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June 7, 2010

*Submitted Via Email to: July082010VCMS4@waterboards.ca.gov
Original sent by Overnight Mail*

Attn: Mr. Ivar Ridgeway
320 W. Fourth Street
Suite 200
Los Angeles, California 90013

Re: Comments from Construction Industry Representatives Concerning the May 2010 Draft
Tentative NPDES Permit No. CAS004002 – Ventura MS4.

Dear Mr. Ridgeway:

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 "5th Draft Permit"), which was posted on May 5, 2010, 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"), including its Los Angeles/Ventura Chapter ("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 1,300 member companies, which together have nearly 100,000 employees. BIA/SC's members have, for decades, built the majority of the homes built in the region that it serves. CICWQ is a water quality coalition comprised of representatives from three industry trade associations (in addition to BIA/SC) involved in the development of public and private building, infrastructure and roads throughout Southern California (Associated General Contractors, Engineering Contractors Association, and Southern California Contractors Association). LAV, a Chapter of BIA/SC, represents approximately 350 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 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.

Over the course of years and concerning five different tentative drafts of the permit, we have met with Board staff in efforts to explain our views on the proposed permit requirements 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.¹ We understand and support what seem to be the aims of the permit – including the aim of improving water quality by increasing use of low impact development techniques.

Over the years of involvement, we have been very impressed with the hard work and engagement of the Board's staff. Now, however, we are more concerned than ever about some crucial aspects the 5th Draft Permit, particularly its indefensible findings and its proposed requirements concerning land use and development. Concerning those aspects, the 5th Draft Permit is far worse than its precursor posted in February 2009 (the "4th Draft Permit").

SUMMARY OF OUR COMMENTS BELOW

Our comments below are aimed at the Land Use Development section of the tentative permit (Section E), and most especially at the 5th Draft Permit's rejection of the generally recognized rule that bio-filtration should be used in design as a strategy to maintain pre-development hydrology as much as reasonably feasible. In our view, the 5th Draft Permit and (especially) its fiction-like findings about low impact development ("LID") together comprise a thinly-veiled attempt to justify the Board's May 2009 embrace of the "deal" that was negotiated secretly earlier last year by certain representatives of the permittees and certain non-governmental organizations. The Board's embrace of the secret deal was then, in May 2009, an

¹ In addition to our deep involvement concerning Ventura County, we have similarly been actively involved in discussions concerning the proposed revisions of similar permits covering other areas in California. For example, we were very involved in discussions concerning the recently adopted permits for North Orange County and Riverside and San Bernardino Counties (Region 8, the Santa Ana Regional Water Quality Control Board). In addition, we have worked closely with our regulated community counterparts in the San Francisco Bay area.

abdication of its proper role. The Board would again be abdicating its proper role if it were to yet again embrace the secret deal by rubber-stamping the 5th Draft Permit.

Accordingly, first, we explain our policy concerns about the 5th Draft Permit's effective rejection of bio-filtration as a LID measure and the lack of evidence justifying the proposed permit requirements and the findings in the 5th Draft Permit. In addition, we explain the 5th Draft Permit's legal errantry and the Board's failure to harmonize the 5th Draft Permit with the California Water Code and the California Environmental Quality Act (CEQA) and to provide appropriate and reasonable implementation measures and grandfathering provisions in light of the present woeful state of the economy.

Specifically, the comments below relate to seven discrete topics. Those topics, and the page numbers of this comment letter in which they can be found, are as follows:

1. The most fundamental policy aim of so-called Low Impact Development (LID) concerning new development is to *maintain or closely replicate* – to the extent feasible – *predevelopment hydrology*, within the overall goals of development projects. (Pages 4-6).
2. Rather than encouraging the maintenance or close replication of natural flows from projects, the 5th Draft Permit's LID provisions require the unnatural and unprecedented arresting of storm water flows across property lines. (Pages 6-7).
3. Instead of mandating deviations from predevelopment hydrology (as the 5th Draft Permit's LID provisions would do), *bio-filtration*, used in combination with strategies aimed at detaining – but not permanently retaining – storm water, should be allowed as the preferred alternative in many situations. Specifically, the permit requirements should not establish a compliance metric of "Effective Impervious Area" (EIA) viewed on a lot-by-lot or individual project scale. Instead, the permits LID requirement should require designs and strategies aimed more directly at managing storm water based on volume and water quality outcomes. (Pages 7-14).
4. The sudden "about-face" findings set forth in 5th Draft Permit (which purport to justify the permit's proposed LID requirements) are unsupported by substantial evidence and are instead undercut by the evidence in the record (which instead very broadly supports bio-filtration options). (Pages 14-18).
5. As was a problem with the 4th Draft Permit, the 5th Draft Permit was derived without any proper consideration of the statutory factors set forth in California Water Code Section 13241. (Pages 18-22).
6. The permit requirements still need to be better integrated into the California Environmental Quality Act. (Page 22).

7. The Board should put in place generous “grandfathering” implementation provisions in light of the severe economic recession and the need to respect dormant plans. (Pages 23-24).

DISCUSSION

1. **The most fundamental policy aim of so-called Low Impact Development (LID) concerning new development is to *maintain or closely replicate* – to the extent feasible – *the predevelopment hydrology*, within the overall goals of development projects.**

The most basic and fundamental principle of the concept of LID is to develop real property in ways that *minimize* – as much as reasonably possibly given the context at hand and practical considerations – the differences between a site’s pre-development hydrology (i.e., the hydrological situation prior to development) and its post-development hydrology (i.e., the hydrological situation after development is completed). *In other words, the most important aim of LID is to maintain the natural flow of diffuse and discrete surface water as much as reasonably possible when developing land.*

For example, the 5th Draft Permit itself, in its Finding No. 17 on p. 7, cites (purportedly in support of the 5th Draft Permit requirements) the May 15, 2008 Resolution of the California Ocean Protection Council Regarding Los Impact Development, which reads at page 1 – with emphasis added:

WHEREAS, Low Impact Development (LID) is a stormwater management strategy aimed at maintaining or restoring the natural hydrologic functions of a site to achieve natural resource protection objectives and fulfill environmental regulatory requirements.

The federal government also generally recognizes that maintaining the pre-development hydrology following development is the central aim of LID. For example, again the 5th Draft Permit, in Finding No. 19 on page 7, cites (again purportedly in support of the 5th Draft Permit requirements) the U.S. Environmental Protection Agency document entitled Reducing Stormwater Costs through Low Impact Development (LID) Strategies and Practices, USEPA Doc No. EPA 841-F-07-006, December 2007. Although this EPA document is internally inconsistent and occasionally off-base in its descriptions of what LID is and should accomplish, it states plainly at page 2 (with emphasis added):

*In the case of new development, **LID is typically used to achieve or pursue the goal of maintaining or closely replicating the predevelopment hydrology of the site.***

This particular statement by the U.S. EPA – about “maintaining or closely replicating” a site’s predevelopment hydrology as a central LID goal – is itself consistent with the stated intent

of our nation's Congress, as reflected in recent federal legislation concerning storm water management, federal construction projects, and LID. Specifically, in 2007, Congress enacted the Energy Security Implementation Act of 2007. In Section 438 thereof, Congress set forth the following LID requirements (with emphasis added):

The [federal] sponsor of any development or redevelopment project involving a Federal facility with a footprint that exceeds 5,000 square feet shall *use site planning, design, construction, and maintenance strategies* for the property *to maintain* or restore, to the maximum extent technically feasible, *the predevelopment hydrology of the property with regard to the temperature, rate, volume, and duration of flow.*

The 2007 Congressional mandate has since been codified as 42 U.S.C. § 17094, "Storm water runoff requirements for Federal development projects." It therefore stands as a clear and incontrovertible indication that Congress means for LID strategies to have as their goal, to the extent reasonably feasible, "strategies ... to maintain ... the predevelopment hydrology of the property with regard to the temperature, rate, volume, and duration of flow."

Congress's LID mandate to respect the *natural flow* of storm water is itself consistent with both millennia of civil law and policy concerning storm water management and – importantly here – more than a century of California law. Specifically, the California courts have long recognized and applied what is called the "*natural flow doctrine*," which holds that diffuse surface flows should be allowed to flow in a natural manner to their eventual receiving waters. 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 in the original, quoting *Keys v. Romley*, 64 Cal.2d 396, 405-06 (1966)).²

² The natural flow doctrine has been altered only slightly by the California courts in the last few decades in order to facilitate reasonable land development. Slightly altering the natural flow doctrine is a *modern reasonableness test*. Under it, a property owner may develop his or her site and alter the natural flow of diffuse and/or discrete surface water, but only if the property owner is reasonable when doing so; whereupon a downstream owner can claim the right to be free of any imposition of unnatural storm flows only if the downstream owner in turn undertakes reasonable defensive steps. See, e.g., *Locklin v. City of Lafayette*, 7 Cal. 4th 327, 337 (1994). Nonetheless, the natural flow doctrine remains both the purer basis of the modern reasonableness test and clearly the ideal. Juxtaposed against both the natural flow doctrine and the modern reasonableness test is a third, competing legal doctrine (which was the common law in England and is now widely disfavored), called the "*common enemy doctrine*." The common enemy doctrine stands for the propositions that (i) individuals' property rights are paramount, (ii) in developed and developing areas, diffuse and discrete surface water is a common scourge, and (iii) essentially "every property owner is on his own" and may take any and all steps to alter the

The *natural flow* doctrine, which allows and seeks to maintain the natural flows of diffuse and discrete surface water, is also consistent with the federal Clean Water Act's overarching and lofty objective to "restore and *maintain*" the natural integrity of waters.³ Therefore, we would expect the 5th Draft Permit's LID requirements to cleave closely to the *natural flow* doctrine, and to advance the central LID goal of maintaining or closely replicating predevelopment hydrology. Unfortunately, as the next section explains, the 5th Draft Permit's LID requirements would do neither.

2. Rather than encouraging the maintenance or close replication of natural flows from projects, the 5th Draft Permit's LID provisions require the unnatural and unprecedented arresting of storm water flows from properties.

Rather than adhere to the principal LID aim of *maintaining* predevelopment hydrology through thoughtful development strategies, the 5th Draft Permit would mandate the unprecedented and unsound practice of purposefully *arresting* – on each and every site developed – storm water that otherwise would naturally leave the site in its predevelopment state. Specifically, subparts 4.E.III.1 (a)-(d) and 4.E.III.2 (a)-(c) have as their central aim *not the maintenance or close replication of predevelopment hydrology, but instead the uncritical prevention of the discharge of storm water across property lines regardless of predevelopment hydrology – at great and undue expense.*

The main provision of the 5th Draft Permit which departs from the central aim of LID is stated in subpart 4.E.III.1(c). There, the draft permit language states that -- to comply with the permit – any meaningful amount of development can occur on any parcel only if the parcel is developed and engineered such that the parcel will "infiltrate, store for reuse, or evapotranspire, without any runoff[,] at least the volume of water that results from" a very substantial storm (based on one of three optional tests: 85% of a 24-hour storm, 80% of annual storm water, or a ¾" storm). (Emphasis added.) *Importantly, the proposed, arbitrary, absolute on-site retention mandates would be imposed even at sites where the predevelopment hydrology would naturally allow storm water to flow across property lines – perhaps flowing to receiving waters, habitat areas or other areas that depend on those natural flows.*

The result of these requirements would be that countless property owners, in order to develop their parcels, would need to undertake measures to accomplish – if possible – what

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

³ *See* 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.").

would be, in many contexts, be unnatural and expensive. For example, where enough marginally-useful rain barrels could not be utilized to capture rainwater for on-site use, expensive cisterns would need to be buried under or within homes and businesses. The potential benefits of such expensive measures are particularly dubious in the semi-arid environment of Ventura County, where rain events are relatively infrequent and/or may occasionally come back-to-back such that the volume capture requirements would be insufficient to yield meaningful benefit in comparison to costs.

- 3. Instead of mandating deviations from predevelopment hydrology (as the 5th Draft Permit's LID provisions would do), *bio-filtration*, used in combination with strategies aimed at detaining – but not permanently retaining – storm water, should be allowed as the preferred alternative in many situations. Specifically, the permit requirements should not establish a compliance metric of “Effective Impervious Area” (EIA) viewed on a lot-by-lot or individual project scale. Instead, the permits LID requirement should require designs and strategies aimed more directly at managing storm water based on volume and water quality outcomes.**

Briefly, the main and fundamental change that is needed in the draft permit requirements is this: The final permit language should reject any mandate to *retain* storm water on site “without any runoff” (subpart 4.E.III.1(c)), and instead allow property owners to *detain* storm water and then discharge it across property lines (in a manner more consistent with natural flows) using bio-filtration, bio-swales, and other appropriate vegetated management practices that have been proven successfully to treat storm water before its discharge from the site.

More specifically, the 5th Draft Permit is unreasonable for a number of reasons. First, subpart 4.E.III.1(a) introduces a new and unprecedented limitation on “effective impervious area” (EIA), allowing no more than 5% of any parcel to be developed with “effective impervious” surfaces as defined and qualified in the succeeding subsections.

We strongly oppose the uncritical use of EIA on a parcel-by-parcel basis as a performance metric associated with the implementation of low impact development best practices. As we have pointed out previously, numerous problems exist with using EIA as a performance metric. First and foremost, the use of EIA at a small-scale (lot-by-lot or individual project) level – especially when it is translated into a mandate to arrest natural storm water flows – removes the focus from where it should be: squarely on designing to approximate predevelopment hydrology and, just as importantly, managing the quantities (i.e., volumes) and quality of storm water. Importantly, the evidence shows that detention and bio-filtration (as opposed to uncritical storm water *retention*) will yield superior water quality impacts over a range of storm events and frequencies, largely owing to the practical inability to retain on site relatively large and/or back-to-back storms.

Second, the term “EIA” lacks a common, understandable and implementable definition – particularly concerning the “effective” element of “effective impervious area.” In other words,

the concept of “effective” impervious surfaces necessarily implies the ability to render otherwise impervious improvements “ineffective” (and therefore permissible) through the use a volume-based translator relevant to LID BMP sizing. Therefore, the term is too vague and ambiguous to be used as a logical regulatory standard apart from a *storm water volume detention* requirement, design storm exceptions, etc.

CICWQ, in particular, has instructed repeatedly that a limitation on EIA as a performance standard for sizing LID BMPs engenders widespread confusion and misunderstanding in the development and building industry with respect to its definition, what this standard would require, and especially the justification for it. Proposing EIA as a performance standard has also created confusion among stormwater professionals generally, including those serving the principal permittee and co-permittees and those within Regional Board staff as well. For example, the Ventura Watershed Protection District worked for nearly a year on a Technical Guidance Manual (TGM) attempting to define and clarify the use of EIA; but debate and uncertainty remains. Both the San Diego and Santa Ana regional water quality control boards ultimately rejected the use of EIA in favor of a single volume-management approach.

Moreover, it is clear that EIA does not have an agreed upon, logical definition or justification; and its proposed applicability on a parcel-by-parcel basis (i.e., irrespective of any scale) raises serious concerns about unintended consequences (such as limiting infill and redevelopment, promoting low-density sprawl, and steering development unwisely toward relatively naturally pervious areas). In addition, any EIA mandate based on permanent retention for infiltration would have limited utility and/or possibly even be dangerous in many site contexts – such as hillsides, bluffs and palisades, soils with restrictive layers such as hard pans, or high water tables.

Worse, the notion that EIA considerations should be made applicable to each and every parcel of land (regardless of any scale) springs from uncritical academic speculation. EIA has been studied only at a larger scale and generally under uncontrolled conditions (i.e., where there is no consideration of the existence or non-existence of engineered solutions or hydrology-based LID applications). Accordingly, the conclusions that can be drawn from the existing science have meaning only on a watershed scale where its definition first appeared. Only one academic, Dr. Richard Horner, has uncritically applied the findings of other EIA studies to conclude that each and every parcel must be bound by the same EIA standard. His conclusion about the need to apply EIA on a parcel-by-parcel basis is refuted by numerous studies and commentators. For example, the 5th Draft Permit at Finding No. 19 on page 7, cites (again purportedly in support of the 5th Draft Permit requirements) the U.S. Environmental Protection Agency document entitled Reducing Stormwater Costs through Low Impact Development (LID) Strategies and Practices, USEPA Doc No. EPA 841-F-07-006, December 2007. That EPA report states at pp. 1-2 the following (with emphasis added):

Water quality protection [LID] strategies are often implemented at three scales: the region or large watershed area, the community or neighborhood, or [development] site or block. Different storm water approaches are used at

different scales to afford the greatest degree of protection to waterbodies because the influences of pollution are often found at all three scales.

[LID] [s]trategies related to the broad growth and development issues are often implemented at the regional or watershed scale. Once communities have determined where to grow and where to preserve, various storm water management techniques are applied at the neighborhood or community level. These measures, such as road width requirements, often transcend specific development sites and can be applied throughout a neighborhood. Finally, site-specific stormwater strategies, such as rain gardens and infiltration areas, are incorporated within a particular development.

Many smart growth approaches can decrease the overall amount of impervious cover associated with a development's footprint. These approaches include directing development to already degraded land; using narrower roads; designing smaller parking lots; integrating retail, commercial and residential uses; and designing more compact residential lots.

Applying an EIA standard on the scale of each and every residential lot – as Dr. Horner champions – is contrary to and conflicts with this evidence. First, it would prevent a more scalable look at development and mitigation opportunities by requiring that, in effect, all mitigation must occur on each parcel – even on each residential lot. This, in turn, creates an impediment to “designing more compact residential lots” as the above-quoted EPA report advocates. Respectfully, the Board should reject the imposition of EIA generally and especially when applied on a parcel-by-parcel, lot-by-lot basis. We are attaching hereto as Attachments 1 and 2 the detailed refutation of Dr. Horner’s Low Impact Development Case Study for Ventura County and a rebuttal to a paper submitted by Dr. Horner titled Assessment of Evapoation Potential with Los Impact Development, each prepared by Geosyntec Consultants, Inc.

Instead of embracing the EIA concept at the lot-by-lot scale, there seems to be a relatively broad willingness on the part of Ventura stakeholders (perhaps even including the non-governmental organizations, or NGOs) to consider a volume detention approach as the single performance standard to be used, without the complication and confusion created by appending EIA to it. Specifically, the NGOs have acknowledged that EIA lacks meaning unless a design storm volume is specified and there are clear criteria of what would be considered non-effective impervious area in light of such volumetric considerations. This is an important acknowledgement because it correctly confirms that EIA as a stand-alone concept falls short as a performance standard.

The U.S. EPA, as well, seemingly would be pleased to defer to the Board if it were reject the 5th Draft Permit’s EIA requirements and adopt instead a volume detention approach. In correspondence between BIA/SC and EPA prior to the Board’s May 2009 adoption hearing, EPA stated that it was willing to accept alternative engineering approaches other than EIA, such as a volume detention approach (which is contained in adopted MS4 permits in southern California

and the Bay Area and found in guidance documents in several states). Specifically, BIA/SC wrote to EPA to question their representatives' seeming support for using EIA as a performance standard in designing and implementing LID BMPs at one or more scales. Although EPA supports the use of "clear, measureable, and enforceable requirements" for LID performance, such as limitations on EIA, EPA's letter to BIA/SC dated July 31, 2008 (*see* Attachment 3 hereto) explained that "use of the 5% EIA requirement is not the only acceptable, quantitative approach for incorporating LID into renewed MS4 permits in southern California." The EPA further stated that "we are open to other quantitative means for measuring how LID tools reduce storm water discharges."

In addition, EPA commented on the Santa Ana Regional Board's north Orange County MS4 permit (March 24, 2009) and stated that "EPA has not determined that EIA is not necessarily the only or always the best method to implement LID" and that they are supportive of a volume capture approach. Of course, because we presume that the EPA would want to conform its policies to the intent of Congress as reflected in 42 U.S.C. § 17094 (discussed above), we also presume that the EPA would prefer volume capture "strategies ... to maintain ... the predevelopment hydrology of the property with regard to the temperature, rate, volume, and duration of flow." Thus, a volume detention and release approach utilizing bio-filtration would best fulfill the goal of LID.

Continuing with our specific concerns about the 5th Draft Permit's LID requirements, subpart 4.E.III.1 (b), (c) and (d) describe how impervious surfaces on new and redevelopment may be rendered ineffective through the retention of storm water discharges regardless of predevelopment hydrology. Specifically, as we noted briefly above, the 5th Draft Permit would recognize EIA as rendered ineffective impervious area if the property owner can demonstrate that the parcel will retain enough storm water "without any runoff" for infiltration, harvest and use, or evaporative measures.

We take issue with this regulatory scheme for several reasons that deserve greater explanation. First, as noted above at length, it constitutes an intentional, improper departure from the mandated goal of trying to replicate, to the extent feasible, pre-development hydrology. Second, the LID requirement is again applied on a parcel-by-parcel, lot-by-lot basis, rather than on a scalable basis (development or block, neighborhood or community) as recommended by EPA in the 2007 report quoted above.

Third, and most importantly in terms of understanding the alternative that we urge the Board to embrace, is that the retention requirement is contrary to EPA's definition of LID because it disfavors development strategies designed to appropriately "filter" runoff, such as bioretention cells or other vegetated LID BMPs. There are five principal EPA documents regarding LID; and four of them approvingly point to biotreatment-type development strategies, such as detention (i.e., slow down, treat through vegetation, and then release across property lines), filtration, and surface release of stormwater. In a compilation of case studies by EPA, most of 17 exemplary projects included biotreatment elements, such as bioretention, swales, wetlands. *See* U.S. EPA 841-F-07-006. Each of two case studies described in another EPA

document (*see* Attachment 4 hereto, at pp. 1-2, EPA 841-B-00-005) included the use of under-drains, and the example in one of the two specifically fed into the MS4 system at issue. Another EPA document updated in January 2009 refers to the many practices used to adhere to LID principles of promoting a watershed's hydrologic and ecological functions, such as bioretention facilities and rain gardens to adhere to LID principles. *See* Attachment 5 hereto, at p. 2, EPA-560-F-07-231 (describing "an under-drain system to release treated stormwater off site," permitting planted areas to "safely allow filtration and evapotranspiration of stormwater"); <http://www.epa.gov/owow/nps/lid/> (fact sheet describing under-drains used to release treated stormwater off site and permitting planted areas to safely allow filtration of stormwater).

Similarly, the volume detention approach that we recommend as an alternative to the 5th Draft Permit's EIA, on-site retention approach is consistent with State Water Resources Control Board's guidance, which generally defines LID practices as including filtration, detention, bioretention, and other practices, each of which produce runoff. *See*,

http://www.waterboards.ca.gov/water_issues/programs/low_impact_development/

(describing design techniques that "filter" and "detain" runoff as consistent with the goal of LID, and also describing LID practices to include bioretention facilities, rain gardens, grass swales and channels, vegetated rooftops, vegetated filter strips, and permeable pavements). The State Board, as well, recognized mimicking pre-development hydrology as a goal (*See, A review of Low Impact Development Policies: Removing Institutional Barriers to Adoption, pp.13*) whereas, in contrast, the 5th Draft Permit intentionally departs from that goal by mandating the heroic retention of storm water regardless of the predevelopment hydrology.

Finally, there are the massive costs of compliance with such a requirement. A lot-by-lot, parcel-by-parcel large volume retention requirement remains impractical and unwise in most circumstances, and is not a goal that can be achieved for most projects within any reasonable costs, despite heroic efforts. Although the NGO stakeholders have pointed to other programs, guidelines and permits and argued that the 5th Draft Permit is proven achievable and therefore practicable. However, a careful review of the examples to which the NGO stakeholders point reveals that the indications are misleading. Specifically, a careful review and analysis of documents referenced by NRDC in a 2009 comment letter regarding the Orange County MS4 permit was prepared by Geosyntec Consultants (Attachment 6). The Geosyntec review shows that, in all of the examples cited by NRDC, none of the LID BMP sizing provisions appear in an adopted permit covering a watershed to size and scale of Ventura County, so the utility, practicability, and results of such guidelines or permit conditions remains to be seen. In addition, in contrast to the 5th Draft Permit, none of the examples cited generally mandate zero discharge "without any runoff" or require large volumes of water to be collected in infiltration, harvest and use or evapotranspiration regardless of feasibility.

There are many locations where it would be unhelpful (at best) or even very dangerous (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 in Los Angeles

County or La Conchita Ranch farther west in Ventura County) would be rendered dangerously unstable by any mandate of imperviousness and infiltration coupled with development. Even moderately sloping hillsides would similarly 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.

We recognize that it may be difficult for some to visualize the consequences of the 5th Draft Permit's onsite retention requirement. Therefore, we have attached hereto the declaration of Dr. Mark Grey (See Attachment 7), which reflects some quantification of the EIA requirement as presented in the 5th Draft Permit. Note also that these calculations were validated by staff at the Ventura County Watershed Protection District.

- A moderately-sized single family home would need the equivalent of 27 50-gallon drums to store the water as mandated by the permit.
- An extremely low-density 10-acre commercial property would need the equivalent of a 6 lane swimming pool (25 yards in length, 3.5 feet deep).
- The Ventura County Fire Station currently under construction in Simi Valley needs space for a typical backyard swimming pool.

As we have noted before, a 5% EIA requirement would have additional negative ramifications. For example, the requirement would encourage and incentivize sprawl, steering development to areas that have the most fields susceptible to digging and flexibility concerning perimeter features – in other words, development would be pushed toward open spaces that have little utility otherwise. 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.

Because the proposed EIA requirement would apply notwithstanding the many circumstances where it would be inappropriate (suboptimal at best, harmful at worse), 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.

Subparts 4.E.III.2 (a) and (b) of the 5th Draft Permit describe how a project that cannot meet the onsite volume capture standard may qualify for alternative compliance for *technical* infeasibility with additional planning and land development requirements. Importantly, the omission of any consideration of *economic* feasibility is obviously problematic. Obviously, it does not matter that a particular LID approach is *technically* feasible if it costs vastly too much to afford or no one would ever buy the resulting improvements made at great expense.

We recommend that the Board look to the permits recently adopted by the Santa Ana and San Diego Regional Boards in 2009. Those permits include language that clearly requires examination of both technical and economic factors that must be balanced when selecting suitable LID BMP combinations.⁴

Subpart 4.E.III.2 (c) of the 5th Draft Permit introduces the specific requirements for alternative compliance for those projects that can demonstrate true *technical* infeasibility (i.e., regardless of design, cost, or consumer appetite). The subpart would establish a limit of no more than 30% EIA without exception. We must first note that the pathway for supposedly accommodating “infeasibility” still mandates that runoff from 70% of the site must be infiltrated or harvested for reuse on-site. A site with technical limitations or where infiltration is undesirable (e.g., a brownfield) is likely to be infeasible at 30% EIA as much as it is as 5% EIA. Furthermore, the 30% EIA limitation is arbitrary, has no foundation from a scientific or technical standpoint, and has no source to support its selection as a standard of compliance. We oppose this standard as a performance metric particularly because it would operate to rule out or render

⁴ Santa Ana Regional Board Permit R8—2009-0030, Section XII.C.6 provides: “*The LID BMPs shall be designed to mimic pre-development hydrology through technically and economically feasible preventative and mitigative site design techniques. LID combines hydrologically functional site design, with pollution prevention methods to compensate for land development impact on hydrology and water quality.*” (Emphasis added.) Similarly, San Diego Regional Board Permit R9—2009-0002, Section F.(7)(b) states: “*For each PDP participating, a technical feasibility analysis must be included demonstrating that it is technically infeasible to implement LID BMPs that comply with the requirements of Section F.1.(d)(4). The Copermittee(s) must develop criteria for the technical feasibility analysis including a cost benefit analysis, examination of LID BMPs considered and alternatives chosen. Each PDP participating must demonstrate that LID BMPs were implemented as much as feasible given the site’s unique conditions. Analysis must be made of the pollutant loading for each project participating in the LID substitution program. The estimated impacts from not implementing the required LID BMPs in section F.1.d.(4) must be fully mitigated. Technical infeasibility may result from conditions including, but not limited to:*

(i) Locations that cannot meet the infiltration and groundwater protection requirements in section F.1.c.(6). Where infiltration is technically infeasible, the project must still examine the feasibility of other onsite retention LID BMPs;

(ii) Smart growth and infill or redevelopment locations where the density and/or nature of the project would create significant difficulty for compliance with the onsite volume retention requirements; and

(iii) Other site, geologic, soil or implementation constraints identified in the Copermittees updated local SSMP document.” (Emphasis added.)

economically infeasible many development projects that would otherwise integrate multiple societal benefits (for example, high density urban housing near transit nodes or mixed use development on former brownfields). These types of development projects already face daunting technical hurdles without placing special restrictions on *on-site* stormwater management features.

Lastly, subpart 4.E.III.2 (d) of the 5th Draft Permit introduces the concept of determining watershed equivalency alternative compliance, but it does so by again using the 5% EIA metric as a performance metric. Here again, the regulatory focus on EIA as a performance metric is inappropriate, when the focus should be on managing quantities and quality of storm water. In addition, because ascertaining watershed equivalency is complex and dependent upon countless considerations and context, it is inappropriate to try to define such equivalency in the MS4 permit itself. The subpart as written is confusing and will be extremely difficult to apply in any meaningful way.

To truly demonstrate approximate equivalency, multiple metrics would need to be considered and proven, possibly including attention to long term hydrologic records and water quality monitoring data over long temporal scales; but this would be extremely difficult and incredibly expensive. Given the difficulties inherent in approximating watershed equivalency, and attempt to streamline the ascertainment should be addressed as part of the Technical Guidance Process and Manual update and development and interpretation by local authorities.

To recap, we believe that a *volumetric detention* engineering approach, coupled with appropriate automatic waivers based on objective site-specific circumstances, is far better than any EIA approach (especially the on-site retention requirement regardless of context or natural hydrology) and more in accord with the federal and state statutes and policy goals. Ideally, the volumetric detention 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 and engineering expedient, we would subscribe to (and have supported in discussions with the San Diego and Santa Ana regional boards) the detention and treatment of the entire volume of a reasonably moderate design storm.

- 4. The sudden “about-face” findings set forth in 5th Draft Permit (which purport to justify the proposed LID requirements) are unsupported by substantial evidence and are instead undercut by the evidence in the record (which broadly supports bio-filtration options instead).**

The Board should take particular note of the radical changes that took place within the “Findings” between the penultimate 4th Draft Permit (revision dated April 30, 2009) and the 5th Draft Permit. Specifically, the April 30, 2009 revision to the 4th Draft Permit set forth a finding that was specifically critical of the EIA concept that is now reflected in the 5th Draft Permit. Specifically, Finding No. 19 of that draft read as follows:

Staff finds there is a growing acceptance by stormwater professionals to integrate LID principles into stormwater management programs and MS4 permits. However, there remains significant controversy regarding the appropriate requirements and metrics for LID. At the heart of this controversy is a dispute regarding the feasibility and effectiveness of requiring a fixed volume of stormwater to be captured and retained onsite for infiltration, reuse, and evapotranspiration, as opposed to permitting a portion of the stormwater to be released off site after it is treated, when it is infeasible to retain the required stormwater on site due to site specific conditions.

Staff has reviewed extensive technical literature regarding this issue (e.g. R. Horner, Investigation of the Feasibility and Benefits of Low-Impact Site Design Practices ("LID") for Ventura County (February 2007); E. Strecker, A. Poresky, D. Christen, Memorandum: Rainwater Harvesting and Reuse Scenarios and Cost Consideration, (April, 2009). Staff finds that there is consensus in the technical community that site conditions and the type of development can limit the feasibility of retaining, infiltrating, and reusing stormwater at sites due to a variety of site specific conditions. Factors that affect the feasibility of a fixed volume capture standard include, but are not limited to: soils infiltration capacity, subsurface pollution, and locations in urban core centers.

Regarding the effects of capturing a fixed stormwater volume on site, Staff finds the fixed volume approach may be ignoring basic hydrological principles that relate the feasible infiltration volume to the infiltration capacity of local soils. Requirements to capture a fixed volume on site could disturb the natural water balance and lead to unintended engineering and hydrologic consequences. For example, a typical hydrological condition in Ventura County is one of successive storms during the winter which may exceed the stormwater capacity that can be retained on site. This may result in ponded water on site with attendant health and safety risks, saturation of the near surface soils, and reduction of water resources in Regional waterbodies. These effects could damage site structures, increase groundwater pollution by forcing enhanced pollution spreading, or destroy aquatic habitat. Staff finds these reasonably potential effects are not well evaluated scientifically. Finally, staff cannot find that a fixed retention volume versus a standard that attempts to release surface flows at a predevelopment level would result in a greater reduction of stormwater pollution.

(Emphasis added.)

At the May 7, 2009 hearing, however, the Board was presented with an ultimatum: Either (i) accept without change the secret "deal" that was negotiated behind the scenes (and which squarely conflicted with the finding set forth above), or (ii) instead displease some Board members' friends at the non-governmental organizations. In the Board discussion that followed, several members complained that they were being required to accept "all-or-nothing" provisions that were dictated through such a process. Nonetheless, the Board subscribed to the secret deal

In response, BIASC, BILD, and CICWQ lodged a petition with the State Water Resources Control Board challenging the legitimacy of the May 7, 2009 adopted permit. On March 10, 2010, the State Board staff requested that the Board accept a voluntary remand of the challenged permit and cited numerous irregularities in the permit (including, apparently, secret and improper attempts by the Board's staff to alter belatedly the above-quoted finding).

In what now appears to be an attempt to rationalize the Board's May 7, 2009 adoption of the secret deal, new and different findings were added to the 5th Draft Permit before it was released for public comment. These findings now are false and do not accurately represent their source material.

As noted above Finding Nos. 17 and 19 of the 5th Draft Permit discuss source materials from the California Office of Planning and Research and U.S. EPA, respectively, which define, discuss and champion LID. These findings are purported seemingly to support the EIA/on-site retention requirements set forth in subpart 4.E.III.1 of the 5th Draft Permit. Upon examination, however, the OPR and EPA materials that are cited recognize biofiltration and biotreatment as necessary and proper LID strategies. See Ocean Protection Council Resolution adopted May 15, 2008, as cited in Finding No. 17 of the 5th Draft Permit ("WHEREAS, *LID design detains, treats and infiltrates runoff by minimizing impervious area...*")(emphasis added).⁵

Similarly, Finding Nos. 19, 27, 28, and 29 undercut, rather than support, the permit requirements set forth in subpart 4.E.III.1 of the 5th Draft Permit. These findings refer to a 2007 compilation of LID case studies and cost data, none of which support the 5th Draft Permit's onsite-retention, EIA requirement. The background of the compilation study defines several excellent LID Best Management Practices (BMPs), including "Runoff Conveyance Practices (p.4) and "Filtration Practices" (p. 5) which are disallowed BMPs in the 5th Draft Permit. We respectfully urge the Board to change the requirements to assure that the use of these practices will be permissible.

A close examination of the case study compilation reveals three major problems with using the study to justify an onsite retention requirement. First, none of the 17 case studies were conducted in the Southwest, with its unique climatic conditions (flashy, semi-arid climate). Second, nearly all of the case studies use some form of biofiltration BMP as part of the project; but biofiltration is not a permissible strategy under the 5th Draft Permit. Finally, the study concludes that there are no significant cost increases when LID is employed; but this particular finding is expressly based on an assumption of reduced infrastructure costs because LID would

⁵ Finding No. 17 similarly refers to dated research by commentator, Hoffman, concerning institutional barriers to LID. The paper suggests strategies to move past institutional roadblocks to LID, such as leadership and *motivation to change inflexible regulations*. We agree with this sentiment, but note that the 5th Draft Permit would uncritically add to inflexible regulations within Ventura County.

lead to narrower roads and shorter sidewalks. However, in nearly one year of work to implement the LID provisions, no changes to zoning codes or building standards have been proposed in Ventura County. The alleged cost offsets, therefore, cannot be assumed for Ventura County. Moreover, the 5th Draft Permit would impose costs associated with cisterns which were never considered in the studies compiled.

Finding Nos. 20 and 21 purport that ancillary benefits result from LID. The benefits discussed are, however, of the type that are appropriately weighed and evaluated, under California Law, through the California Environmental Quality Act. As we discuss below in more depth, we urge the Board to integrate its requirements with CEQA, which is the authoritative legislation on how to mitigate any environmental impacts of development.

Finding No. 22 of the 5th Draft Permit is perhaps the most egregious misrepresentation of the content of the cited material. The finding alleges that there is "growing acceptance" to LID and – in particular – "associated onsite retention criteria." Nothing could be further from the truth. First, each and every California MS4 permit adopted since May 7, 2009 has rejected the use of the Effective Impervious Area standard and has allowed biofiltration as an allowable BMP. We urge the Board to review these recent permits before it enacts the requirements in the 5th Draft Permit. Furthermore, the finding alleges that the other requirements cited rely upon an onsite retention strategy, which is not the case. Specifically:

- The West Virginia MS4 Permit, after setting a retention standard as described in the Finding, goes on to establish an elaborate "Credit" system that allows the volume of water to be reduced by up to 75%. *Furthermore, the permit requirements are not currently in effect, and will not be for 4-1/2 years after permit adoption. This significant allowance was provided in recognition of the significant regulatory requirements that needed to be changed to successfully implement the onsite retention requirement.*
- USEPA's Technical Guidance on Implementing Stormwater Runoff Requirements should be acknowledged for what it is – Guidance. This is not a binding requirement, and even the Finding acknowledges that it only applies where technically feasible.
- In describing the requirements in the City of Philadelphia, Finding #22 again omits critical details. The requirements only apply when technically feasible and a Waiver is available. Most notably, the City of Philadelphia establishes an incentive to reduce impervious area to 5% - such a project would receive an expedited review within 5 days, an unprecedented turnaround time in Ventura County. Regardless, the criterion is used for establishing an incentive, not a mandate as the Finding purports.
- Finally, the requirements cited from the City of Portland are also incomplete. The requirement refers to the "Performance Approach" used by the city for "unique

circumstances” and is silent with regard to the “Simplistic Approach” and “Presumptive Approach” more commonly employed. Within these approaches, the City of Portland establishes a hierarchy of BMPs with infiltration at the top; none-the-less, the hierarchy allows offsite discharge from vegetated facilities. (Stormwater Manual, p 1-10.)

Finding Nos. 23 through 25 purport to justify the regulation of impervious areas, citing supposedly learned academic analysis related to the topic. That analysis and the studies on which it is based, however, relate to analyses of the effects of impervious areas at the watershed (i.e., regional) level, not at the level of individual lots or projects. Indeed, Dr. Horner, on whose research the secret deal is based, postulates that there should be absolutely no difference whatsoever between regulating at the watershed or community level, on the one hand, versus at the level of an individual lot for a mobile home (or a dog house). The Board should reject such simplistic analysis.

Finding No. 26 merely references the agreement (i.e., secret deal) that was struck between several Ventura County cities and certain environmental lobbying groups. The agreement, however, was not based on any particular research or scientific justification; it is acknowledged as a *political* compromise. See Transcript of Adoption Hearing May 7, 2009, at p. 298, testimony of Mike Sedell (“It was interesting to observe that while your staff recommendation was able to garner support for most of their proposals . . . , what the permittees and the NGOs developed is what we perceive to be a true compromise, was universally opposed, except, of course, by the two sides at the table.”). The Board should neither be impressed with such a political compromise, nor the attempt by a subset of parties to coerce the Board into abdicating its responsibility.

5. As was a problem with the 4th Draft Permit, the 5th Draft Permit was derived without proper 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 remains – because 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 remains most perilous for the Board to again fail to take into account the section 13241 factors.

The 5th 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. 26. This legal conclusion is erroneous. Unless the Board

changes course and honors its obligations under the California Water Code, it will simply be compounding its legal errors.

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 many interests, and require *some* reasonable controls.⁶ Certainly, the federal directive is not a mandate to be immoderate or a mandate to do something in Ventura County merely because it was tried once somewhere in Florida.

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 hortatory “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.” (Emphasis added.) Thus, the federal statute merely instructs the Board, as the E.P.A. Administrator’s surrogate, 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.*, 96 F.2d 1292, 1308 (9th Cir. 1992) (“NRDC

⁶ 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.)

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, 661 (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") (emphasis added).

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 (California 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, economic considerations, the need for housing, and the need to recycle water) – among any other factors. 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 pre-empt 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.

Finally, the Board, its staff, and its counsel should know and recognize that any particular MS4 permit requirements are not mandated by federal law in such a way that the Burbank opinion would excuse compliance with California Water Code § 13241. This exact legal issue was addressed recently by the Commission on State Mandates in connection with the San Diego County MS4 permit. There, the water boards' attorneys took the same legal approach that is now reflected in the 5th Draft Permit, and the approach was rejected resoundingly by the commission. In a memorandum dated May 10, 2010 from the Chief Counsel of the State Water Resources Control Board to all regional board executive officers, the author of that letter stated that the water boards “will challenge these decisions in court.”

We submit to the Board that the Commission on State Mandates correctly ruled that *the discretionary establishment of any particular MS4 permit conditions is not a federal mandate*. Armed with a proper understanding of the law (as explained above and further confirmed by the Commission on State Mandates), the Board should act here and now to stop shirking of its most basic State law obligations and stop compounding its legal errors. 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. As explained above and in the accompanying Technical Summary, many of the proposed permit conditions in the 5th Draft Permit would never survive a fair consideration of the section 13241 factors – especially those related to environmental characteristics, economic considerations, and the need for housing.

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

As we have noted before concerning earlier tentative draft permits, California law has long established CEQA as the procedural mechanism for evaluating – and mitigating – the environmental impacts of land development. The CEQA process evaluates all environmental impacts and provides a consistent process for the mitigation of the impacts that are foreseen, along 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 any fixed, inflexible numeric standards for low impact development – such as the generally-applicable 5% EIA standard or a hard-and-fast on-site retention mandate, the 5th Draft Permit trumps all other considerations (environmental and otherwise) and improperly shifts ultimate land use approval authority to the Board.

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. 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 have previously offered more detailed analysis of this approach through our 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.

7. The Board should put in place generous "grandfathering" implementation provisions in light of the severe economic recession and the need to respect dormant plans.

Since the Board adopted the present Ventura MS4 permit on May 7, 2009, the regulated community has been confused and consternated about how to implement its land use provisions in light of ongoing planning and existing plan. Adding to the confusion and concern were the delayed release of the final version of the permit (which took longer than 3 weeks), the amended permit (dated January 13, 2010 but revealed on January 29, 2010), and a March 2010 remanded permit with a new hearing date set for July 8, 2010. The May 7, 2009 permit also required a Technical Guidance Manual (TGM) be submitted no later than one year after the adoption, and set an effective date for the Land Development Requirements of 90 days after the Executive Officers approved the TGM.

Over the past year, the Ventura County Watershed Protection District has prepared a draft TGM – but with very little stakeholder participation. Stakeholder participation was truncated, in part, due to the voluntary remand of the permit which was announced in March 2010. This was acknowledged by the VCWPD in its transmittal of the TGM to the Board Executive Officer on May 6, 2010.

Throughout this comment letter, we have indicated aspects of the 5th Draft Permit that should be changed before adoption. In addition to those, additional time to create implementation guidance must be provided. We are certain that the 120 days requested by the VCWPD would be insufficient for the level of outreach and education that must occur to implement any new low impact development requirements effectively. Furthermore, setting the effective date of the requirements "90 calendar days" after Regional Water Board Executive Officer approval of the TGM is vague and creates unnecessary uncertainty. Ninety days is also an extremely short time period for the significant level of redesign that could be required for projects to meet any new low impact development requirements, even if the final permit were to reflect the changes requested in this letter.

Moreover, significant actions that extend beyond the TGM must be taken by the Co-Permittees to implement the permit. As noted previously, significant barriers to implementing low impact development requirements remain; and Co-Permittees must amend zoning ordinances, building codes, and General Plans to reflect these changes. For example, to assist in reducing imperviousness in new residential developments, street widths should be narrowed. To facilitate reuse of captured stormwater, building codes should be updated to allow that water for non-potable building uses (e.g., toilet flushing). Conflicts with other policy goals must also be balanced. To our surprise and disappointment, none of these types of changes have been introduced during the past year within or concerning Ventura County, and the TGM does not even identify these types of changes as necessary strategies for successful low impact development.

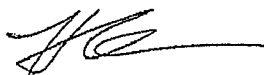
We note that the West Virginia permit that is cited in the findings of the 5th Draft Permit allowed the permittees there six months to develop their implementation manual. It goes on to recognize, however, that setting up long-term controls will “require changes to local codes and ordinances,” and therefore “allows four years from the date of SWMP approval to being implementation of this standard.” (Fact Sheet p. 14 at <http://www.dep.wv.gov/WWE/Programs/stormwater/MS4/permits/Documents/WV%20MS4%20GP%202009%20FINAL%20Fact%20Sheet.pdf>.)

We encourage the Board here to provide similar implementation provisos, with a minimum of four years after the revised Technical Guidance Manual is approved. A generous implementation schedule is necessary particularly because our economy is broken. Now, more than ever, we need to protect not only “shovel-ready” plans but plans otherwise in the works.

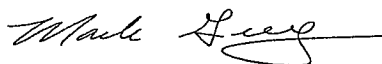
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Since the first tentative draft was released, the BIA/SC and its affiliates have been active participants and contributors to the creation of new and improved MS4 permit. We continue to believe that rational, *implementable* permit requirements are 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.

Sincerely,



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BIA-Los Angeles/Ventura



Mark Grey, Ph.D.
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