” or “Permit”), which was released last month by the staff of the State of California, Los Angeles Regional Water Quality Control Board (the “Board”). The comments herein are those of the following entities, each of which represents the homebuilding industry or related construction and land development industries within the Southern California region which operate in Ventura County and ultimately the new homeowners who purchase there. Specifically, the comments are from:

- Building Industry Association of Southern California, Inc. (“BIA/SC”);
- The Los Angeles/Ventura Chapter of BIA/SC (“LAV”);
- Construction Industry Coalition on Water Quality (“CICWQ”); and
- Building Industry Legal Defense Foundation (“BILD”).

BIA/SC is a nonprofit trade association representing more than 2,300 member companies, which together have more than 200,000 employees. LAV, a Chapter of BIA/SC, represents approximately 650 member companies involved in every aspect of building and providing new homes in Ventura County and most of Los Angeles County. CICWQ is

**“Building Homes ... Building Communities”**

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comprised of the four major construction and building industry trade associations in Southern California. Specifically, CICWQ is the BIA/SC, the Associated General Contractors of California, the Engineering Contractors Association, and the Southern California Contractors Association. BILD is a non-profit mutual benefit corporation and wholly-controlled affiliate of BIA/SC. BILD's purposes are to monitor legal developments and to improve the business climate for the construction industry in Southern California. BILD focuses particularly on litigation and regulatory matters with a regional or statewide significance to its mission.

During and between the comment periods on the three drafts of the Permit, we have met with Board staff in efforts to elaborate on the substantial unintended consequences that the permit will create. We have participated in numerous stakeholder meetings to discuss concerns about the proposed requirements and submitted extensive comments on the previous drafts. We understand and support the goals of improving water quality. Yet we remained concerned that the permit as proposed will not achieve its water quality objectives and will in fact result in negative consequences that will impact the land use development process and the overall economy of Ventura County. Given the current direction of the LARWQCB to take the adopted requirements of this permit and apply them in a broader context to LA County, and US EPA's apparent intent to urge adoption of these requirements throughout Southern California, we must express our sincere disappointment that an appropriate and effective application of the law has not yet been achieved, despite our best efforts to utilize science and onsite experience to draft reasonable and practicable water quality requirements.

The Land Use Development (Part 5, Section E) and Construction (Part 5, Section F) sections of the permit are relatively unchanged since the first draft of the Permit. Previously we have offered significant comments on these sections, and the permit as a whole, we reiterate the following primary concerns with the proposed third draft (Draft Tentative) Permit.

**1. The Proposed Permit has not been balanced, as required by the Board's enabling statutes under the Porter-Cologne Act, as specified in California Water Code Section 13241.**

When enacting water quality requirements using its discretion under the state Porter-Cologne Act, the Board is obligated to "balance" using the factors identified in Section 13241 (in accordance with *City of Burbank v. State Water Resources Control Bd*). The draft permit states that this balancing is not required but that it has been completed anyway (Findings F.22 and F.23, each at page 27. To date, we have seen no evidence of such balancing, either in documentation of such an analysis, or in the resulting requirements included in the permit. In fact, because the first draft of the permit did not indicate that balancing had been completed and the third draft does, the balancing analysis must have been completed since the first draft. Therefore, we find it startling that no documentation of such analysis has been presented nor have any of the requirements been reconsidered.

A complete balancing analysis would reveal the significant impact the proposed requirements will have on the overall economy in Ventura County and the cost impact on affordable housing. The grading ban alone will substantially decrease housing production and

increase the costs of housing development. Furthermore, such balancing would also necessitate the inclusion of a process in the Permit to address the natural environmental conditions, which can vary greatly across the County. The one-size-fits-all numeric standards for Effective Impervious Area, Erosion Potential, Treatment Standards and prohibitions on grading do not reflect the considerable range of geologic and hydrologic conditions throughout the County.

**2. If the permit were crafted under Federal authority, the proper analysis to justify the requirements has not been completed.**

Even though the permit claims that a balancing analysis has been completed under the Porter-Cologne Act, the findings state that the analysis is unnecessary because the permit is “not reserved state authority” Finding E.7, at page 11. Indeed, the permit claims that the authority for the permit is completely federal, because the “conditions could have been included in a permit adopted by U.S. EPA.... Hence they are not more stringent than federal law.” Finding F.8, found at page 22-23. The authority for issuing permits in California clearly rests with the state, not U.S. EPA, and speculation on how U.S. EPA might act cannot provide a solid foundation for requirements in the permit. Indeed, a quick review of EPA-promulgated permits across the country will find no similarly sweeping numeric mandates for low impact development, nor any seasonal grading bans. In fact EPA’s own guidance recognizes the impracticality of applying numeric standards to municipal stormwater discharges. Because the requirements of the Permit go beyond that required by federal law, the proposal must be done under the discretion of state law, and therefore balancing must be completed.

If one considers the permit prepared under federal authority, the requirements would need to be considered Technology Based Effluent Limits (TBELs). The federal law requirements for establishing TBELs have not been followed, and therefore these requirements cannot be promulgated under this authority. In order to establish TBELs, the Board would need to perform various analyses that we believe has not been performed to date. For example, the Board would need to undertake the following steps, among others:

- (i) gather extensive information on the industry (through questionnaires, sampling and monitoring, literature reviews, and other methods);
- (ii) perform detailed qualitative and quantitative analyses of this information;
- (iii) develop sets of proposed control options for the industry;
- (iv) estimate the effluent reductions, costs, economic impacts, and environmental effects of those options;
- (v) shape the options into a proposed set of limits;
- (vi) explain the proposed limits and additional supporting documents;
- (vii) review comments on the proposed limits; and
- (viii) incorporate those comments into a final regulation (again with considerable supporting documentation).

These procedures establish the framework and background to support any new TBEL standard that can be reasonably achieved using available and changing technology.

**3. There is no justification for a 6-1/2 month grading ban and such a ban will affect significant portions of land designated as developable property in the County.**

The 3<sup>rd</sup> draft Permit still includes a proposed ban on grading activity for over half the year. Again, this restriction cannot have been evaluated using the Section 13241 balancing factors, since the economic consequences, which must be considered, will result in work stoppage of construction activity and business expansion on a substantial portion of developable land in the County. Currently construction activity of one acre or greater is regulated under the State Construction General Permit, which is up for renewal. The additional restrictions in the draft MS4 Permit have not been substantiated by evidence of excessive violations or data indicating unusual water quality impacts from construction site storm water runoff in Ventura County.

The grading prohibitions as drafted in the Permit may in fact negatively impact the goal of improving water quality. By limiting the grading period between April and October you can actually increase a projects rainfall exposure through several years of grading as opposed to a one time disturbance. This prolongs the grading equipment required onsite to cut, fill, and balance a projects grading. The proposed grading restrictions result in the need to work, rework, and stockpile sections of grading within several six month periods actually increasing the overall carbon emissions that wind up in storm water runoff. In addition to increasing the overall site exposure to erosion and sedimentation though several grading seasons. Also, the proposed grading restrictions do not take into consideration other grading activities regulated by the United States Fish and Wildlife Service or the California Department of Fish and Game, which can further limit grading activity between the months of March though August for sensitive species monitoring.

The proposed ban will reduce the construction season for significant portions of developable land in Ventura County to less than half its current potential. Additional economic impacts result in the loss of construction jobs as equipment is relocated to other areas or remains idle. In fact, when combined with the restrictions on construction activity (such as limits to reduce fugitive emissions and to protect habitat) and the associated start-up and wrap-up times, the permit effectively reduces the construction season on affected parcels to less than five months per year, and in areas with additional sensitive species regulation it could be less than three months per year. The economic contribution of the construction industry, and the economic value added by new housing, new businesses and economic expansion do not appear to have been considered in the crafting of this prohibition.

The permit does authorize the co-permittees to provide a variance to the grading prohibition if certain conditions are met. However, it does not appear that this process will prove helpful or provide meaningful relief from the ban. First, the conditions of the variance, which include numeric effluent limits regardless of the size, duration, or intensity of a storm event, are untenable. In typical circumstances, these numeric effluent limits will force the use of Advanced Treatment Technology, which in itself adds considerable cost and poses additional environmental consequences that are not considered in the draft permit. In significant storm events, no technology will achieve the listed numeric effluent limits, and therefore co-permittees

will be reluctant to use their authority to grant a variance. In a significant rain the co-permittee will be automatically in violation of the permit and subject to penalty. . This risk will likely prove too great for any of the co-permittees to assume. The variance provision, therefore, is rendered ineffectual.

In order to assess the significant impact of the grading ban, we have repeatedly asked the Board staff to explain which properties would be affected by the ban, and to explain its assertion that “only 8% of projects” would be affected. We now understand that this estimate has been raised to “between 9 and 14% of projects.” We find this analysis to be grossly insufficient. First, the original analysis did not appropriately apply the criteria specified in the permit – the permit states that land over a 20% slope would be subject to the ban, yet the original list of affected projects compiled by the Board staff used project *size* as a surrogate for slope and listed projects that were over 20 acres in size. This methodology over-counts large flat projects and under-counts small sloped projects. The latest list provided by Board staff appears to be based on slope, but remains incomplete, with the analysis of Environmentally Sensitive Areas still pending. In any case, the utilization of historical or momentary data based merely on the *number* of affected projects (versus the number of unaffected projects) inadequately portrays the widespread effect of the grading ban – because a 200 acre project and a 10 acre project are counted equally. Given that Ventura County has designated land for development through its SOAR ordinances; the Board’s staff should analyze the amount of land that is designated for development and would be affected by the grading ban. We are confident that such an analysis will illustrate that much more land is affected, and that the associated balancing analysis is required under California Water Code Section 13241 as a result.

**4. The limitations on Effective Impervious Area do not reflect development patterns and scales, and are not consistent with the underlying research.**

The 3<sup>rd</sup> Draft Permit still includes the requirement that land use development projects limit the “effective impervious area” (EIA) to 5% of any project site. There are several concerns with this blanket requirement. The requirement appears to be based on research that correlates imperviousness in a watershed with water quality. Aside from the concern that the research has not been developed locally and has not been adequately peer-reviewed to meet U.S. Data Quality Act regimens, the requirements do not consider the spatial scale considered in the research.

Geosyntec evaluated the study Investigation of the Feasibility and Benefits of Low-Impact Site Design Practices (“LID”) for Ventura County to assess the assumptions used in the analysis related to runoff volume control and the findings of feasibility related to capping EIA. Key findings of this review are listed below, and the full evaluation is included in Attachment 1. The applicability of the EIA goal assumed for the study has not been supported by literature for watersheds with large tributary areas.

- On a whole, the imperviousness of the case studies analyzed are likely lower than typical development projects in Ventura County. The result is that more landscaped area is assumed to be available for LID features.
- The study assumed that all of the pervious area would be available for infiltration; no reduction was made to account for necessary building setbacks or to account for the typical

scenario in which some pervious area is upgradient of impervious area or otherwise not suitable for infiltration.

- Study findings regarding volume reduction apply only where geotechnical issues and high groundwater do result in statutory limits on infiltration. Simply providing amended soil to compensate for these conditions is not expected to provide the benefit that the study suggests, as the underlying soils control ultimate infiltration loss rates.
- The method used to develop the required infiltration volume potentially over predicts pre-development runoff and under predicts post-development runoff, thereby potentially biasing required infiltration volumes below what they would actually need to be to achieve the desired results.
- The Chralowicz study, which was used as the primary basis for estimating infiltration capacity, is based on assumptions that are not necessarily representative of typical conditions in Ventura County. Assumed infiltration rates are notably higher than typical Ventura County soils. Rainfall patterns are within the range of Ventura County conditions, but notably lower than some parts of Ventura County. Assumed infiltration basin design standards are not representative of typical LID features.
- The study relies on the logic that if the estimated volume reductions are met, the feasibility of the lower EIA standard is demonstrated. This finding does not consider the typical scenario in which EIA results from impervious area that is unavoidably down gradient of pervious area.

Overall, the findings of the study do not appear to fully support the stated conclusions related to volume reduction and feasibility of meeting an EIA standard lower than that proposed by the draft permit. Considering the simplifications that the study relied upon, we believe that there should be more qualifications of, or limitations on, the findings. For example, the study might more reasonably support the conclusion that LID is feasible in new development up to a certain level of density, where pervious area is appropriately located on the development site, native infiltration rates are sufficient, and where statutory limitations on infiltration are not present. From these findings, it may logically follow that most impervious area upgradient of pervious area could be feasibly disconnected. With proper site design practices, a low EIA is feasible in many project scenarios.

The Permit envisions a possible alternative path for redevelopment projects, called the Redevelopment Project Area Management Plan (RPAMP). The role of the RPAMP is to afford the co-permittees the authority to develop regional scale solutions that meet water quality goals on a scale larger than any individual project. We support the concepts behind the RPAMP, because it is more consistent with the underlying literature, but request that these provisions be restructured so that they become the fundamental framework of the permit, as opposed to making it an alternative that would require special Board action and be subject to uncertain and unspecified approval criteria.

**5. The permit requirements need to be integrated into the California Environmental Quality Act.**

California law has long established CEQA as the mechanism for evaluating – and mitigating – the environmental impacts of land development. The CEQA process evaluates all environmental impacts and provides a consistent process for their mitigation, with opportunity for input from a wide cross-section of agencies and public interests. By establishing fixed, inflexible numeric standards for low impact development and grading conditions, the permit trumps all other environmental considerations and improperly shifts the primary responsibility for land use approval authority to the Regional Water Quality Control Board. There are many situations where the fixed numerics prescribed in the permit cannot be met because of physical site and water quality characteristics or competing land use and environmental policy considerations. The permit provides no process for this site-specific evaluation by the permittees – which would otherwise appear intrinsic to the standard of maximum extent practicable.

We therefore recommend, as an alternative to fixed, inflexible numeric standards, that CEQA could be utilized to integrate low impact development and grading considerations into the project approval process in ways heretofore not applied. This would allow for the appropriate evaluation of water quality impacts in the context of all other environmental impacts. Perhaps more significantly, it would integrate the consideration of low impact development techniques into the land use planning process at the time of project design and development – rather than the all-too-common current occurrence where these techniques are evaluated after substantial approvals are in place and changes are difficult to retro-fit. Using CEQA as the tool to accomplish the integration of low impact development techniques would be achieved if the numeric standards were established as presumptive thresholds of environmental significance, which would significantly increase the level of analysis of water quality impacts – at the time when changes are most likely to be accommodated. We offer more detailed analysis of this approach in Attachment 2. The CEQA integration approach would achieve the Board's goals of appropriate attentiveness to low impact development concepts and reasonable consistency between jurisdictions and permits, while maintaining the ability to make local decisions appropriate for the jurisdiction's environmental circumstance.

**6. Newly added BMP performance BMPs have not been justified and are inappropriate MALs.**

This 3<sup>rd</sup> Draft Permit introduces new BMP performance standards that have not been included in previous drafts of the permit without any rationale or justification. (Attachment C, Tables 3 and 4.) Again, we are concerned that such a one-size-fits-all approach to numeric effluent limits is inappropriate given the variable geologic conditions within Ventura County. We also worry that these performance standards, which do not appear linked to any monitoring requirements, will demand expensive monitoring regimens in the future without any clear relationship to water quality. The basis for these standards needs to be explained. As we have explained in previous comment letters, we do not believe the permit is consistent with the State Water Quality Control Board's Blue Ribbon Committee Report. The Committee did not

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recommend the usage of numeric effluent limits, and yet the 3<sup>rd</sup> Draft Permit appears to increase the number and type of MALs.

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Since the first draft was released, the BIA and its affiliates have been active participants and contributors to the creation of new and improved MS4 permit. We believe that rational, implementable permit requirements are critical to achieving water quality goals. We have provided substantial comments and invested substantial time to discuss the proposed requirements with Board staff, the co-permittees and other stakeholders. We hope that these comments are received in the manner in which they are intended – to continue the discussion of how we can create a workable permit that improves water quality to the maximum extent practicable. We remain committed to a positive dialog with the Board that results in an informed, balanced and effective permit.

Sincerely,



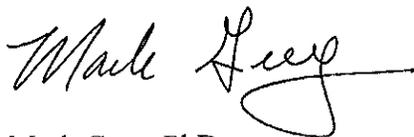
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