

VIA E-MAIL



January 11, 2013
Mr. Wayne Chiu, P.E.
San Diego Regional Water Quality Control Board
9174 Sky Park Court, Suite 100
San Diego, Ca 92123-4340

**Building
Industry
Association
of Southern
California, Inc.**

Re: Comment Letter– Tentative Order No.R9-2013-0001, Regional MS4 Permit,
Place ID: 786088Wchiu.”

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Irvine, California 92614
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<http://www.biasc.org>

Dear: Mr. Chiu,

On behalf of Building Industry Association of Southern California, Inc. (BIASC), Construction Industry Coalition on Water Quality (CICWQ) and the members of both, we appreciate the opportunity to provide comments on the San Diego Regional Water Quality Control Board Tentative Order No. R9-2013-0001; NPDES No. CAS0109266, National Pollutant Discharge Elimination System (NPDES) Permit and Waste Discharge Requirements for Discharges of Urban Runoff from the Municipal Separate Storm Sewer Systems (“MS4s”) Draining the Watersheds within the San Diego Region (the “Tentative Order”). In addition, we respectfully request that our comment letter submitted to the Regional Board on September 14, 2012 be made a part of our overall comments to the Tentative Order and admitted into the formal administrative record, because the constructive suggestions for permit improvement remain relevant at this point in the Tentative Order development.

BIASC is a nonprofit trade association representing nearly 1,000 member companies, which together have nearly 100,000 employees. For decades, BIASC’s members have built the majority of the new homes in Ventura, Los Angeles, Orange, Riverside, and San Bernardino Counties in southern California. CICWQ is an education, research, and advocacy water quality coalition comprised of representatives from five industry trade associations (in addition to BIASC) which are involved in the development of public and private building, infrastructure and roads throughout California (Associated General Contractors, Engineering Contractors Association, Southern California Contractors Association, Engineering and General Contractors Association, and United Contractors). All of the above trade associations, their members and the union labor work force are affected by the post-construction runoff control requirements proposed in the Tentative Order, and this letter is meant to provide the San Diego Regional Board with constructive suggestions for improvement.

Baldy View Chapter
L.A./Ventura Chapter
Orange County Chapter
Riverside County Chapter

We appreciate the Regional Board's earlier release of a precursor to the Tentative Order as an Administrative Draft, and the extensive stakeholder involvement process that ensued over the summer and autumn of 2012. Unfortunately, the Tentative Order does not reflect critically important changes to the Tentative Order's Development Planning requirements which we and many other public and private stakeholders recommended, both during the focused stakeholder meetings and in comments submitted to the Regional Board. Moreover, Regional Board staff does not provide sufficient findings of fact to support the priority project water quality and hydromodification control design criteria and performance standards in the Tentative Order. The requirements proposed in the Tentative Order are vastly different from those contained in the 2010 South Orange and South Riverside County MS4 permits, and there is simply insufficient performance data to demonstrate the need for any change.

We are concerned that key water quality and hydromodification control provisions within the Development Planning section (Section C.3) are (i) unsupported by substantial evidence, (ii) very bad public policy, and (iii) not properly considered as legally required. Specifically, certain provisions: (i) lack sufficient auditing or performance data showing the need for or advisability of such requirements, (ii) lack technical or scientific basis, and (iii) depart without any justification from required and approved technical documents that have been issued by the San Diego Regional Board for priority development projects in San Diego, Orange, and Riverside Counties. In addition, the hydromodification control provisions illuminate the Regional Board's failure to consider the factors required by California Water Code section 13241 – especially subsection (b) thereof.

1. There are no findings of fact to support changes in the requirements to evaluate, design and install LID BMPs (Section E.3.c) when comparing the proposed requirements in the Tentative Order with that of the requirements in the 2010 adopted South Orange and South Riverside County MS4 permits.

The Orange and Riverside County permits have been in effect for a short period of time (<2 years); and there is no data (program audits or annual report data, for example) that we can find that would support any changes to priority development project water quality control design criteria (found in Section E.3.C of the Tentative Order). Moreover, in one particular instance concerning which we and others have repeatedly commented to Regional Board staff, there is no technical justification provided by staff for requiring biofiltration LID BMP to be sized at 1.5 times the remaining design capture volume not reliably retained on-site. Section E.3.c.(3)(b)(i)[c] requires that if biofiltration is used as an alternative compliance method the biofiltration BMP is required to be sized to 1.5 times the design capture volume, which is an increase from the existing South Orange County permit. The permit and the fact sheet provide no technical justification for the 1.5 factor and therefore this requirement should be deleted from the permit. BIASC and CICWQ comment letter submitted to the Regional Board on September

14, 2012 and attachments including suggested permit redline remains relevant in this matter. We have provided this here as Attachment 1.

2. There are no findings of fact or supporting technical and scientific data indicating the need for changes in hydromodification control requirements for priority development projects.

As we have commented before, there needs to be (i) an in-stream hydromodification control performance standard using the erosion potential (EP) approach; and (ii) the permit must recognize that there are a number of different types of channel hardening that have been used for armoring in stream systems besides concrete. In Attachment 1, we again make suggestions for improving the consistency of hydromodification control standards with those identified and allowed in the South Orange County MS4 permit.

The Tentative Order provides an “on-site” option for addressing hydromodification through flow duration control. This is an important element of the hydromodification control standard. However the Tentative Order is incomplete in that it lacks an option to assess and demonstrate hydromodification control through in-stream metrics. In many cases, significant development within a watershed has already caused hydromodification impacts. Requiring project-by-project flow duration control for each new project may not address the existing issue as effectively as a regionally-coordinated approach that combines upland control with in-stream remedies. Including the EP standard—as BIASC and CICWQ urge--would enable the development of more comprehensive approaches that include both upland controls and stream modifications (i.e., restoration). This option is critical for more effectively and efficiently protecting the region’s aquatic resources.

Additionally, the Tentative Order includes an unnecessarily narrow definition of hardened channels that includes only those channels lined with concrete. Other forms of artificial hardening may be comparably resistant to hydromodification impacts, such as channels that are lined with rip rap, armored with soil cement, or armored with other practices. While the co-permittees or the project proponent should be responsible for demonstrating that a specific channel material is sufficiently stable, the narrow definition currently provided by the Tentative Order does not allow the use of sound engineering judgment and does not allow for use of innovative materials.

The comment letter submitted by BIASC and CICWQ to the Regional Board on September 14, 2012 remains relevant here, as the Regional Board staff did not make any changes to the hydromodification control requirements except for minor exemption allowances for using USGB council’s LEED for redevelopment program standards. Exemptions, generally, are welcome and appropriate. But, in practice, referencing a voluntary, national green building and

development certification program for use as part of a NPDES permit does not provide a viable pathway for most priority development projects that are located in already urbanized areas that are served by existing MS4 infrastructure. Exemptions identified in the adopted San Diego Hydromodification Management Plan are appropriate and should be cited and referenced in the Tentative Order, and any reference to USGB LEED standards deleted.

3. Preserve the 2010 adopted San Diego County Hydromodification Management Plan elements

The Regional Board staff has provided no technical justification for the new hydromodification provisions. The HMPs for San Diego and South Orange County are based on sound science and should be allowed time to understand if they are adequate for mitigating hydromodification impacts. The Regional Board adopted the San Diego Hydromodification Management Plan (HMP) in July 2010. Significant work, technical analysis and stakeholder input have gone into the development of the HMP and these requirements have been in effect for just 16 months. Rather than providing separate criteria, the permit should acknowledge implementation of the Regional Board approved HMP as a sufficient mechanism for meeting hydromodification requirements. Of particular note and concern is the removal of exemptions for certain priority development projects (projects in urban areas with greater than 70% existing impervious surface, for example) that discharge to an MS4 system that then discharges into a significantly hardened channel system. It is unquestionably bad public policy to require installation of controls (or payment of in-lieu fees to compensate for the inability to install controls) when there is no threat to the receiving water.

To this end--and for sake of brevity, we support and encourage the Regional Board to accept comments from Orange County Public Works which pertain to the hydromodification control requirements. Changes in permit language as indicated in the County's redline of the Tentative Order would sufficiently address our concerns about the tentative hydromodification control requirements, and we urge the Regional Board to accept these changes.

Regional Board staff has publically stated that the proposed hydromodification control requirements in the Tentative Order are consistent with the 2010 adopted HMP and that only minor adaptation is necessary. That assertion is simply not true and in fact adoption of the Tentative Order requirements will render the HMP obsolete and require a total overhaul. According to the County of San Diego and the co-permittees within the County (and private developer stakeholders), more than \$1.5 million have been spent to date developing the plan and conducting required monitoring. By changing the performance standards, requiring hydromodification controls at all priority development projects, and removing standard exemptions that are found in all other 4th term MS4 permits in California, the Regional Board is sweeping away years of program development activities and turning program implementation on

its head. The Tentative Order should explicitly recognize the findings of hydromodification management plans (HMPs) that have been previously approved by this Regional Board. The South Orange County HMP and the San Diego County HMPs were both the products of rigorous technical analysis based on the state of the practice, which were reviewed in detail by Regional Board Staff. The findings of these efforts must not be jeopardized under the new terms of the Tentative Order. Specifically, findings regarding exempt water bodies must be appreciated and upheld, and they should be explicitly recognized in the Tentative Order.

4. The Tentative Order’s proposed hydromodification control measures betray the Regional Board’s failure to take into account the considerations required by California Water Code section 13241

For years, BIASC and CICWQ have been urging the water boards when developing MS4 permit requirements to address and respect their longstanding legal obligation to take into account the six, specified, non-exclusive factors which are set forth in California Government Code section 13241. The water boards have persistently refused. Most recently (just months ago), the Los Angeles Regional Board dismissed its obligation to consider the Section 13241 factors by noting that it had, in fact, more or less considered two of them (economics and some technical considerations). If the Regional Board here were to adhere to such a position, it would act in violation of California law and without justification.

There is perhaps no greater example of a permit condition written pursuant to a failure to consider the Section 13241 factors than the hydromodification control measures in the Tentative Order – particularly those which impose heroic, expensive engineering standards on development that drains into hardened flood control channels. Section 13241, subsection (b), requires consideration of the “[e]nvironmental characteristics of the hydrological unit under consideration....” By imposing expensive hydromodification control measures even where a receiving flood control system is already firmly hardened, the Tentative Order ignores this Section 13241, subsection (b), factor (obviously so, and regrettably consistent with the Regional Board’s general refusal to take into account all six Section 13241 considerations).

BIASC and CICWQ believe that the water boards’ persistent refusal to take demonstrably and meaningfully into account the Section 13241 required considerations results from a mistaken view of the applicable law. Specifically, the water boards’ seemingly hold to the belief that the “maximum extent practicable” standard in federal law absolves the state agencies of any obligation to apply Section 13241 when issuing MS4 permits. If indeed the water boards’ legal position is thus, then it reflects a mistaken view of the degree of “federalism” reflected in the Clean Water Act and its interplay with the California Water Code. Moreover, such a position would reflect a failure to apply basic “federal preemption principles,” which apply any time a party claims that federal law displaces state law.

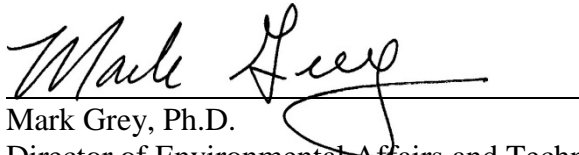
BIASC and CICWQ urge the Regional Board to reconsider and reverse its refusal to apply meaningfully all six Section 13241 considerations, and to correct the Tentative Order accordingly.

Concluding Remarks:

BIASC and CICWQ have been active participants and contributors to the creation of improved MS4 permits across southern California. We continue to believe that rational, *implementable*, and *effective* 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 create a workable permit that improves water quality to the maximum extent practicable. We remain committed to a positive dialog with the Regional Board and its staff – one that will result in an informed, balanced and effective permit.

If you have any questions or want to discuss the content of our comment letter, please feel free to contact me at (951) 781-7310, ext. 213, (909) 525-0623, cell phone, or mgrey@biasc.org.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark Grey", is written over a horizontal line. The signature is fluid and cursive.

Mark Grey, Ph.D.
Director of Environmental Affairs and Technical Director
Building Industry Association of Southern California and
Construction Industry Coalition on Water Quality

Enclosures:
Attachment 1

cc. Andy Henderson, Esq., Building Industry Legal Defense Foundation