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April 10, 2009

Submitted Via Email to: VenturaMS4Comments041009@waterboards.ca.gov

Original sent by Overnight Mail

Attn: Tracy Woods, Storm Water Permitting
320 W. Fourth Street
Suite 200
Los Angeles, California 90013

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

Dear Ms. Woods:

Thank you for this opportunity to respond to the 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 “4th Draft Permit”), which was released on February 24, 2009, 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 that includes Ventura County. Specifically, the comments are from:

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

BIA/SC is a nonprofit trade association representing more than 1,700 member companies, which together have more than 100,000 employees. LAV, a Chapter of BIA/SC, represents approximately 400 member companies involved in every aspect of building and providing homes in Ventura County and most of Los Angeles County. BILD is a non-profit mutual benefit corporation and wholly-controlled affiliate of BIA/SC. BILD’s purposes are to monitor legal and regulatory conditions for the

construction industry in Southern California and intervene as appropriate. BILD focuses particularly on litigation and regulatory matters with a regional or statewide significance to its mission.

During and between the comment periods on four different drafts of the permit, we have met with Board staff in efforts to explain our views on the provisions reflected in those drafts. We have also 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 the permit – including the goal of improving water quality by increasing use of low impact development techniques and otherwise influencing land use policy.

In addition to our deep involvement concerning Ventura County, we have similarly been very actively involved in discussions concerning the proposed revisions of similar permits covering different land areas. For example, we have been very involved in discussions concerning the recently released tentative permit for North Orange County (Region 8, the Santa Ana Regional Water Quality Control Board). In addition, we have been working closely with our regulated community counterparts in the San Francisco Bay area.

As our years of involvement have progressed, we have been and remain impressed with the hard work and engagement of the Board's staff. We remain very concerned, however, about some key aspects the 4th Draft Permit. Even though some objectionable aspects of the earlier drafts have been removed or corrected, we remain concerned that the 4th Draft Permit would in fact damage the land use development process and do substantially harm the already strained economy of Ventura County. Given that the current direction of the Board is to take the requirements of this permit and apply them in the future to LA County, we must again express our disappointment that the 4th Draft Permit still fails to the best policy options, despite our efforts to bring science, reason and experience to help craft reasonable and practicable requirements in the new MS4 permit.

In order to emphasize our main concerns, our comments below are aimed mainly at the Land Use Development section of the tentative permit (Section E), as well as the numeric performance standards in the 4th Draft Permit.

1. The proposed permit conditions were not derived following consideration of the statutory factors set forth in California Water Code Section 13241.

When enacting water quality requirements, the Board is obligated to "balance" using the considerations identified in Water Code section 13241, and made applicable to permit requirements by Water Code section 13263 (in accordance with *City of Burbank v. State Water Resources Control Bd*). This requirement is all the more imperative in the instant circumstance, because there is now – as a consequence of recent litigation – a

judicial cloud over the regional basin plan due to the Board's persistent refusal to consider the Water Code sections 13241 factors are they relate to storm water. Particularly given the status of the basin plan, it is obviously perilous for the Board to again fail to take into account the section 13241 factors.

The 4th Draft Permit states, however, that consideration of the Calif. Water Code section 13241 factors is *not* required, suggesting instead that the federal standard for MS4 permitting set forth in 33 U.S.C. section 1324(p)(3)(B)(iii) preempts the need or ability to consider the section 13241 factors. *See* Findings E.25 at p. 21. This legal conclusion is erroneous.

It is true that the relevant federal statute law at issue – 33 U.S.C. section 1324(p)(3)(B)(iii) – directs the Board (here, as the U.S. E.P.A. Administrator's surrogate) to "require controls to reduce the discharge of pollutants to the maximum extent practicable[.]" However, this introductory "maximum extent practicable" directive is what is called "hortatory" (meaning it merely *encourages* or exhorts action) rather than mandatory (indicating any legally enforceable mandate). *See Rodriguez v. West*, 189 F.3d 1351, 1355 (Fed. Cir. 1999) (holding that the express "maximum extent possible" directive of former 38 U.S.C. section 7722(d) was "hortatory rather than to impose enforceable legal obligations"). Because the language is introductory and hortatory, it does not require the Board to impose any and all possible requirements. Instead, the directive is merely a charge to go forth, balance interests, and require *some* reasonable controls.¹ Certainly, the federal directive is not a Congressional mandate to be immoderate.

Our reading of the relevant federal statute is bolstered by the remainder of 33 U.S.C. section 1324(p)(3)(B)(iii). Immediately following the introductory "maximum extent practicable" language is this: "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."

¹ *See Conservation Law Foundation v. Evans*, 360 F.3d 21, 28 (1st Cir. 2004):

[The environmentalist plaintiffs] essentially call for an interpretation of the statute that equates "practicability" with "possibility," requiring [the agency] to implement virtually any measure ... so long as it is feasible. Although the distinction between the two may sometimes be fine, there is indeed a distinction. *The closer one gets to the [environmentalists'] interpretation, the less weighing and balancing is permitted.* We think by using the term "practicable" Congress intended rather to allow for the application of agency expertise and discretion in determining how best to manage ... resources.

(Emphasis added.)

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(Emphasis added.) Thus, the federal statute merely instructs the Board (as the E.P.A. Administrator's surrogate here) to *exercise its broad discretion* – within bounds of reason, of course.

The federal courts have consistently ruled that the section 1324(p)(3)(B)(iii) federal directive is one mandating only the reasonable exercise of broad discretion – nothing more. See *Arkansas v. Oklahoma*, 503 U.S. 91, 105 (1992) (“Congress has vested in the [EPA or a surrogate state] broad discretion to establish conditions for NPDES permits.”); *Natural Resources Defense Council, Inc. v. U.S. E.P.A.*, 966 F.2d 1292, 1308 (9th Cir. 1992) (“NRDC contends that EPA has failed to establish substantive controls for municipal storm water discharges as required by the 1987 amendments. *Because Congress gave the administrator discretion to determine what controls are necessary, NRDC's argument fails. * * * Congress did not mandate a minimum standards approach or specify ... minimal performance requirements.*” (emphasis added)); *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1166-67 (9th Cir. 1999) (“Under [the MEP standard set forth in Clear Water Act section 402(p)(3)(B)(iii)], the EPA's choice to include [or exclude] ... limitations in [NPDES] permits [for MS4s] was within its discretion.”); *City of Abilene v. U.S. E.P.A.*, 325 F.3d 657, (5th Cir. 2003) (“The plain language of [CWA section 402(p)] clearly confers broad discretion on the EPA [or a surrogate state agency] to impose pollution control requirements when issuing NPDES permits”).

Given that the federal directive set forth in section 1324(p)(3)(B)(iii) merely mandates that the Board must take evidence and exercise its broad discretion concerning permit conditions, there is surely no conflict – of the type giving rise to federal preemption concerns – between 33 U.S.C. section 1324(p)(3)(B)(iii), on the one hand, and Calif. Water Code section 13241, on the other hand. The latter (Water Code section 13241) requires the Board to *consider*, when exercising its discretion, a certain list of *non-exclusive* factors (beneficial uses, environmental characteristics, realistic outcomes, economics, the need for housing, and the need to recycle water). California law further requires the Board to provide a record of the required analysis which is sufficient to demonstrate that it has meaningfully weighed and considered each of the prescribed non-exclusive factors. See *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515: “[T]he agency which renders the challenged decision must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order.... [The agency must reveal] the relationships between evidence and findings and between findings and ultimate action....”

In short, there is nothing about exercising discretion in compliance with Calif. Water Code sections 13241 and 13263 which conflicts with the federal mandate to go forth and exercise broad discretion when regulating MS4 permittees. The Supreme Court of the United States has stated that courts should always attempt to reconcile laws to avoid finding federal preemption. See *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 127 (1973); see also *Rice v. Norman Williams Co.*, 458 U.S. 654, 659

(1982) (“[T]he inquiry is whether there exists an *irreconcilable conflict* between the federal and state regulatory schemes.”). Both state and federal courts generally recognize a presumption *against* finding federal preemption, even when there is express preemptive language. *See, e.g., Washington Mutual Bank, FA v. Superior Court*, 75 Cal.App.4th 773 (1999):

In interpreting the extent of the express [federal] preemption, courts must be mindful that there is a strong presumption against preemption or displacement of state laws. Moreover, this presumption against preemption applies not only to state substantive requirements, but also to state causes of action.

Id. at 782, citing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 523 (1992) and *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). In the absence of express federal preemptive language, the presumption against finding federal preemption is even stronger:

“In the absence of express pre-emptive language, Congress’ intent to preempt all state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress ‘left no room’ for supplementary state regulation.

Hillsborough County v. Automated Medical Labs, 471 U.S. 707, 713 (1985).

In addition, the question of whether federal preemption exists is purely a question of law. *See, e.g., Industrial Trucking Association v. Henry*, 125 F.3d 1305, 1309 (9th Cir. 1997), citing *Inland Empire Chapter of Associated Gen. Contractors v. Dear*, 77 F.3d 296, 299 (9th Cir.1996) and *Aloha Airlines, Inc. v. Ahue*, 12 F.3d 1498, 1500 (9th Cir.1993) (“The construction of a statute is a question of law that we review de novo.... Preemption is also a matter of law subject to de novo review.”). It does not matter that federal preemption springs from express statutory language or from federal regulations promulgated under a statute. In either event, federal preemption is a question of law. *See Bammerlin v. Navistar International Transportation Corp.*, 30 F.3d 898, 901 (7th Cir. 1994) (meanings of federal regulations are questions of law to be resolved by the court).

Given that the existence and extent of federal preemption is properly as a question of law, the burden of demonstrating to a court that preemption exists rests with the party asserting the preemption (here, the Board) – because federal preemption is an affirmative defense. *See Bronco Wine Co. v. Jolly*, 33 Cal.4th 943, 956-57 (2004) (“The party who claims that a state statute is preempted by federal law bears the burden of demonstrating preemption.”); *see also United States v. Skinna*, 931 F.2d 530, 533 (9th Cir.1990) (stating that the burden is on the party asserting a federal preemption defense). Therefore, if the Board asserts (as the 4th Draft Permit suggests it will) that federal law preempts the consideration and application of the Porter-Cologne Act’s factors, the Board would bear

the burden of demonstrating, as a matter of law, that actions required of it under its enabling state law are preempted.

Armed with this understanding of the law, the Board cannot reasonably maintain that the federal law precludes application of the California Water Code § 13241 balancing factors to the weighty policy choices before it. But the 4th Draft Permit's betrays a failure – an admitted failure – to consider the section 13241 factors. As explained below, many of the proposed permit conditions in the 4th Draft Permit would not survive a fair consideration of the section 13241 factors.

2. The parcel-by-parcel 5% limitation on Effective Impervious Area does not respect appropriate development patterns and scales, and is not consistent with the underlying research or sound policy.

The 4th Draft Permit still includes the requirement that land use development projects limit the “effective impervious area” (EIA) to 5% of any project site. We have many concerns with this proposed requirement, not the least of which is that the study was based on research that correlates *imperviousness in an entire watershed* with water quality. Despite the fact that the research was conducted at an overall watershed scale, the 4th Draft Permit applies a “one-size-fits-all” imperviousness standard at the project or parcel scale.

In addition, there are myriad places where it would be unhelpful (at best) or harmful (worse) to apply an imperviousness standard for purposes of facilitating storm water retention and infiltration. For example, bluff tops (such as those at Pacific Palisades or at La Conchita Ranch farther west) would likely be rendered unstable by any mandate of imperviousness and infiltration coupled with development. Even moderately sloping hillsides would be negatively affected, as would areas where the natural water table is relatively high (for example, Moorpark in Ventura County). Nor would the EIA requirement do any good where development occurs on top of hard pan soils or bedrock, where infiltration could not occur. In many such areas, storm water would flow very *naturally* off of the parcel.

Also, as we have noted before, a 5% EIA requirement would have additional ramifications that are problematic. For example, the requirement would – on a relative basis – encourage and incentivize sprawl, steering development to areas that have the most open space and flexibility concerning perimeter features. Such policy implications are particularly problematic in Ventura County, which has a strict SOAR initiative (urban-growth limitations), such that maximum flexibility to accommodate dense development should be maintained. Similarly, the requirement would incentivize development on relatively porous soils (which could be used better at a regional scale), while discouraging development on impervious ground, even though the latter could be developed with the least change to pre-development flows.

Because the proposed EIA requirement would apply notwithstanding the myriad circumstances where it would be inappropriate (suboptimal at best, disastrous at worst), the requirement is proposed in disregard of Calif. Water Code section 13241(b), which requires consideration of the “[e]nvironmental characteristics of the hydrographic unit under consideration.” Attention to this consideration would indicate that – of course – a 5% EIA requirement should not be generally or universally imposed.

We believe that a *volumetric* engineering approach, coupled with appropriate exceptions or waivers (based on objective criteria or, better yet, site-specific circumstances as determined by those with the closest proximity) is far better than an EIA approach. Ideally, the volumetric engineering approach would be based on calculations that seek to approximate, as closely as practicable, the pre-construction run-off patterns (a so-called “delta volume” or “delta-v” approach). However, as an administrative, regulatory and engineering expedient, we would subscribe to (and have supported in North Orange County discussions) the collection and treatment of the entire volume of a reasonably moderate design storm.

The 4th Draft Permit proposes a path for redevelopment projects as an alternative to the 5% EIA requirement, called the Redevelopment Project Area Management Plan (RPAMP). The role of the RPAMP is to afford the co-permittees the authority to develop larger scale solutions that meet water quality goals – on a scale larger than individual projects. We support the seeming intent behind the RPAMP, because it seems aimed at allowing site-specific considerations and appropriate tailoring to site-specific circumstances. However, we believe that attention and tailoring to site-specific circumstances needs to be the rule, not an exception to a “one-size-fits-all” rule like the 5% EIA rule.

3. As proposed, the 4th Draft Permit’s EIA requirement violates both the “Natural Flow Doctrine” and the Clean Water Act’s overall objective to “Restore and Maintain” the natural integrity of the water cycle.

One aspect of the 4th Draft Permit is especially radical and objectionable. That is the New Development/Redevelopment Performance Criteria on page 55 of 121. Particularly, section 5.E.III.1(c), states that the proposed 5% EIA requirement could generally be met only by the “infiltration and stor[age] for reuse” of the volume of a design storm. As proposed, the provision would seemingly impose, for the first time, a generally-applicable requirement that *no storm water (from a design storm) should leave a parcel that has been developed or redeveloped.*

As it reads, this requirement seemingly flies in the face of recognized, basic low impact development (LID) strategies, which generally aim to have LID undertaken so that the pre-construction flows of storm waters are maintained, matched, or reasonably approximated. For example, the U.S. E.P.A.’s definition of LID, which was updated just last month, states clearly that the use of LID best management practices (BMPs) for the

filtration (not just infiltration) is appropriate – and repeats the basic goal of trying to maintain pre-construction hydrology. Specifically, the US EPA defines LID as follows:

A comprehensive stormwater management and site-design technique. Within the LID framework, the goal of any construction project is to design a hydrologically functional site that mimics predevelopment conditions. This is achieved by using design techniques that infiltrate, filter, evaporate, and store runoff close to its source. (Emphasis added)

<http://cfpub1.epa.gov/npdes/greeninfrastructure/information.cfm#glossary>

As proposed, however, the language of the 4th Draft Permit generally rules out the use of LID BMPs for filtration, and instead requires generally implementing designs for the *retention* of all storm water for the design storm (which, in parts of Ventura County, could be up to 1½ inches of rain).

Rejecting the use of LID BMPs for filtration – and instead, as a general proposition, requiring that no storm water (except in the largest rains) can leave a developed or redeveloped parcel – is a radical measure that should not be undertaken. It would violate millennia (literally) of civil law concerning flows of storm water (called “diffuse surface water”). Specifically, the law in California – which itself is derived from the laws of the ancient Roman Empire – has long favored what is called the “*natural flow doctrine*,” which states that diffuse surface flows should be permitted to flow from all lands to their natural water course. *See Gdowski v. Louie*, 84 Cal.App.4th 1395, 1402 (2000) (“California has always followed the civil law rule. That principle meant ‘the owner of an upper ... estate is entitled to discharge surface water from his land *as the water naturally flows*. As a corollary to this, the upper owner is liable for any damage he causes to adjacent property *in an unnatural manner*.... In essence each property owner’s duty is to leave the natural flow of water undisturbed.” – emphasis added by the court, quoting *Keys v. Romley*, 64 Cal.2d 396, 405-06 (1966)).

The “natural flow doctrine” has been altered by the California courts in recent decades to facilitate reasonable land development and protect private and public land owners. Replacing the natural flow doctrine is a “*modern reasonableness test*.” Property owners (public and private) may alter the natural flow of diffuse and/or discrete surface water, but only if they are reasonable when doing so, and downstream owners can then trump the reasonable efforts of the upstream owner if they also take reasonable defensive steps. *See Locklin v. City of Lafayette*, 7 Cal.4th 327, 337 (1994).

Juxtaposed against both the natural flow doctrine and the modern reasonableness test is a third, much less favored doctrine, called the “*common enemy doctrine*.” The common enemy doctrine stands for three propositions, that (i) individual property (development) rights are paramount, (ii) storm water is a common scourge, and (iii) each property owner may act “for herself or himself” and take steps to alter the natural or

unnatural flow of such waters for the protection of his or her property, without regard for the effect on neighbors. See *Skoumbas v. City of Orinda*, 165 Cal.App.4th 783, 792 (2008). Although the common enemy doctrine is sometimes still applied in a few other states, the common enemy doctrine has been largely discredited and criticized by progressive courts, environmentalists, academics, and concerned policy makers because of the obvious and very negative implications for the broader community and for the preservation and restoration of natural flows. See *Keys v. Romley*, 64 Cal.2d 396, 400-03 (1966) (Mosk, J., concurring).

Of these three doctrines (the *natural flow* doctrine, the *modern reasonableness* test, and the *common enemy* doctrine), the *natural flow* doctrine – which seeks to *maintain the natural flows* of diffuse and discrete surface water – is the doctrine that conforms best to the federal Clean Water Act’s overarching objective to “restore and maintain” the natural integrity of waters.² See 33 U.S.C. § 1251(a). Accordingly, we would, of course, expect the Board and the non-governmental organizations that defend natural resources to prefer strongly the *natural flow doctrine*, and to deviate from it (if at all) only as reasonably necessary to accommodate competing societal goals.

Rather than favor the natural flow doctrine, however, the 4th Draft Permit – with its seeming refusal to allow generally (i) the *filtration* of diffuse surface water, and (ii) any discharge across property lines – would establish a new and different doctrine, a “*universal retention doctrine*,” standing for the general proposition that no diffuse surface water should leave any parcel that has been developed or redeveloped, except in very large storms.

If it were the intent of the Board’s staff to propose such a universal retention doctrine, such a radical step should not be taken without far more discussion, study, and major revision. However, we see such a new doctrine as apparently reflected in Section 5.E.II.1(c) of the 4th Draft Permit (p. 55 of 121). In addition, we see such a universal retention doctrine reflected in the latest urgings of Natural Resources Defense Council, Inc. (“NRDC”) – both in recent discussions concerning the North Orange County MS4 permit revisions and in a very recently revealed product of secret discussions between NRDC, certain other non-governmental groups, and some city managers in Ventura County. The recent revelations about these discussions show that NRDC and the others who were closeted away would generally impose a new *universal retention doctrine* on all development and redevelopment, especially suburban and exurban development.

² See S. Rep. No. 92-414, 92 Cong. 2d Sess., 2 U.S. Code Cong. & Adm. News ‘72 3668, 3674 (1972) (“The Committee believes the restoration of the natural chemical, physical, and biological integrity of the Nation’s waters is essential.”); H.R. Rep. No. 92-911, p. 76 (1972) (““the word ‘integrity’ ... refers to a condition in which the natural structure and function of ecosystems is [are] maintained.”).

It is very hard to believe that non-governmental organizations that aim to defend natural resources would turn their back on the *natural flow doctrine*, rather than seek to maintain or approximate the natural flows or diffuse and discrete surface waters to the extent and where practicable. But that is what seems to be happening here, even as the U.S. E.P.A. and others are urging that suburban and exurban development should seek to maintain natural flows.

We respectfully urge the Board and staff to reject any embrace of a new *universal retention doctrine*. We urge instead appreciation of the *natural flow doctrine* or, better yet, the *modern reasonableness test* applied with ever-evolving and progressive standards of reasonableness. We suspect that the U.S. E.P.A. would similarly urge abandonment of a universal retention proposition (assuming the E.P.A. representatives are fully aware and fathom the policy implications of the proposal). In addition, we have only barely discussed this new, general universal retention doctrine with the appropriate individuals at the California Department of Fish and Game and the U.S. Fish and Wildlife Service. We found that they were not aware of the implications of the Draft Permit. For example, today, Mr. Roger Root of the U.S. Fish and Wildlife Service's Ventura Office informed us that he has no record or understanding that their staff was ever notified about any proposed permit requirements which would generally and intentionally interfere with the natural flows of water. We urge the Board's staff to thoroughly discuss the new and generally-applicable universal retention policy carefully with your fellow agency counterparts, and then remove any preference for or use of the universal retention doctrine from the eventual permit revisions.

4. The permit requirements still need to be better integrated into the California Environmental Quality Act.

As our industry representatives have noted before, 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. Moreover, CEQA continues to evolve as science and policy imperatives drive it to do so. (For example, several years ago, green house gas emissions were never a focus of CEQA; now they certainly are.)

By establishing fixed, inflexible numeric standards for low impact development, the 4th Draft Permit trumps all other considerations (environmental and otherwise) and improperly shifts land use approval authority to the Board. Although the 4th Draft Permit may refer to waivers or exceptions for infeasibility, the 4th Draft Permit provides no clear process for this site-specific evaluation by the co-permittees and exceptions where the permit requirements are unreasonable, infeasible or suboptimal.

CEQA could – and we maintain should – 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. The best way to use CEQA as the tool to accomplish the integration of low impact development techniques would be to establish LID numeric standards 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 the accompanying attachment, which is – again – the CEQA integration proposal that we have lodged before. The CEQA integration approach would achieve the Board's goals of appropriate attentiveness and reasonable consistency between jurisdictions and permits, while maintaining the ability to make local decisions appropriate for the jurisdiction's environmental circumstance.

5. The numerical performance criteria are justified and unworkable.

The 4th Draft Permit reflects the continued inclusion of numerical treatment BMP performance standards in Appendix C, which could be interpreted as arbitrary numeric effluent limits which would be imposed irrespective of site-specific considerations and/or storm-specific considerations. A reasonable approach would be to require consideration of such constituents and their management during planning and design, but not to treat them as performance standards for ongoing maintenance and compliance, due to the myriad of factors (site-specific and storm-specific circumstances) that could influence exceedances. We therefore ask that the Table 3 be either deleted or simply used as design goals, from which the permittees could develop design criteria for treatment control BMP performance and include these criteria in an updated version of the Ventura County Stormwater Design Manual.

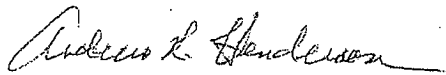
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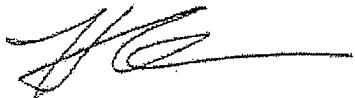
Since the first draft was released, the BIA and its affiliates have been active participants and contributors to the creation of new and improved MS4 permit. We continue to believe that rational, *implementable* permit requirements are critical to achieving great progress concerning water quality and our environment. 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 and its staff – one that will result in an informed, balanced and effective permit.

Thank you for your consideration of these comments.

Sincerely,



Andrew R. Henderson
Vice President and General Counsel,
Building Industry Association of Southern
California and General Counsel,
Building Industry Legal Defense Foundation



Holly Schroeder
CEO, Building Industry Association
LA/Ventura Chapter

**Attachment to
Construction Industry Comments
re: proposed Ventura County MS4 permit**

Building Industry Association of Southern California, Inc. (BIA/SC)

**Integration of
Low Impact Development Measures
and CEQA Approvals**

May 29, 2008

In recent months, at least one of Southern California's regional water quality control boards have put forth proposals aimed at requiring local governments to impose fixed "low impact development" ("LID") numerical requirements on a lot-by-lot basis on all development within their respective jurisdictions. LID concepts generally involve designing and engineering real estate developments, and incorporating storm water best management practices, such that both (i) the water quality effects of increased storm water volume resulting from construction of impervious surfaces are minimized or mitigated, and (ii) the off-site hydrological impacts of the development are minimized. LID numerics attempt to quantify such concepts by, for example, specifying that new development and redevelopment projects must be mitigated by reducing impervious surfaces, or increasing percolation, infiltration, storage or evapotranspiration such that no more than (for example) 5% of the total project area is effectively impervious.

BIA/SC is eager to foster improvement in real estate development and redevelopment practices concerning LID. However, faced with proposals to impose of one-size-fits-all numeric LID requirements, such as fixed and absolute Effective Impervious Area (EIA) or erosion potential (Ep) requirements, we are opposed to such impositions. This is not to suggest that the LID numerical measures cannot be put to very good use. To the contrary, evolving LID metrics of this type are useful, so long as physical development constraints and land use and environmental policy implications relevant to their application can also be taken into account. LID metrics should therefore be integrated into land use/environmental approvals for development projects.

Despite the potential usefulness of metrics, we oppose the imposition of any strict and absolute numeric mandates, for example, the 5% maximum EIA or the maximum $Ep=1$ limitation, as generally-mandated restrictions. Our opposition is based on our view that there are many situations where relevant physical site and water quality characteristics, and/or competing land use and environmental policy considerations, would warrant deviation (large or small) from strict compliance with numeric LID requirements – whether for infill, redevelopment, or undeveloped land.

This position paper sets forth the current views of BIA/SC's staff concerning two areas of thought. Both relate to the integration of LID water quality metrics into California's longstanding and highly evolved land use environmental review and

approval process, which is mandated and governed by the California Environmental Quality Act ("CEQA"). In this first section below, emphasis is on *chronologically* synchronizing the application of LID mandates with CEQA review and approvals, which we feel is imperative. Second, looking more at the substantive effects of regulation (i.e., affecting outcomes), we discuss the potential integration of MS4 permit LID metrics into the CEQA review and approval process. We believe that such synchronization and integration with CEQA will permit reasonable consideration of appropriate LID requirements exceptions based on consideration of physical constraints, feasibility, and the availability of scalable solutions.

I. Synchronizing application of MS4 LID measures with the CEQA process.

We believe that synchronizing CEQA review and application of MS4 Permit LID objectives is necessary for several reasons. First, to be timely applied, LID water quality metrics should be taken into account **as early as possible** in land use planning and development design processes. Second, the introduction of LID metrics should not unduly complicate the already challenging land use and environmental review, permitting and approval process. Third, LID metrics should not be imposed in ways that undermine vested project design approvals that are already settled pursuant to CEQA. Therefore, rather than impose water quality LID metric standards apart from CEQA, regulators wishing to impose LID metrics should instead direct proper attention to them at the right stage of the land use and environmental approval process: *during* CEQA.

CEQA compliance is required by law whenever a California public agency proposes to carry out or approve any discretionary plan or project, including private land use and development projects. For example, any approval of a city's or a county's comprehensive general plan must be in compliance with CEQA, as must other discretionary actions (such as the decision of a city to annex additional land, or approve zoning, tentative tract maps, or other development applications). Each such discretionary action where CEQA compliance is required presents an opportunity for LID considerations to be brought to bear.

In general, CEQA compliance is designed to assure that local agencies regulate activities so that major consideration is given to preventing environmental damage and protecting environmental quality. Cal. Pub. Res. Code § 21000(g); 21001. To comply with CEQA, public agencies must analyze projects as provided by the Act to identify the potentially significant effects of the project on the environment, to identify and evaluate alternatives to the project, and to identify and evaluate mitigation measures to avoid, reduce and mitigate impacts of the project on the environment.

Further, CEQA compliance assures meaningful public disclosure of potentially significant project effects on the environment and available mitigation measures, and provides the opportunity for comments and input regarding the project and its effects on the environment by the public and other agencies, including responsible and trustee agencies protecting California's resources. *See, e.g.,* Cal. Pub. Res. Code §§ 21002,

21003, 21080.3, and 21091. Perhaps most importantly, and unlike other environmental review statutes, CEQA requires that public agencies shall not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available that would substantially lessen the significant environmental effects of the project (Cal. Pub. Res. Code § 21001); and the Act further requires the incorporation of all feasible mitigation measures prior to approval of any discretionary project that will result in unavoidable significant adverse effects. Cal. Pub. Res. Code § 21081.

Besides being applicable to proposed discretionary approvals related to *general* planning and potentially sweeping governmental steps like large annexations of land for potential future project development, CEQA is the pivotal and conclusive step in the private *project* planning process. As the California Supreme Court explained long ago:

[W]e have consistently interpreted CEQA to authorize, indeed to require, environmental review of private projects **at the earliest possible stage**. The CEQA Guidelines embody this principle as well. Thus, **EIRs and Negative Declarations should be prepared as early as feasible in the planning process to enable environmental considerations to influence project program and design and yet late enough to provide meaningful information for environmental assessment**.

Napa Valley Wine Train, Inc. v. Public Utilities Com., 50 Cal.3d 370, 398-99 (1990) (internal quotations and citations omitted, emphasis added). See also Cal. Pub. Res. Code §21003.1. Because CEQA review should take place at the optimal time to influence a private project's design, conditioning and approval, and when mitigation can best be addressed, LID considerations should be taken into account then as well.

Therefore, we hope that any adopted LID numeric standards would be imposed and applied only in *chronological* (i.e., procedural) synchronicity with CEQA approvals. Stated differently, any imposition of LID metric standards by any of the regional water boards should both "grandfather" vested private project approvals and govern future CEQA analysis and project approvals. Without appropriate grandfathering and chronological and procedural integration, strong industry resistance against otherwise acceptable impositions should be expected.

II. Criteria for waivers or exception from of LID numeric requirements based on site-specificity, feasibility, alternative scalable solutions, project scale, and project type.

If a regional water quality control board were to impose fixed LID numerical limitations for land development within its jurisdiction, many questions would naturally arise about physical and environmental conditions that would warrant exception to such fixed standards. In light of recent proposals by regional water boards, BIA/SC's staff has reflected on these questions, and has attempted to set forth for consideration a slate of "waiver conditions" or "exceptions" which could apply to absolute LID numeric standards. The exercise has clarified our view of a dichotomy between (i) the

opportunity for site-specific balancing and tailoring of LID practices to physical and environmental conditions that is possible under CEQA, and (ii) the futility of efforts to develop a fixed, precisely-described slate of waiver conditions or exceptions that can sufficiently address the many factors that should be considered when considering LID metrics to determine sufficiency of LID measures.

Specifically, as we worked to prescribe a fixed slate of waiver conditions, we continued to recognize the many different circumstances in which site-specific characteristics should be taken into account. Given our recognition of this fact, we would expect that any fixed slate of numeric LID standards, coupled with equally fixed, numeric waiver provisions or exceptions, would likely be objectionable to various camps at the outset – simply because they would fail to take into account both (i) the broad array of potential differing site-specific characteristics and physical conditions, and (ii) the wide spectrum of policy considerations that influence land use and environmental decisions.

As we tried to develop such a slate of waiver provisions, we therefore found ourselves constantly reflecting on the CEQA approach – not just in terms of *chronology* and process, but also in terms of CEQA's substantive approach to site-specificity and tailoring to account for feasibility. That is because CEQA requires focused consideration of the individual physical site characteristics and the specific design and plan for each proposed project, as well as evaluation of project-specific impacts. In addition, CEQA requires environmental mitigation tailored to the specific physical and development characteristics and impacts in each instance. Essentially, the level and degree of informed tailoring that CEQA requires is much more than the level and degree of tailoring that one could achieve through developing and agreeing upon a prescriptive, static slate of waiver criteria, drafted into a county-wide MS4 permit.

The following, brief description of CEQA may help to explain our desire to use CEQA in concert with the MS4 permit as the means to advance LID metrics. Under CEQA, virtually all individual projects and plans (e.g., parcel maps to comprehensive general plans) that may result in significant environmental impacts are required to undergo an "environmental impact" analysis. For relatively simple projects, a lesser degree of analysis is appropriate, resulting in a negative declaration (or mitigated negative declaration) based upon appropriate findings. However, whenever any interested citizen presents a "fair argument" of any significant environmental impact, a full environmental impact report ("EIR") is required, complete with the fielding of public comments, the provision of responses thereto, a public hearing, etc.

Importantly, the processes for both negative declarations and EIRs have opportunities for public participation and inter-agency involvement. Affected agencies such as regional water boards can and should participate in the CEQA processes: (i) *anecdotally* if possible by commenting on any particular plan or project, and (ii) *formulaically* through the establishment of relevant "thresholds of environmental significance" for matters within their respective expertise. Established thresholds of environmental significance in turn drive both (i) the level of required environmental analysis, and (ii) required levels of mitigation.

Also under CEQA, the agency that is primarily responsible for approving and conditioning any project or plan must require the incorporation of mitigation measures to avoid, reduce or minimize significant environmental impacts. If significant, unmitigated environmental impacts likely will remain despite such requirements, then the lead agency may approve the project only upon if it makes two sets of further findings: First, the agency must find that, with respect to each unavoidable significant environmental effect, (a) changes or alterations have been required or incorporated into the project that mitigate or avoid significant effects, (b) those changes or alterations are within the responsibility or jurisdiction of another public agency, and/or (c) specific considerations or circumstances make additional mitigation measures infeasible. Second, the agency must find that the societal benefits of the project outweigh the residual environmental impacts.

Frankly, BIA/SC's member companies are not especially fond of the CEQA process. As a process, it is arduous, costly, and frequently abused by critics of development. Therefore, it is ironic that BIA/SC's staff finds itself touting CEQA as essential to the orderly and wise advancement of LID concepts. We do so because, in addition to the need for chronological and procedural integration discussed above, substantively, CEQA's best attribute is the potential to *balance* and to *tailor* the conditioning and approval of, and development of mitigation measures for any project to its site specific circumstances. The ability to *tailor* and require all reasonably feasible mitigation measures can best assure that sensible LID measures are required and that non-sensible LID measures are not required.

Against this backdrop, we feel that the best approach would be for regional water boards to use MS4 Permits to establish selectively-applicable and presumptive LID thresholds of environmental significance for use in the CEQA process. For example, through the permit, a regional board could make $Ep = 1.2$ a presumptive threshold of environmental significance for certain larger scale projects, and mandate application of the "hydromodification analysis study" (HAS) process to larger developments and comprehensive plans.¹ CEQA would then operate procedurally to require environmental analysis of all larger scale projects where there is a fair argument that $Ep > 1.2$ in the post-development condition. Pursuant to CEQA, the analysis would have to evaluate the significance of hydro-modification impacts in light of specific project physical and environmental conditions.

Substantively, unless the required HAS were to lead to finding that there would be no significant environmental impacts from allowing an even higher Ep value,² the

¹ The HAS process is complicated and expensive – too much so to apply to smaller projects and individual infill projects. Accordingly, we would urge limiting its application to very large projects and also to larger-scale general and watershed planning (which would ultimately influence smaller projects).

² We know from experience that there are projects where robust engineering and environmental analyses can show that a project-scale Ep value in excess of 1.2 will

analysis must identify and evaluate appropriate mitigation to reduce of environmental impacts to below the presumptive level of significance, wherever feasible. Thus, a regional water board could impose the LID numeric standard ($E_p =$ no more than 1.2), both to assure proper assessment of potential impacts and to identify and incorporate of mitigation; but the imposition would not be an inviolable absolute. Instead, the board could impose the measure where appropriate such that, presumptively, it must be (i) achieved where it is reasonably feasible to do so, and (ii) approached as nearly as feasible where achievement is infeasible – in each case by operation of CEQA.

A similar approach could likewise convert the proposed 5% EIA limit from an absolute requirement to a presumptive CEQA threshold, which can trigger CEQA analysis to assure mitigation is appropriately incorporated to the greatest extent warranted and feasible through the CEQA process. Here as well, we would hope that the regional water boards would make the 5% EIA threshold of significance selectively applicable only to the larger projects impacting theretofore undeveloped lands which are likely to impact surface water quality in a potentially significant and adverse way. For example, small projects, infill projects, projects that would improve upon baseline conditions, projects that drain into regional BMPs, and the like, should be expressly exempt from application of such 5% EIA presumptive threshold of significance.

III. Conformity between California's CEQA review and approval of new development and redevelopment projects and federal regulations pertaining to MS4 permits and post-construction storm water pollution.

The federal regulations pertaining to MS4 permit applications and land use planning and development approval processes and outcomes discuss “structural and source control measures to *reduce* pollutants from runoff from commercial and residential areas that are discharged from the municipal storm sewer system....” 40 C.F.R. § 122.26(d)(2)(iv)(A) (emphasis added). Specifically concerning land use planning and post-construction storm water pollution, 40 C.F.R. § 122.26(d)(2)(iv)(A)(2) requires in relevant part (emphasis added) the MS4 permit applicant to provide:

nonetheless avoid significant environmental impacts (due to the site characteristics, the nature of downhill lands and downstream waters, natural morphologic characteristics, and the like). Accordingly, any prescribed threshold of significance should be “presumptive” rather than absolute, so that mitigation toward the selected threshold is not required when it does not serve to avoid significant environmental impacts. For example, concerning imperviousness, where a project is proposed for development on exposed natural bedrock, there may be no negative environmental impact from failing to provide for disconnection and percolation. By establishing a threshold of significance at $EIA = 5\%$ which is presumptive, the presumption can be appropriately negated upon a proper showing of facts. Moreover, by making the threshold presumptive, interested citizens could still put forth a “fair argument” that the threshold of significance should be even lower in appropriate instances, consistent with CEQA case law and guidelines.

A description of *planning procedures* including a comprehensive master plan to develop, implement and enforce controls to reduce the discharge of pollutants from municipal separate storm sewers which receive discharges from areas of new development and significant redevelopment. Such plan shall address controls *to reduce* pollutants in discharges from municipal separate storm sewers after construction is completed.

These federal regulations indicate neither (i) that strict maintenance of the *status quo* is the *sine qua non* of all land development and redevelopment, nor (ii) that the EPA Administrator (or its authorized state surrogate) must assert project-specific control over all land use planning and projects in order to define the "maximum extent practicable" pollution-avoidance measures. Instead, the regulations require the MS4 applicant to provide a proposed management program which:

- "shall include *a comprehensive planning process* which involves public participation and where necessary intergovernmental coordination, *to reduce* the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate." 40 C.F.R. § 122.26(d)(2)(iv) (preamble) (emphasis added); and
- describes "procedures of site planning which incorporate consideration of potential water quality impacts." 40 C.F.R. § 122.26(d)(2)(iv)(D).

We believe that CEQA – as a process – fulfills these requirements, including public participation, intergovernmental coordination, and most importantly a very specific, case-by-case determination of what design and mitigation measures are appropriate in light of potential water quality impacts.

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