

Building Industry Legal Defense Foundation
Building Industry Association of Greater Los Angeles and Ventura Counties
Major Issues and Comments on the
12/27/06 Draft NPDES MS4 Permit for
Ventura County, Ventura Watershed Protection District, and Incorporated Cities

The following are the preliminary comments of the above-referenced parties on the 12/27/06 Draft NPDES MS4 Permit for Ventura County, Ventura Watershed Protection District, and Incorporated Cities (the "Draft Permit"). Given the process for comment, and status of the Draft Permit reviewed, please consider these comments preliminary. The submitting parties intend to participate fully in the public process for adoption of a renewed MS4 Permit, and therefore must reserve the right to submit additional comments and information for inclusion in the administrative record, and for consideration by Los Angeles Regional Board staff and board members as the process for preparation and adoption of the subject MS4 Permit proceeds. All documents, attachments, comments memoranda and other materials referenced or cited in this document are hereby incorporated by reference into these comments. Capitalized terms and acronyms used herein and not otherwise defined have the meaning ascribed to them in the Draft Permit.

General Issues	Specific Requirements/Concerns	Comments
1. Improper Regulation of Discharges "Into" Storm Drain Systems	<p>The Draft Permit provides that "Discharges <i>into</i> and from the MS4 in a manner causing or contributing to a condition of pollution, contamination or nuisance...are prohibited." <i>Draft Permit</i>, I.A.1., p. 25. "Discharges <i>to</i> the MS4 not covered by an NPDES individual or general permit are prohibited."</p> <ul style="list-style-type: none"> This provision as written shifts to co-permittees liability for pollution that may enter their MS4s as a result of unauthorized, or unknowing and even <i>intentional</i> discharges (such as 	<ul style="list-style-type: none"> Comment: The federal Clean Water Act (CWA) and the regulations adopted thereunder require that MS4 operators must adopt means, measures and methods to control discharges into storm drains that may cause pollution (illicit discharges, non-stormwater discharges and other discharges that may be significant contributors of pollutants); but the CWA and federal regulations do <i>not</i> contemplate that co-permittees would be liable for discharges into storm drains that could cause pollution if the methods, means and measures adopted by MS4 operators are ineffective in any particular instance to control such a discharge. <i>See</i> 33 U.S.C. § 1342; 40 CFR 122.26; 40 CFR 122.34. As a result, the appropriate approach for the <i>Draft Permit</i> to take would be to mandate that co-permittees adopt means, methods and measures to control

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	<p>industrial discharges, sewage discharges, residential hazardous materials spills, nursery and farming discharges, and discharges of pollutants from upstream MS4 systems), even if the MS4 operator has properly adopted control measures, ordinances and programs to control and prevent these types of illicit discharges in accordance with the federal Clean Water Act and regulations thereunder. While the Clean Water Act mandates that MS4 operators shall adopt means, methods and measures to identify and control illicit discharges that would introduce pollutants into an MS4 system, it does not contemplate that, as set forth in the proposed provision, if such discharges occur they would constitute the basis for co-permittees liability for failure to comply with the Permit.</p> <ul style="list-style-type: none"> • A requirement to prohibit all discharges into the MS4 that could cause or contribute to pollution or nuisance precludes the development and implementation of any subregional 	<p>improper discharges into the MS4 system, and require investigation and follow up to control improper discharges if they occur. The <i>Draft Permit</i> should not, however, create a prohibition against discharges into the MS4, and in turn, a violation by the co-permittees if those discharges occur, because the discharges are not in the immediate control of the MS4 operator.</p> <ul style="list-style-type: none"> • Comment: State Water Resources Control Board (“State Board” or “SWRCB”) Order 2001-15 found the exact language used in <i>Draft Permit</i> § I.A.1. invalid and overly broad because it regulates discharges “into” MS4s, when the federal Clean Water Act and Porter Cologne regulate discharges of waste and pollutants <i>from</i> MS4s to receiving waters. SWRCB Order 2001-15 at p. 10. Regional Water Quality Control Boards (“Regional Board”) can emphasize control of discharges into the MS4 to improve the quality of discharges from MS4s, and can emphasize that dischargers into MS4s continue to be required to implement a full range of BMPs. However, MS4 permit prohibitions may not broadly restrict all discharges <i>into</i> an MS4, in part because that approach does not allow flexibility to use regional solutions where they could be applied in a manner that fully protects receiving waters. <i>Id.</i>

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	treatment and/or volume reduction BMPs that would be deployed downstream of the first catch basin, but prior to discharge into a receiving water.	
2. Cal. Water Code § 13241 Balancing	The Regional Board's position is that, under <i>City of Burbank</i> , they may not consider the substantial costs of compliance with the <i>Draft Permit</i> , and may not otherwise balance the factors listed under Water Code § 13241 in adopting the <i>Draft Permit</i> because, although the requirements of the <i>Draft Permit</i> are more "explicit or may be more specific than those enumerated in federal regulations," per the Regional Board they are tailored and "prescribed to be consistent with the [federal Clean Water Act]" and are simply the measures "necessary to reduce the discharges of pollutant to the maximum extent practicable and to meet water quality standards." <i>Draft Permit</i> , Finding F.6, p. 22.	<ul style="list-style-type: none"> • Comment: 13241 Balancing is the Method for Exercising Discretion to Determine MEP. In May 1973, the United States Environmental Protection Agency ("EPA") delegated responsibility for enforcing the CWA, including issuing NPDES permits, to the State and Regional Boards. California's Porter-Cologne Act (Calif. Water Code sections 13000 <i>et seq.</i>) is the statutory framework that sets forth the obligations of the Board when setting permit conditions for the protection of water quality. In delegating responsibility for CWA enforcement and permitting, EPA expressly embraced the Porter-Cologne legislative scheme and statutory framework as adequate to protect the waters of the United States under the federal Clean Water Act. 54 Fed.Reg. 40664 (Oct. 3, 1989); <i>Waterkeepers Northern California v. State Water Resources Control Board</i>, 102 Cal. App. 4th 1448, 1452; Cal. Water Code § 13370 <i>et seq.</i> • When the federal government delegated enforcement and permitting powers under the CWA to the State and Regional Boards, EPA consented to and embraced the <i>entire</i> statutory scheme under the Porter-Cologne Water Quality

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		<p>Control Act (“Porter-Cologne”), including Cal. Water Code Sections 13241¹ and 13263.² The plain language of Sections 13241 and 13263 require that when a Regional Board considers waste discharge requirements (WDRs) and permit conditions, it must consider all of the factors described in Section 13241, including costs of compliance with those WDRs and permit conditions. <i>City of Burbank v. State Water Resources Control Board</i>, 26 Cal. Rptr. 3d 304, 35 Cal. 4th 613, 625 (2005). These statutes were adopted and in place at the time that EPA approved State delegation of the federal water quality program. <i>Id.</i> Thus, EPA accepted and approved such balancing by Regional Boards in the exercise of their permitting authority when EPA approved the delegation of the federal water quality program to the State of California.</p> <ul style="list-style-type: none"> • Within the Porter-Cologne Act, Cal. Water Code sections 13241 and 13263 combine to obligate the Board to critically consider a number of carefully prescribed, individual

¹ “Each regional board shall establish such water quality objectives in water quality control plans as in its judgment will ensure the reasonable protection of beneficial uses and the prevention of nuisance; however, it is recognized that it may be possible for the quality of water to be changed to some degree without unreasonably affecting beneficial uses. Factors to be considered by a regional board in establishing water quality objectives shall include, but not necessarily be limited to, all of the following: (a) Past, present, and probable future beneficial uses of water; (b) Environmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto; (c) Water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area; (d) Economic considerations; (e) The need for developing housing within the region; and (f) The need to develop and use recycled water.” Cal. Water Code § 13241.

² “The regional board, after any necessary hearing, shall prescribe requirements as to the nature of any proposed discharge, existing discharge, or material change in an existing discharge, except discharges into a community sewer system, with relation to the conditions existing in the disposal area or receiving waters upon, or into which, the discharge is made or proposed. The requirements shall implement any relevant water quality control plans that have been adopted, and shall take into consideration the beneficial uses to be protected, the water quality objectives reasonably required for that purpose, other waste discharges, the need to prevent nuisance, and the provisions of Section 13241.” Cal. Water Code § 13263(a).

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		<p>balancing factors whenever fashioning WDRs and permit conditions for discharges into waters of the State. In addition, Regional Boards must assure that all permits and WDRs are in compliance with the Clean Water Act, as amended. Cal. Water Code § 13377. <i>City of Burbank</i>, 35 Cal. 4th at 626. These two obligations are not in conflict. <i>See id.</i> (“[S]ection 13377 forbids a regional board’s consideration of any economic hardship ... if doing so would result in the <i>dilution</i> of the requirements set ... in the Clean Water Act.”) (emphasis added); <i>see also id.</i> at 627 (“The federal Clean Water Act reserves to the states significant aspects of water policy (33 U.S.C. § 1251(b)), and it specifically grants the states authority to ‘enforce any effluent limitation’ that is not ‘<i>less stringent</i>’ than the federal standard (<i>id.</i> § 1370, italics added [by the Court]).”</p> <ul style="list-style-type: none"> • With respect to stormwater, the Clean Water Act requires that permits for discharges from MS4s must be issued, and that the permits must require controls to reduce the discharge of pollutants to the maximum extent practicable (“MEP”), including management practices, control techniques and system design and engineering methods, and such other provisions as the Administrator State determines appropriate to control pollutants. 33 U.S.C. § 1342(p)(3)(B)(iii). In adopting Section 1342(p) of the Clean Water Act, Congress intended to provide the EPA, or the regulatory agency of an approved state (in California, the Regional Boards), with broad discretion in determining the permit requirements necessary to meet MEP, particularly in light of federal provisions emphasizing that

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		<p>compliance with water quality standards is to be achieved through an iterative process. <i>Building Industry Assn. of San Diego Count v. State Water Resources Control Board</i>, 124 Cal. App. 4th 866, 883 (4th Dist. 2004); <i>City of Abilene v. United States Environmental Protection Agency</i>, 325 F.3d 657, 660-61 (5th Cir. 2003); <i>Defenders of Wildlife v. Browner</i>, 191 F.3d 1159, 1166-67 (9th Cir. 1999).</p> <ul style="list-style-type: none"> • In light of the water quality statutory framework created by Porter-Cologne, in exercising discretion associated with the issuance of permits pursuant to EPA's delegation of the federal water quality program, the Regional Boards must consider the factors expressly set forth in Sections 13241 and 13263 in exercising their broad discretion to determine appropriate permit conditions and WDRs necessary to control water quality to the MEP, as required by Clean Water Act § 1342(p) and Cal. Water Code §13377. Cal. Water Code sections 13241 and 13263 provide instructions to Regional Boards for exercising their discretion. • The Regional Board may not hide behind the MEP requirement to deny its obligation to undertake section 13241 balancing. Instead, conducting a proper and thorough balancing of pertinent factors under Section 13241 is an integral part of, and in fact, is <i>the</i> method that a Regional Board must use to exercise its discretion to determine appropriate permit requirements to meet the broadly worded and discretion-intensive MEP standard. Therefore, the Regional Board can not simply avoid complying with the

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		<p>balancing mandate of Porter-Cologne by holding out everything they do in their municipal storm water permits as within the MEP standard. Instead, in exercising that broad discretion to determine what constitutes MEP under the federal Clean Water Act, the Regional Board must comply with Porter-Cologne, including the consideration of the factors in section 13241, as determined to be appropriate by EPA when it approved delegation of permitting and enforcement authority to the State of California. Further, in the case of stormwater permits, there is nothing in state or applicable federal law that prevents the Regional Boards from considering costs or other section 13241 factors in determining those permit requirements and pollutant restrictions that are necessary to <i>meet</i> the MEP standard, particularly because federal and state law provide broad discretion to the Regional Boards to undertake this task along with guidance in Cal. Water Code Section 13241 and 13263 with respect to accomplishing it. See, <i>City of Burbank v. State Water Resources Control Board</i>, 35 Cal. 4th at 629, <i>Id.</i> at 628 (“The states are free to manage their own water quality programs so long as they do not compromise the federal clean water standards”). Cf. 33 U.S.C. § 1311(a) v. 33 U.S.C. § 1342(p).</p> <ul style="list-style-type: none"> In issuing the <i>Draft Permit</i>, the Regional Board has stated that it is not required to, and has not fully considered the requirements proposed pursuant to Section 13241. But this position is not tenable in light of the broad discretion the Board has to determine what constitutes MEP under federal law, and the direction that state law gives the Regional Boards

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		<p>for exercising that discretion. Given the breadth of the Board's delegated discretion, the Board cannot fairly argue that it lacks the discretion to apply and reconcile the six specific balancing factors which the California Legislature carefully prescribed in Water Code section 13241 when determining what controls are necessary to comply with MEP. Accordingly, BILD and BIA-GLA/V individually call out in the comments below many specific aspects of the Draft Permit which reflect the Board's failure follow Porter-Cologne in determining permit requirements that constitute MEP.</p> <ul style="list-style-type: none"> • Comment: The Balancing Requirements of Section 13241 Are Not Preempted by the Federal Clean Water Act. Recent California case law reflects judicial confusion about whether the MEP standard is itself "preemptive" so as to nullify a Regional Board's state-law obligation to undertake the Section 13241 balancing. The confusion is reflected particularly in two recent cases, <i>City of Burbank</i> and <i>City of Rancho Cucamonga</i>. In <i>City of Burbank v. State Water Resources Control Board</i>, 35 Cal.4th 613 (2005), the California Supreme Court ruled that the state and regional agencies responsible for regulating state water quality (e.g., the Board) must comply with Porter-Cologne – including the need to balance the Section 13241 factors – to the extent the agencies impose terms or restrictions that “exceed the requirements of the federal Clean Water Act.” <i>Id.</i> at 627. In doing so, the Court concluded that the record before it was insufficiently developed for it to determine whether the permit conditions at issue there exceeded the requirements of the

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		<p>federal Clean Water Act. <i>Id.</i> at 628.</p> <ul style="list-style-type: none"> • In addressing the confusion regarding preemption of balancing by the exercise of discretion, two preliminary notes are important. First, while confusion exists in recent cases, it has long been settled that the question of whether federal preemption exists is a question of law - not of fact. <i>See, e.g., Industrial Trucking Association v. Henry</i>, 125 F.3d 1305, 1309 (9th Cir. 1997), citing <i>Inland Empire Chapter of Associated Gen. Contractors v. Dear</i>, 77 F.3d 296, 299 (9th Cir. 1996) and <i>Aloha Airlines, Inc. v. Ahue</i>, 12 F.3d 1498, 1500 (9th Cir. 1993). <i>Bammerlin v. Navistar International Transportation Corp.</i>, 30 F.3d 898, 901 (7th Cir. 1994). Second, the burden of demonstrating to a court that federal preemption exists rests with the agency asserting the preemption. Preemption is an affirmative defense. <i>See Bronco Wine Co. v. Jolly</i>, 33 Cal.4th 943, 956-57 (2004); <i>United States v. Skinna</i>, 931 F.2d 530, 533 (9th Cir. 1990). • Therefore, a regional water quality control board asserting that federal law preempts the application of the Porter-Cologne Act's balancing requirements would itself bear the burden of demonstrating, as a matter of law, that actions required of it under state law are preempted by federal law. Accordingly, under a proper interpretation of preemption rules, the Regional Board faces an uphill battle procedurally to establish federal preemption. Substantive rules regarding finding preemption also must be considered. • The Supreme Court of the United States has opined

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		<p>that courts should always attempt to reconcile the clash of laws to <i>avoid preemption</i>. See <i>Merrill Lynch, Pierce, Fenner & Smith v. Ware</i>, 414 U.S. 117, 127 (1973); see also <i>Rice v. Norman Williams Co.</i>, 458 U.S. 654, 659 (1982) (“[T]he inquiry is whether there exists an <i>irreconcilable conflict</i> between the federal and state regulatory schemes.”) (emphasis added). Both state and federal courts generally recognize a presumption against preemption, even when there is express preemptive language, and there is a strong presumption against preemption or displacement of state laws. See <i>Washington Mutual Bank, FA v. Superior Court</i>, 75 Cal.App.4th 773, (1999) citing <i>Cipollone v. Liggett Group, Inc.</i>, 505 U.S. 504, 523 (1992) and <i>Medtronic, Inc. v. Lohr</i>, 518 U.S. 470, 485 (1996). In the absence of express federal preemptive language, the presumption against preemption is even stronger: if preemption is not express, the federal statute must clearly indicate that Congress ‘left no room’ for supplementary state regulation. <i>Hillsborough County v. Automated Medical Labs</i>, 471 U.S. 707, 713 (1985).</p> <ul style="list-style-type: none"> • In light of these well-settled principles, despite the confusion of recent cases, the Regional Board cannot reasonably argue that the federal regulatory scheme at issue here preempts adherence to Water Code section 13241 balancing factors. First, there is no express federal preemption here that would negate Section 13241 balancing. Accordingly, if preemption exists, it must be implied – and overcome the strong presumption against it.

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		<ul style="list-style-type: none"> • Second, it cannot be fairly argued that the federal regulatory scheme at issue here “left no room” for supplementary state regulation. To the contrary, the federal regulatory scheme here elevates the state agencies acting under Porter-Cologne to the level of the primary governmental actor, and EPA via its delegation has authorized the State to carry out its federal water quality duties <i>by following</i> Porter-Cologne, including Section 13241. • Finally, as discussed in the Comment above, the Regional Board enjoys broad discretion under federal law to apply the Cal. Water Code section 13241 balancing factors (as mandated by the California Legislature) consistent with the requirement to issue stormwater permits controlling pollution to the MEP and pursuant to the broad delegation of authority from EPA that the Regional Board enjoys. Because determination of permit requirements that comply with MEP does not preempt Section 13241 balancing, the Regional Board should, but has not, considered the factors under Section 13241 in determining appropriate permit standards and requirements for inclusion in the <i>Draft Permit</i>.
<p>3. There is no substantial evidence supporting the Regional Board’s conclusion that a variety of <i>Draft Permit</i> Conditions and Requirements are</p>	<p>For example, the <i>Draft Permit</i> purports to establish Municipal Action Levels (MALs), but the MALs actually function as numeric effluent limitations. The <i>Draft Permit</i> specifically provides that two or more exceedances of the MALs constitute a violation of the <i>Draft Permit</i>. <i>Draft</i></p>	<ul style="list-style-type: none"> • Comment: Because the Regional Board has failed, to date, to conduct or document the proper analysis of proposed WDRs and permit requirements set forth in the <i>Draft Permit</i>, as required to properly implement the federal MEP standard in issuing the permit, numerous provisions in the <i>Draft Permit</i> are not reasonably designed to control pollutants in discharges to the MEP as circumspectly defined. As discussed above, the

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<p>appropriate to implement MEP</p>	<p><i>Permit</i>, F. 11., p. 23.</p> <p>In addition, project level rather than sub-watershed or watershed scale implementation of LID requirements (<i>Draft Permit</i>, Part 4 §E.1.I.), and implementation of wet season grading and paving restrictions regardless of probability of precipitation (<i>Draft Permit</i>, Part 4 §f.1.), and hydromodification control standards, including EP=1 (<i>Draft Permit</i>, Part 4 §E.1.II.) and interim standards (<i>Draft Permit</i>, Part 4 §E.1.II.).</p> <p>See also, Attachment A hereto; Comments submitted by the Construction Industry Coalition for Water Quality, and the technical memorandum prepared by Geosyntec Consultants submitted therewith.</p>	<p>Regional Board must consider the WDRs and permits requirements of the <i>Draft Permit</i> in light of all of the factors set forth in Cal. Water Code Sections 13263 and 13241, including but not limited to costs and natural baseline conditions, to determine WDRs and permit requirements that constitute regulation of discharges to the MEP. The Regional Board has failed to consider the <i>Draft Permit</i> provisions in light of Cal. Water Code section 13241 factors, as discussed above, and further, has failed to consider the <i>Draft Permit</i> provisions in light of the definition of MEP, as established by case law, and in light of other factors determined by the State Board to be appropriate to evaluating achievement of MEP. As a result, many of the current provisions of the <i>Draft Permit</i> do not comport with appropriate legal parameters that circumscribe MEP.</p> <ul style="list-style-type: none"> • Pursuant to case law and administrative determinations, MEP is a technology-based standard established by CWA § 1342(p)(3)(B)(iii). <i>Building Industry Assn. of San Diego County v. State Water Resources Control Board</i>, 124 Cal. App. 4th 866, 889 (4th Dist. 2004). MEP generally emphasizes pollution prevention and source control BMPs (as a first line of defense), in combination with treatment BMPs (as a second line of defense). <i>Id.</i> MEP considers economics, and is generally less stringent than BAT, which is an acronym for “best available technology economically achievable.” <i>Id.</i> MEP does not require that all possible water quality controls are implemented. <i>Id.</i>

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		<ul style="list-style-type: none"> • The State Board has also issued a guidance memorandum addressing the factors that should be considered in determining whether permit standards and/or compliance actions achieve the MEP standard. This guidance provides: <p style="margin-left: 40px;">“To achieve the MEP standard, municipalities must employ” [and therefore MS4 Permits should be designed to require,] “whatever Best Management Practices (BMPs) are technically feasible (i.e., are likely to be effective) and are not cost prohibitive. The major emphasis is on technical feasibility. Reducing pollutants to the MEP means choosing effective BMPs and rejecting applicable BMPs only where other effective BMPs will serve the same purpose, or BMPs would not be technically feasible, or the cost would be prohibitive.” <i>State Water Resources Control Board Memorandum, entitled “Definition of Maximum Extent Practicable,”</i> prepared by Elizabeth Jennings, Senior Staff Counsel, February 11, 1993; parenthetical added.</p> • To ascertain requirements necessary to achieve the MEP standard, the State Board recommends consideration of several factors, including, <i>inter alia</i>: <ul style="list-style-type: none"> • Effectiveness: Will BMPs address a pollutant of concern? • Public Acceptance: Does the BMP have public support?

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		<ul style="list-style-type: none"> • Cost: Will the cost of implementing the BMP have a reasonable relationship to the pollution control benefits to be achieved? • Technical Feasibility: Is the BMP technically feasible considering soils, geography, water resources, etc.? <i>Id.</i> • Accordingly, issuance by the Regional Board of WDRs and permit conditions that are reasonably designed to achieve MEP as required by Cal. Water Code §§ 13263, 13377 and Clean Water Act §1342(p)(3) requires that the Regional Board identify and incorporate standards and conditions into municipal permits that will result in co-permittee implementation of source and treatment control BMPs, that are, among other things: (i) available, (ii) effective to control pollutants of concern, (iii) technologically feasible, (iv) not cost-prohibitive, and (v) the cost of which is reasonably related to pollution control achieved. • Many of the <i>Draft Permit</i> provisions described in more detail in (i) Attachment A to this Chart, and (ii) in the memorandum prepared by Geosyntec Consultants and submitted to the Regional Board by the Construction Industry Coalition for Water Quality are not reasonably tailored to comport with MEP, particularly to the extent that the provisions either: <ul style="list-style-type: none"> • require implementation of technologies that are not currently available (e.g., MALs , 2 exceedances of

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		<p>which constitute permit violations, discharge limits for dewatering BMPs during maintenance, numeric limits for construction discharges);</p> <ul style="list-style-type: none"> • are not designed to consistently result in effective water quality benefits (<i>e.g.</i>, interim hydromod standard for sites under 50 acres, ‘one size fits all’ requirements to prioritize LID strategy over integrated water reuse management and other hydrologic and treatment controls regardless of local conditions); • are technically infeasible, unrealistic, or too stringent to implement using BMPs (<i>e.g.</i>, MALs, 2 exceedances of which constitute permit violations), discharge limits for dewatering BMPs during maintenance, ‘one size fits all’ limitations for impervious surface, pre- and post-development duration matching, and pre- v. post- Ep matching, regardless site location, tributary area condition, local soils, channel stability and similar factors); and/or • the cost would exceed the water quality benefit of implementation (<i>e.g.</i>, project level rather than sub-watershed or watershed scale implementation of LID requirements, implementation of construction site numeric limitations, and implementation of wet season grading and paving restrictions, regardless of probability of precipitation). • Because the Regional Board has not properly exercised

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		<p>its discretion, critically considering appropriate available evidence regarding factors set forth in Cal. Water Code § 13241 and State Board guidance in establishing the WDRs and permit requirements of the <i>Draft Permit</i>, the provision outlined in Attachment A and the Geosyntec memorandum, and addressed herein do not currently comport with a proper interpretation of MEP. In many cases, the current provisions of the <i>Draft Permit</i> are <i>not</i> (i) available, (ii) effective to control pollutants of concern, (iii) technologically feasible, (iv) economically feasible, (v) rationally related to baseline environmental conditions generally or locally and/or (vi) reasonably cost effective in light of anticipated pollution control.</p> <ul style="list-style-type: none"> • Comment: The Regional Board says they considered costs, although in their view they did not have to do so. The Regional Board has failed, however, to provide any kind of “analytical roadmap” sufficient to explain how the Porter-Cologne balancing factors have been reconciled, how cost estimates were considered and if they are in fact accurate in terms of the costs of compliance with the <i>Draft Permit</i> provisions. <i>Draft Permit</i>, Finding F.16., p. 24. For example, the <i>Draft Permit</i> contains seasonal grading restrictions for specific types of sites (<i>Draft Permit</i> Part 4 §F.1.) which prohibit grading from October 1-April 15. The cost of such a prohibition will depend on several factors including the cost of land/acre, which includes the direct cost of the land and all costs related to acquisition, entitlement, etc. and the project internal rate of return, which can vary between 20 and 30%.

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		<p>Calculations show that for even a small 10-acre development, prohibiting grading for 6 months during the “rainy season” would result in a cost of between \$500,000 and \$1,000,000. <i>See Attachment B.</i> Yet the water quality benefits that would be achieved by this restriction are dubious and unsubstantiated, particularly in light of the fact that, on average, only 23 to 28 of approximately 195 days during the wet season does rainfall occur. As a result, the proposed restrictions are not cost effective or designed to comport with a proper determination of requirements necessary to achieve MEP, as discussed in the preceding comment, and they are therefore arbitrary and capricious. The <i>Draft Permit</i> also sets forth numeric effluent limitations for construction site runoff that must be met to obtain a wet season grading prohibition variance. <i>Draft Permit</i>, Part 4 § F(b)(1), p. 64. To achieve the numeric effluent limits specified, advanced treatment methods must be employed. Research conducted by CICWQ determined that implementation of an advanced treatment system using chemical polymer addition would result in direct costs between \$2400 and \$9000 per acre for an example site handling anywhere from 1-inch to 20-inches, respectively, of total runoff per season. <i>See Attachment C.</i> Key variables include the size of the construction site, total gallons of stormwater treated (direct correlation to amount of polymer required), and the amount of detention needed and associated mixing, piping and pumping systems to treat stormwater. All advanced treatment vendors interviewed by CICWQ stated that advanced treatment systems achieve 10 NTU effluent <i>when</i></p>

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		<p><i>combined</i> with existing erosion control BMPs that reduce the concentration of influent sediment. Therefore, the cost of advanced treatment is <i>in addition to</i> existing erosion and sediment control stormwater BMPs that are required in Ventura County; CICWQ polled Ventura County major builders and the range of cost for existing construction phase erosion and sediment control is between \$5,000 and \$8,000 per dwelling unit. Using an average of 3.5 dwelling units per acre and the mid-point cost per dwelling unit for existing BMPs plus the cost of treating 10 inches of total runoff per acre per season, the combined cost of construction phase erosion and sediment control BMPs plus Advanced Treatment on a per acre basis is approximately \$28,000.</p> <ul style="list-style-type: none"> • Moreover, CICWQ research determined that currently there are an insufficient number of vendors providing advanced treatment capability (2 vendors currently operating in ALL of southern California), so that treatment for all hillside construction sites, sites within or discharging into ecologically sensitive areas, or sites discharging into 303(d) listed waterbodies for sediment within the permit area is technically infeasible. In light of CICWQ's research, the proposed restrictions are clearly not cost effective or designed to comport with a proper determination of requirements necessary to achieve MEP, as discussed in the preceding comment, and they are therefore arbitrary and capricious. • The Regional Board's failure to analyze the cost of applying numeric effluent limits is all the more glaring in light

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		<p>of the fact that the available science indicates that numeric effluent limits are only feasible where Advance Treatment with polymers is employed without consideration of natural baseline loads of, for example, sedimentation and turbidity. See General Issue No. 20, below. Reconciliation of the Porter-Cologne balancing factors in accordance with the Regional Board's enabling statute would serve to illuminate the unreasonableness of the requirements set forth in the <i>Draft Permit</i>.</p> <ul style="list-style-type: none"> The chart attached hereto as Attachment A, and the technical memorandum prepared by Geosyntec Consultants and submitted to the Regional Board by the Construction Industry Coalition for Water Quality are hereby incorporated into these comments by reference.
4. State Unfunded Mandates	As further detailed in Attachment A, the CICWQ letter, the Geosyntec memorandum, comment 3 above, and the sections below, abundant new <i>Draft Permit</i> requirements for co-permittees to review and approve SWPPP and BMP plans, inspect, monitor and enforce compliance with a variety of Regional Board permits, incorporate certain specified structural BMPs throughout their jurisdictions (such as catch basin screens) and requirements to maintain post-construction BMPs, all create huge unbudgeted municipal costs. The Regional	<ul style="list-style-type: none"> Comment: The Regional Board has the legal authority under State law to impose mandates which "exceed" or are "more explicit" than the mandates or specific requirements of federal law. <i>Building Industry Association of San Diego County v. State Water Resources Control Board</i>, 124 Cal.App.4th 866 (2004); <i>City of Burbank v. State Water Resources Control Board</i>, 35 Cal.4th 613 (2005). However, when the Regional Board elects to use its discretion to impose mandates that do not comport with the federal Clean Water Act, including MEP, it is electing to impose a state mandate within the meaning of California Constitution, Art. XIII B, Section 6. The Regional Board may impose such state mandates under Porter-Cologne; however, once imposed, the

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	<p>Board's position is that the co-permittees are responsible for funding the implementation of all provisions of the <i>Draft Permit</i>, no matter the cost, from general funds, district assessments, plan review fees, permit fees, industrial/commercial user fees, revenue bonds, grants or other local funding mechanisms.</p>	<p>California Constitution requires that they must be funded by the State. Since portions of the <i>Draft Permit</i> "are more explicit" than and "exceed" a proper determination of standards required to implement the federal CWA, including MEP, as described in comment 3 above, implementation of these provisions must be funded by the State.</p> <ul style="list-style-type: none"> • See Attachment A, the CICWQ letter and the Geosyntec memorandum for further detailing of the provisions of the <i>Draft Permit</i> which do not comport with the legal parameters that circumscribe MEP. Examples of such provisions include the expanded inspection and enforcement requirements imposed on the co-permittees under the <i>Draft Permit</i>.
5. CEQA	<p>The Regional Board's position is that they do not have to comply with CEQA in light of the recent <i>County of Los Angeles</i> case. <i>Draft Permit</i>, Findings § G.1., p. 24.</p>	<ul style="list-style-type: none"> • Comment. Unless an appropriate determination of <i>Draft Permit</i> requirements necessary to achieve MEP is made, the requirements of the <i>Draft Permit</i> do not comport with proper implementation of MEP and the Clean Water Act, and by default must be adopted pursuant to State law. CEQA analysis (using functional equivalent) must be conducted for provisions of the <i>Draft Permit</i> adopted pursuant to State law. <i>County of Los Angeles v. State Water Resources Control Board</i>, 143 Cal.App.4th 985, modified by 2006 Cal.App.LEXIS 1744 (2006). • Comment: Water Code § 13389 was part of Porter-Cologne adopted to accomplish the delegation of administration of the federal Clean Water Act, including the issuance of NPDES permits, to California. It does not exempt

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		<p>from CEQA other permits and/or requirements imposed by the Regional Board under Porter-Cologne. Cal. Water Code § 13372. Cal. Water Code § 13372 provides that the provisions of Chapter 5.5 of Porter-Cologne “apply only to actions required under the Federal Water Pollution Control Act and acts amendatory thereof or supplementary thereto.” Section 13389 is part of Chapter 5.5 of Porter-Cologne.</p> <ul style="list-style-type: none"> Comment: The court in <i>Committee for a Progressive Gilroy v. State Water Resources Control Board</i>, 192 Cal.App.3d 847 (1987) held that orders restoring water waste discharge levels to originally approved levels for a wastewater treatment plant were not exempt from compliance with CEQA by section 13389 because that section applies only to actions required under the Clean Water Act. Orders of the Regional and State Boards regarding wastewater discharge issued under the authority of the Porter-Cologne Water Quality Control Act were not required by the Clean Water Act and thus not exempt from CEQA review. In its discussion of Cal. Water Code Section 13389 a California appellate court stated, “Chapter 5.5 of the Porter-Cologne Act was enacted to allow the State of California to administer the National Pollutant Discharge Elimination System (NPDES) permits program. This chapter was patterned after the Federal Water Pollution Control Act which created the NPDES permit system. Section 1371 of that act excludes the issuance of NPDES permits from the requirements of the National Environmental Policy Act after which CEQA was patterned. It is fairly apparent that the exemption for the promulgation of waste discharge

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		<p>requirements from CEQA contained in Water Code section 13389 was meant to parallel the exemption for the issuance of NPDES permits from the requirements of NEPA found in section 1371 of the federal act.” <i>Pacific Water Conditioning Assn., Inc. v. City Council</i>, 73 Cal.App.3d 546, 557 (1977). Thus, the purpose of section 13389 was to exempt from CEQA permits issued by the State under the federal Clean Water Act – not WDRs that are adopted under Porter-Cologne. Because the Regional Board is adopting WDRs under Porter-Cologne rather than simply implementing the NPDES program mandated by the federal Clean Water Act, section 13389 does not apply to exempt such an action from CEQA review.</p>
<p>6. End-of-Pipe pollutant concentrations are equated to receiving water violations</p>	<p>The <i>Draft Permit</i> specifies “the ‘end of pipe’ compliance points for MALs are at 36 inches in diameter or greater discharge pipes with outfalls to receiving waters.” The <i>Draft Permit</i> further indicates that two or more exceedances of MALs at these ‘end-of-pipe’ locations will be a violation of the permit, and will trigger the requirement to make an RWL, which is a report of violation of <i>receiving water</i> limitations. See, e.g., <i>Draft Permit</i>, Findings § F.11. p. 23; Part 2, pp 29-30.</p>	<ul style="list-style-type: none"> • Comment: The effect of these provisions is to improperly make ‘end-of-pipe’ exceedances a violation of the MS4 permit and presumptive evidence of receiving water limit violations, even if receiving water data itself shows no violations. As such, the MALs are serving as numeric effluent limitations. This approach constitutes inappropriate science and policy, because end-of-pipe loads and concentrations cannot properly be determinative of receiving water violations without using procedures that take into account existing controls on point and nonpoint sources of pollution, the seasonal or flow variability of the pollutant or pollutant parameter, receiving water quality monitoring data, assimilative capacity, mixing zones and, where appropriate, dilution factors. See for purposes of reference only, 40 CFR. §122.44(d).

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		<ul style="list-style-type: none"> • Comment: Specifying end-of-pipe effluent limitations that are presumptive evidence of receiving water violations is also legally inappropriate. Neither the federal Clean Water Act or Porter-Cologne mandate that an “end of pipe” detection based approach be applied to storm water regulation. Further, a detection based approach does not comport with the purpose and policies of the Clean Water Act and Porter Cologne. With respect to the federal Clean Water Act’s regulation of storm water the focus is on controlling discharges of pollutants to the maximum extent practicable or MEP, and the implementation of management measures which are appropriate. EPA Guidance on Municipal Storm Water Permitting entitled “<i>National Pollutant Discharge Elimination System (NPDES) Storm Water Program Questions and Answers</i>” (January 21, 2004), provides, “Under the NPDES storm water program, there is a progression of approaches used to ensure that water quality standards are achieved: 1) setting technology-based standards; 2) defining maximum extent practicable abatement measures and technology (giving the permitting authority flexibility in how to achieve it); 3) establishing performance standards to address problem parameters; and 4) establishing numerical effluent limits. The storm water program utilizes a BMP framework, which is a combination of approaches 1, 2 and 3, because EPA feels that the vast majority of storm water discharges can be adequately controlled to meet water quality standards by managing activities that have the potential to contribute pollutants.”

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		<ul style="list-style-type: none"> • Further, EPA’s Phase II stormwater regulations generally defining MEP and appropriate approaches to implement MEP provide that “narrative effluent limitations requiring implementation of best management practices (BMPs) are generally the most appropriate form of effluent limitations when designed to satisfy technology related requirements (including reductions of pollutant to the maximum extent practicable) and to protect water quality.” 40 C.F.R. §122.34(a). Therefore, these general regulations go on to specify that “implementation of BMPs . . . constitutes compliance with the standard of reducing pollutant to the MEP.” <i>Id. See also, Defenders of Wildlife v. Browner</i>, 191 F.3d 1159 (9th Cir. 1999). In addition, as discussed more fully in comment 3 above, implementation of the MEP technology-based standard under the CWA requires consideration of available technologies to achieve the permit standard, and technical feasibility of implementation. The State Water Resources Control Board Blue Ribbon Panel Report found that it was not technically feasible for urban areas to meet numerical effluent limitations. p. 8; <i>See also</i>, Geosyntec memorandum. • Moreover, the State Board has ruled that the iterative approach to BMP implementation and adjustment, focusing on timely improvement of BMPs, is appropriate for stormwater quality control, and the State Board has determined that it is generally not appropriate to require compliance with numeric effluent limitations. <i>State Water Resources Control Board</i>,

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		<p>Order WQ 2001-15, p. 8.</p> <ul style="list-style-type: none"> • Thus, the focus of both the federal Clean Water Act and Porter-Cologne is on the protection of the beneficial uses that apply to receiving waters – not on meeting an arbitrary numeric limit at the point of discharge to a municipal storm water system. • As a result, these provisions do not comport with a proper determination of MEP, lack scientific basis, constitute poor policy, are arbitrary and capricious, and violate Water Code section 13262(a), which requires adoption of conditions <i>reasonably</i> required to protect beneficial uses and implement water quality objectives. The permit should be revised to incorporate the concept of action levels developed and implemented consistently with the Blue Ribbon Panel Report, and as described in more detail in the Geosyntec memorandum.
<p>7. In-stream receiving water quality violations are presumptive evidence of MS4 Permit violations</p>	<p>This issue is the flipside of the issue addressed in Comment 6 above. The <i>Draft Permit</i> also contains provisions that two receiving water exceedences of MALs as determined by in-stream mass emissions data will be presumptive evidence that MS4 discharges violate MEP and therefore constitute a permit violation. <i>Draft Permit</i>, Part 2, pp. 29-30.</p>	<ul style="list-style-type: none"> • Comment: The effect of these provisions is to improperly make receiving water exceedences a violation of the MS4 permit, regardless of whether the MS4 discharge is actually a significant contributor of pollutants to the receiving water. As such, the MALs are again serving as numeric effluent limitations, but in this case are being applied in receiving waters as evidence of discharge characteristics. This approach constitutes inappropriate science and policy, because receiving water monitoring data cannot properly be determinative of end-of-pipe loads and concentrations for MS4 systems, without using procedures that take into account

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		<p>existing controls on point and nonpoint sources of pollution, and the actual probable source of a particular pollutant or pollutant parameter within the receiving water.</p> <ul style="list-style-type: none"> • Comment: Specifying effluent limitations that are applied in the receiving water and that constitute presumptive evidence of end-of-pipe discharge violations is also legally inappropriate, for the same reasons discussed under Comment 6 above. • Comment: As a result, these provisions do not comport with a proper determination of MEP, lack scientific basis, constitute poor policy, are arbitrary and capricious, and violate Water Code Section 13262(a), which requires adoption of conditions <i>reasonably</i> required to protect beneficial uses and implement water quality objectives. The permit should be revised to incorporate the concept of action levels developed and implemented properly and consistently with the Blue Ribbon Panel Report, and as described in more detail in the Geosyntec memorandum.
<p>8. Elimination of Vested Rights/ Retrofit of Approved Projects Ready for, and Under Construction.</p>	<p>The <i>Draft Permit</i> contains no grandfathering provisions for approved projects, or even projects with vested rights, but applies a plethora of new requirements and conditions to all new Development and Redevelopment sites. As a result, the new requirements imposed by the <i>Draft Permit</i> must be fulfilled for all new development and redevelopment</p>	<ul style="list-style-type: none"> • Comment: The <i>Draft Permit</i> as written will eviscerate project approvals and vested rights, creating the obligation to retrofit projects to address new requirements at a stage in development that does not lend itself to practical re-design. A grandfathering provision exempting projects with approved tentative maps and/or vested rights should be incorporated into the <i>Draft Permit</i>. Tentative maps, final maps and development agreements are intended to provide protections to allow the developer to proceed with development in substantial

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	<p>projects, regardless of construction status or vested rights. This will force co-permittees to require retrofitting of approved and/or vested projects, even if they are under construction. See <i>Draft Permit</i>, Findings § F.1., p. 20.</p>	<p>compliance with the rules and policies in effect on the date in which the subdivider's application was deemed complete, or in the case of a development agreement, on the effective date of that agreement. See, e.g. Cal. Gov. Code § 66498.1. However, the applicable statutes related to vested rights provide an exception when failure to condition or deny a further project approval or entitlement would pose a danger to the health and safety of residents of the community or when the condition or denial is required by federal or state law. See, e.g., Cal. Gov. Code § 66498.1(c). Because the <i>Draft Permit</i> does not contain a grandfathering provision, it is likely that vested protections will be eliminated as necessary to avoid a conflict with the <i>Draft Permit</i>. Thus, projects with vested maps that are already financed, and even those projects where work has already begun, may have to implement the new requirements mandated by the <i>Draft Permit</i>, including those standards dealing with LID, hydromodification and treatment BMPs regardless of technical feasibility and cost, which to date are factors that have not been considered for new projects, much less projects already approved and/or under construction.</p> <ul style="list-style-type: none"> • Comment: Failure to properly consider effects of the <i>Draft Permit</i> provisions on projects that are vested, approved, and/or under construction is arbitrary and capricious, constitutes a misapplication of the MEP standard, and violates Water Code section 13262(a), which requires adoption of conditions <i>reasonably</i> required to protect beneficial uses and implement water quality objectives.

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		<ul style="list-style-type: none"> • Comment: The San Diego Regional Board recognized these flaws in their recently adopted MS4 Permit, and revised their proposed permit prior to adoption to incorporate a grandfathering provision for vested, approved and/or project under construction. We similarly recommend that the following grandfathering provision should be incorporated into the <i>Draft Permit</i> to address the issues outlined in this comment: <p style="margin-left: 40px;">“Updated Development and Redevelopment requirements shall apply to all projects or phases of project, unless, at the time any updated SUSMP or hydromodification requirement commences, the projects or project phases meet any one of the following conditions:</p> <p style="margin-left: 40px;">(i) the project or phase has received final tentative tract map approvals;</p> <p style="margin-left: 40px;">(ii) the project or phase has begun grading or construction activities; or</p> <p style="margin-left: 40px;">(iii) a Copermittee determines that lawful prior approval rights for a project or project phase exist, whereby application of an updated SUSMP or hydromodification requirement to the project is practically or legally infeasible.</p> <p>Where feasible, the Copermittees shall utilize the SUSMP and hydromodification update periods to ensure that projects undergoing approval processes include application of the updated SUSMP and hydromodification requirements in their</p>

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<p>9. Requirements to Condition all Development to provide Water Quality Mitigation consistent with New Permit, Regardless of Legal Authority of Local Agencies to do so</p>	<p>The <i>Draft Permit</i> requires that the Co-permittees develop authority to condition projects to provide storm water mitigation consistent with new Permit requirements, regardless of whether any further discretionary permits for the project are necessary. <i>Draft Permit</i>, Findings § F.1.</p>	<p>plans.”</p> <ul style="list-style-type: none"> • Comment: Local agencies have limited land use authority to condition projects that have already completed CEQA review and received all discretionary permits and approvals. By definition, issuance of ministerial permits do not involve discretionary action, and, while local agencies can enforce all conditions or approval and mitigation measures specified for a project prior to issuance of ministerial permits, they cannot impose new conditions to ministerial permits. 14 CCR § 15041; Cal. Pub. Res. Code § 21166. Further, common law and statutory vested rights can impact the ability of any local agency to impose additional requirements on certain projects. <i>See</i> Cal. Gov. Code § 65864 <i>et seq.</i> (development agreements); Cal. Gov. Code § 66498.1 <i>et seq.</i> (subdivision map act); <i>Avco Community Developers, Inc. v. South Coast Reg'l Comm'n</i>, 17 Cal.3d 785, 791 (1976) (common law vesting rights). As a result, this mandate that projects be conditioned, regardless of whether any discretionary approvals are still necessary for development of the project, by the Regional Board forces municipalities to violate State law and therefore constitutes an <i>ultra vires</i> act on the part of the Regional Board.
<p>10. Incorporation of Numeric Limits -- MALs</p>	<p>The <i>Draft Permit</i> purports to establish Municipal Action Levels (MALs), but the MALs actually function as numeric effluent limitations. The <i>Draft Permit</i> specifically provides that two or more exceedances of</p>	<ul style="list-style-type: none"> • See Comments 6 and 7 above. • Comment: Because the Draft Permit specifies that 2 or more exceedances of the MALs constitute a permit violation, from a practical standpoint the MALs are not action levels. They are numeric <i>effluent</i> limitations. Incorporation of

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	<p>the MALs constitute a violation of the <i>Draft Permit</i>. See, e.g., <i>Draft Permit</i>, F. 11., p. 23. Further, exceedences of MALs improperly constitute presumptive evidence of receiving water standards, as well as MEP and discharge standards. <i>Draft Permit</i>, Part 2, pp 29-30.</p>	<p>numeric effluent limits is contrary to the Blue Ribbon Panel Report recommendations that requiring MS4 Permit discharges to comply with numeric limits is not technically feasible at this time. <i>Storm Water Panel Recommendations to the California State Water Resources Control Board – The Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial and Construction Activities</i> (June 19, 2006) (“Blue Ribbon Panel Report”) p. 8. The Blue Ribbon Panel report concluded that action levels should only be used to “trigger appropriate management response,” rather than triggering regulatory response and penalties as in the <i>Draft Permit</i>. p. 8.</p> <ul style="list-style-type: none"> • Further, the State Board “<i>Policy for Implementation and Enforcement of the Non-Point Source Pollution Control Program</i>” (May 2004) provides that a “Key Element” of a NPS program is inclusion of “a description of the MPs and other program elements that are expected to be implemented to ensure attainment of the implementation program’s stated purposes(s).” p. 12. Thus, the focus of the State Board NPS program is on development and implementation of BMPs as opposed to incorporation of specific numeric limits into regulatory programs established to deal with NPS pollution. In addition, the State Board “<i>Non-Point Source Program Strategy and Implementation Plan, 1998-2013</i>” (January 2000) provides, “RWQCBs will generally refrain from imposing effluent requirements on dischargers who are implementing BMPs in accordance with a waiver of WDRs, an approved MAA, or other SWRCB or RWQCB formal action. Once the