Responsiveness Summary – MS4 Waste Discharge Requirements
Comment Due Date: April 10, 2009

1. Ventura Countywide Stormwater Program –(VCSP)
2. Building Industry Association of Southern California- (BIA)
3. NRDC and Heal the Bay- (NRDC)

No.	Author	Date	Comment	Response
1.1	VCSP	04/10/09	The Tentative Order attempts to disregard this important legal requirement by making findings that all provisions contained in the Tentative Order are part of a federal mandate. (Tentative Order at pp. 11, 21.) Through these findings, the Tentative Order tries to conclude that because the requirements are federally mandated, the Tentative Order does not require consideration of section 13241 factors, or constitute an unfunded local government mandate. As indicated above, findings are required to "bridge the analytical gap between the raw evidence and ultimate decision or order." *(Topanga, supra,* 11 Cal.3d at p. 515; see also *San Francisco Petition,* SWRCB Order 95-4, *supra,* at pp. 4-5.) The blanket statements made in the Tentative Order's findings fail to rise to a level necessary to serve as a bridge between evidence and the conclusion. In general, municipal storm water programs are typically a combination of source controls and management practices that address targeted sources within a municipality's jurisdictional area(See National Pollutant Discharge Elimination System (NPDES) Permit Writers' Manual at p. 164.) Also, permit writers are instructed to rely on application requirements and management programs as proposed by the applicants when developing appropriate permit conditions. (See *id.* at p. 165.) Recent court decisions have also declared that the Regional Water Board may adopt water pollution controls in addition to those that come from	The findings are legally adequate to explain the Regional Board's analysis of the requirements it is imposing under its purview. The commenter has failed to present evidence that any of the pertinent permit requirements require pollution abatement beyond the requirement to perform at the maximum extent practicable. The municipal storm water programs include relaxed requirement, but requirements nevertheless, that all dischargers of pollutants must comply with the federal Clean Water Act. The

No.	Author	Date	Comment	Response
			MEP in order to meet water quality standards. (See *Building Industry Assn. of San Diego v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866, 883.) Notwithstanding the recent court decisions that allow for additional discretion, many of the provisions contained in the Tentative Order may in fact exceed requirements associated with implementation of MEP and exceed requirements necessary to meet water quality standards. At the very least, the Tentative Order fails to properly connect the provisions as contained in the Tentative Order to federal requirements from the CWA through its findings. Our specific comments on the various elements of the findings in question are provided here.	requirement that they comply with the Clean Water Act is not born of their governmental status, but of their status as persons who discharge pollutants to waters of the United States. The programmatic requirements are in lieu of a traditional discharge permit with strict numerical effluent limitations, and operate to allow municipalities to comply with the Clean Water Act in a more flexible manner than other dischargers. If the municipalities so requested, the Regional Board could issue them a permit without any of the programmatic requirements, but that permit would require strict compliance, in-stream or end of pipe, with the requirements of the Clean Water Act.
1.2	VCSP	04/10/09	Because Many Provisions In The Tentative Order May Exceed MS4	See response to comment

Responsiveness Summary – MS4 Waste Discharge Requirements
Comment Due Date: April 10, 2009

No.	Author	Date	Comment	Response
			Storm Water Provisions As Mandated By Federal Law, Some Of The Provisions May Be Considered An Unfunded State Mandate Finding E.7, in conjunction with Findings E.26 - E.27, assert that the Tentative Order "does not constitute an unfunded local government mandate subject to subvention under Article XIIIB, Section (6) of the California Constitution" because the Tentative Order implements "federally mandated requirements" under section 402 of the CWA. (Tentative Order at p. 11.) The Permittees object to these assertions on several grounds. First, the Regional Water Board's jurisdiction does not include decisions or determinations regarding what is, or what is not an unfunded mandate subject to subvention under the California Constitution. The Regional Water Board's jurisdiction is limited to water quality and related functions. Decisions regarding what constitutes, or does not constitute, an unfunded mandate is for the Commission on State Mandates. (Gov. Code, §§ 17551 and 17552; see also *Lucia Mar Unified School Dist. v. Honig* (1988) *44* Cal.3d 830, 837 [the question must be decided by the Commission on State Mandates "in the first instance"].) "Whether a particular cost incurred by a local government arises from carrying out a state mandate for which subvention is required under *article XIII B, section 6,* is a matter for the Commission to determine in the first instance." *(County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898, 907 *(County of Los Angeles),* emphasis added.) Second, the Permittees question the purpose and intent of this finding. As discussed above, findings are required to "bridge the	1.1. While it is not the Regional Board's purview to determine whether subvention is required under Article XIIIB, Section 6 of the Constitution it is uniquely within the Regional Board's purview to determine what parts of its permit are required by federal water quality laws such as the Clean Water Act, and what parts are required by state law, such as the Porter Cologne Act. (See e.g., Wat. Code sections 13160, 13370, 13372, 13377.)

No.	Author	Date	Comment	Response
			analytical gap between the raw evidence and ultimate decision or order." *(Topanga, supra,* 11 Cal.3d at p. 515.) The Regional Water Board staff's purpose for including this finding is suspect as it raises an issue that has recently been unsuccessfully litigated in the recent *County of Los Angeles* case. *(County of Los Angeles, supra,* 150 Cal.App.4th 898.) In that case, the Court held that whether the permit obligation(s) in question constitutes a state or federal mandate is a question of fact which must be first addressed by the Commission on State Mandates. *(Id.* at pp. 917-918.) Thus, it is not appropriate for the Regional Water Board staff to propose a finding that attempts to make a conclusion of fact for the Commission on State Mandates.	
1.3	VCSP	04/10/09	Furthermore, even if a program is required in response to a federal mandate, a subvention of state funds may be in order. Government Code section 17556(c) provides that if a requirement was mandated by federal law or regulation, but the state "statute or executive order mandates costs that exceed the mandate in that federal law or regulation," a subvention of funds is authorized. Also, even if the costs were mandated to implement a federal program, if the "state freely chose to impose the costs upon the local agency as a means of implementing" that federal program, "the costs are the result of a reimbursable state mandate regardless whether the costs were imposed upon the state by the federal government." *(Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1594.) For example, the Tentative Order proposes to shift to the Permittees the state's responsibility to inspect and enforce its general industrial and construction storm water permits. Although municipal stormwater programs are required to include industrial and	As the commenter notes in comment 1.2, the question of whether subvention is in order is a matter directed to the Commission on State Mandates, and this comment should instead be directed to that agency. The commenter has submitted no evidence that the requirement that permittees inspect to ensure that their own local stormwater ordinances are complied with, and to

No.	Author	Date	Comment	Response
			construction programs, the provisions in the Tentative Order relate to the state's general permits and are arguably an unfunded state mandate. (See Tentative Order at pp. 49-52, 71-73.) Finally, the findings in question assert that provisions in the Tentative Order to implement total maximum daily loads (TMDLs) are also federal mandates. While it is true that waste load allocations (WLAs) in TMDLs must be reflected in NPDES permits as applicable, the manner in which the TMDL is implemented in the NPDES permit is not a federal mandate, but is left up to the state. (See *Pronsolino v. Nastri (2002)* 291 F.3d 1123, 1140.) Thus, as with the other aspects of the Tentative Order, implementation of applicable TMDL WLAs is not necessarily a federal mandate, immune from subvention of state funds. In summary, because this language is inappropriate for inclusion in the Tentative Order, we recommend that all findings and language related to this issue be removed from the Tentative Order.	document during inspections whether the dischargers have a waste discharge identification number is either a state responsibility, or anything more than a nominal expense. In fact, the inspection requirements do not require the municipalities to inspect to ensure compliance with any state permit or other entitlement to which the developer or other industrial facility may be subject. The municipalities are only required to inspect the industrial facilities under their jurisdiction to ensure compliance with the cities' own storm water management plan or its own SUSMP ordinances. While at such inspections, the only other requirement is to note whether the facility has a WDID number where required.

No.	Author	Date	Comment	Response
				However, identifying whether there is a WDID number, is not an inspection, and involves nominal effort while an inspector is already inspecting a facility. In any event, the cost of these inspections can be readily recouped by assessments upon the facility that is inspected. The commenter has submitted no evidence that compliance with the TMDL provisions of the permit are beyond that which is considered the maximum extent practicable. Indeed the Court of Appeal already held that the Los Angeles MS4 permit, which similarly required compliance with receiving water limitations by 2001, was practicable. The TMDL provisions give substantial extensions of

Responsiveness Summary – MS4 Waste Discharge Requirements
Comment Due Date: April 10, 2009

No.	Author	Date	Comment	Response
				time beyond the 2001 receiving water limitations already required of the Ventura MS4 permittees.
1.4	VCSP	04/10/09	Finding 7 Inappropriately Asserts That " `Costs Incurred By Local Agencies To Protect Water Quality Reflect An Overarching Regulatory Scheme That Places Similar Requirements On Governmental And Nongovernmental Dischargers" (Tentative Order at p. 12) The purpose of this language appears to be to hinder future test claims to the Commission on State Mandates regarding specific provisions contained in the Tentative Order. Under the logic contained in this paragraph, the Regional Water Board would find that as long as the requirements are placed on both government and nongovernmental dischargers, regardless of their legality, there is an over-aching regulatory scheme, and therefore no cost subject to state subvention. However, this is an overbroad view regarding the over-arching regulatory scheme. In this case, the regulatory scheme is the application of municipal storm water permit requirements, which are not equally applicable to governmental and nongovernmental dischargers. Thus, the assertion as contained in the finding is misplaced and should be removed.	Contrary to the commenter's insinuation, municipal dischargers are subject to the Clean Water Act's NPDES permit scheme, not because they are municipal governments, but because they are engaged in the enterprise of discharging pollutants to waters of the United States. Their status as dischargers is no different that the status of publicly owned treatment plants, private waste water agencies, industrial dischargers, etc. The more lenient permit scheme is a function of Congress' recognition of infrastructure constraints attendant with municipal storm water, similar to other existing industries' interim permitting

Responsiveness Summary – MS4 Waste Discharge Requirements
Comment Due Date: April 10, 2009

No.	Author	Date	Comment	Response
				requirements that did not require immediate implementation of the "best available technology." See response to comment 1.1.
1.5	VCSP	04/10/09	Finding 7 Inappropriately Characterizes The Regulation Of Municipal Storm Water As Being More Lenient Than The Discharge Of Waste From Nongovernmental Sources (Tentative Order at p. 12)	Section 402(p)'s basic requirement that municipal dischargers need only be required to control pollutants to the maximum extent practicable, rather than necessarily strictly complying with water quality standards (see Defenders of Wildlife v. Browner) is more lenient than all the other point source discharge industries. Moreover, the BMP-based programmatic approach is intended to allow greater compliance flexibility. If the municipal dischargers believe that the MS4 requirements are more onerous than end-of-pipe numeric effluent

No.	Author	Date	Comment	Response
				limitations, they are free to request a permit designed in that manner.
1.6	VCSP	04/10/09	Finding 7 Inappropriately Asserts That "Local Agency Permittees Have The Authority To Levy Service Charges, Fees, Or Assessments Sufficient To Pay For Compliance With This Order," And That "[L]ocal Agencies Can Levy Service Charges, Fees, Or Assessments On These Activities, Independent Of Real Property Ownership" (Tentative Order at p. 12) The language contained in this fmding is misleading as it fails to completely explain or characterize the overlay of Proposition 218 to assessments related to storm water drainage fees. First of all, storm water drainage fees are typically applicable to developed parcels of land within a municipality's jurisdiction and are not usually assessed based on business ownership. Thus, reliance on the California Supreme Court's decision in *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* is misplaced as that case hinges on the Court's finding that the relationship between the inspection fee at issue and property ownership was indirect. *(Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4`h 830, 843.) . Furthermore, it has subsequently been determined that storm water drainage fees are not subject to the exceptions for "sewer" and "water" service provided in article XIII D, section 6(c) of Proposition 218, and thus, such fees are subject to vote by either property owners in the affected area or voting residents. (See *Howard Jarvis Taxpayers Assn. v. City of Salinas* (2002) 98	The Regional Board acknowledges that imposition of some fees may be subject to the requirements of Proposition 218. That is not the case with, for instance, transit fares for trash receptacles at bus stops, fees charged of permittees for inspections, etc. Nevertheless, the comment falsely insinuates that the municipal government and its citizens are different entities. The fact that a municipality chooses not to impose fees (either because the governing body chooses not to assess them or because the citizens decline to authorize them) does not alter the fact that fee assessments are available. As such, Proposition 218 is

No.	Author	Date	Comment	Response
			Cal.App.4th 1351, 1358-1359 ["We conclude that article XIII D required the City to subject the proposed storm drainage fee to a vote by the property owners or the voting residents of the affected area."].) Thus, it goes without saying that a local agency's ability to levy storm drainage fees on its residents is restricted by the overlay 'of Proposition 218, which would require the agency to propose the assessment for approval by its voters before it could be assessed. The likelihood of success on such an assessment is unknown. Because of the uncertainty associated with the Permittees' ability to levy new or increased fees for storm water, this paragraph should be deleted from the permit. At a minimum, Paragraph 5 of this finding should be revised to read as follows: Third, the ability of a local agency to defray the cost of a program without raising taxes is relevant to the question of whether a particular cost is subject to subvention. *(County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487-488.) _____ permittees have limited authority to levy service charges, fees, or assessments sufficient to pay for compliance with this Order. The' fact sheet demonstrates that numerous activities contribute to the pollutant loading in the municipal separate storm sewer system. Local agencies can levy service charges, fees, or assessments on these activities, independent of real property ownership. See, e.g., *Apartment Ass 'n of Los AngelesCounty, Inc. v. City of Los Angeles* (2001) *24 Cal.4* 830, *842* [upholding inspection fees associated with renting property].) These	not an appropriate point of distinction for determining whether a municipality can assess fees.

No.	Author	Date	Comment	Response
			fees may not exceed the reasonable cost of providing service to the payer. *(Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4866.) or increasing a fee for storm water related services without a vote of the electorate. (Cal. Const. Art. XIID, § 6.c; *Howard Jarvis Taxpayers Assn. v. City of Salinas* (2002) 98 Cal.App.4th 1351.)	
1.7	VCSP	04/10/09	Finding 7 Inappropriately Asserts That Because The Permittees Have Requested BMPs In Lieu Of A Discharge Prohibition Or Numeric Restrictions It Has Voluntarily Availed Itself Of The Tentative Order And That The Program Is Not A State Mandate (Tentative Order at pp. 12-13) The Tentative Order attempts to argue that because the Permittees "voluntarily" chose the type of permit that is being proposed, implementation of the provisions therein are not subject to state subvention.. This logic is flawed. First, as discussed above, determinations regarding state subventions are properly made by the Commission on State Mandates, not the Regional Water Board. Second, the application of state subventions is a question of fact for the Commission on State Mandates. The Regional Water Board cannot pre-determine the Commission's findings under a proper test claim by claiming that the Permittees voluntarily chose the permit in question. Thus, the assertion contained in this paragraph should be deleted.	See response to comment 1.2. The comment falsely implies that the municipalities are being singled out for disparate treatment as municipalities. The Regional Board is uniquely competent to determine the falsity of that suggestion, which is uniquely within the Regional Board's purview.
1.8	VCSP	04/10/09	Finding 7 Inappropriately Asserts That The Permittees' Responsibility For Preventing Discharges Predates The Enactment Of Article XIII B, Section (6) Of The California Constitution (Tentative Order at p. 13)	See response to comments 1.2 and 1.7. The permit provisions are not severable. The MS4 permit

No.	Author	Date	Comment	Response
			This assertion attempts to put forward an argument that permit provisions as contained in this Tentative Order, and any other Order that may be issued to the Permittees in the future, are not subject to the state's constitutional provisions regarding state subvention because the Permittees had a responsibility to control discharges under state law before the constitutional provisions were adopted. We disagree with this conclusion; the Regional Water Board's adoption of each and every permit is a discrete action that may or may not include provisions that are appropriately subject to state subventions. Furthermore, such an argument is better left in a legal brief before a court. The Order is supposed to contain provisions related to the regulation of municipal storm water, not the state's legal arguments to challenges that may or may not occur on the provisions as contained in the Order. Thus, this paragraph should be removed in its entirety.	includes a suite of programmatic requirements that, taken together, are intended to represent the maximum extent of pollution control practicable, which is required by the federal Clean Water Act.
1.9	VCSP	04/10/09	The Tentative Order's approach to implement the WLAs in the TMDLs is lawful and otherwise appropriate. Specifically, the use of BMPs in lieu of numeric effluent limits is consistent with the CWA, federal regulations and guidance, and case law. Further, the TMDLs call for the use of BMPs to implement the WLAs in permits issued under the NPDES program. Finally, the approach avoids potentially unreasonable and unintended policy-based consequences.	Comment noted, but see response to comment 3.4.
1.10	VCSP	04/10/09	The Tentative Order's Use Of BMPs To Implement The WLAs In The TMDLs Is Consistent With Federal And State Law And Guidance	See response to comment 1.9.

Responsiveness Summary – MS4 Waste Discharge Requirements
Comment Due Date: April 10, 2009

No.	Author	Date	Comment	Response
1.11	VCSP	04/10/09	EPA's policy recognizes that because storm water discharges are due to storm events that are highly variable in frequency and duration and are not easily characterized, only in rare cases will it be feasible or appropriate to establish numeric limits for municipal and small construction storm water discharges. The variability in the system and minimal data generally available make it difficult to determine with precision or certainty actual and projected loadings for individual dischargers or groups of dischargers. *Therefore, EPA believes that in these situations, permit limits typically can be expressed as BMPs, and that numeric limits will be used only in rare instances.* (Memorandum from R.H. Wayland, III, and J.A. Hanlon to Water Division Directors (Nov. 22, 2002) re: *Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on those WLAs* at p. 4.) Accordingly, neither federal law nor USEPA's long-standing policy supports the use of numeric effluent limits rather than BMPs.	See response to comment 1.9.
1.12	VCSP	04/10/09	The TMDLs Direct The Regional Water Board To Implement The WLAs In NPDES Permits By Way Of BMPs	See response to comment 1.9.
1.13	VCSP	04/10/09	Further, each TMDL implementation plan discusses BMPs appropriate to meet the MS4 allocation requirements. The purpose of each TMDL is to achieve the applicable receiving water objectives. The TMDL analyses indicate the assimilative capacity of the streams and loads each source may discharge to meet the objectives. The analyses recognize that discharges from a single	This permit includes WLAs as they are expressed in accordance with the assumptions and requirements under which they were adopted and

No.	Author	Date	Comment	Response
			storm water outfall could exceed water quality objectives but not cause the receiving water to exceed the objectives. As a result, the TMDLs assign WLAs to MS4 dischargers as a group and do not require WLAs or numeric WQBELs for individual outfall discharges. "In accordance with current practice, a group concentration-based WLA has been developed for all permitted storm water discharges, including municipal separate storm sewer systems (MS4s)." (Calleguas Creek Metals and Selenium TMDL at p. 17.) Accordingly, the intent of the TMDLs is to assign receiving water limits implemented through BMPs in the NPDES permit. The intent is not to assign the WLAs at the end of each major outfall and require whatever controls are necessary to achieve the limits.	approved, in accordance with 40CFR122.44(d)(1)(vii)(B) .
1.14	VCSP	04/10/09	The Use Of Numeric Effluent Limits In Lieu Of BMPs May Unreasonably Subject The Permittees To Certain Enforcement Provisions The Tentative Order's use of BMPs instead of numeric effluent limits is a sound policy approach that avoids potentially unreasonable and unintended consequences. The use of numeric effluents to implement the TMDL WLAs may subject the Permittees to mandatory minimum penalties where deemed a "serious violation" under the Water Code or where there are four or more violations in any six-month period. Further, the violation of numeric effluent limits could subject the Permittees to additional enforcement through administrative civil liability and/or third party lawsuits. The threat or potential jeopardy of such liability is unreasonable particularly since the TMDL implementation plans and applicable law provide for BMP-based effluent limits to implement the WLAs.	See response to comment 1.13

Responsiveness Summary – MS4 Waste Discharge Requirements
Comment Due Date: April 10, 2009

No.	Author	Date	Comment	Response
2.1	BIA	04/10/09	The proposed permit conditions were not derived following consideration of the statutory factors set forth in California Water Code Section 13241. When enacting water quality requirements, the Board is obligated to "balance" using the considerations identified in Water Code section 13241, and made applicable to permit requirements by Water Code section 13263 (in accordance with *City of Burbank v. State Water Resources Control Bcl). This* requirement is all the more imperative in the instant circumstance, because there is now - as a consequence of recent litigation – a judicial cloud over the regional basin plan due to the Board's persistent refusal to consider the Water Code sections 13241 factors are they relate to storm water. Particularly given the status of the basin plan, it is obviously perilous for the Board to again fail to take into account the section 13241 factors. The 4th Draft Permit states, however, that consideration of the Calif. Water Code section 13241 factors is *not* required, suggesting instead that the federal standard for MS4 permitting set forth in 33 U.S.C. section 1324(p)(3)(B)(iii) preempts the need or ability to consider the section 13241 factors. *See* Findings E.25 at p. 21. This legal conclusion is erroneous. It is true that the relevant federal statute law at issue - 33 U.S.C. section 1324(p)(3)(B)(iii) - directs the Board (here, as the U.S. E.P.A. Administrator's surrogate) to "require controls to reduce the discharge of pollutants to the maximum extent practicable[.]" However, this introductory "maximum extent	*City of Burbank* only requires consideration of the 13241 factors when permit conditions go beyond the requirements of federal law. Conditions to require permittees to control the pollution in storm water to the maximum extent practicable is required by federal law. Therefore, permit conditions that are within that requirement are not beyond federal law. Furthermore, provisions directed to the effective prohibition of non-storm water into the MS4 permit are absolutely required by federal law, even if not practicable. Since the permit provisions are not more stringent than federal law, *City of*

No.	Author	Date	Comment	Response
			practicable" directive is what is called "hortatory" (meaning it merely *encourages* or exhorts action) rather than mandatory (indicating any legally enforceable mandate). *See Rodriguez v. West,* 189 F.3d 1351, 1355 (Fed. Cir. 1999) (holding that the express "maximum extent possible" directive of former 38 U.S.C. section 7722(d) was "hortatory rather than to impose enforceable legal obligations"). Because the language is introductory and hortatory, it does not require the Board to impose any and all possible requirements. Instead, the directive is merely a charge to go forth, balance interests, and require *some* reasonable controls.[1] Certainly, the federal directive is not a Congressional mandate to be immoderate. Our reading of the relevant federal statute is bolstered by the remainder of 33 U.S.C. section 1324(p)(3)(B)(iii). Immediately following the introductory "maximum extent practicable" language is this: "including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State *determines appropriate* for the control of such pollutants." (Emphasis added.) Thus, the federal statute merely instructs the Board (as the E.P.A. Administrator's surrogate here) to *exercise its broad discretion* - within bounds of reason, of course.	*Burbank* does not require an analysis of the 13241 factors. Notwithstanding the absence of a legal requirement to consider the 13241 factors for this permit, several commenters have insisted that the Regional Board should consider the factors. Notably, no evidence has been submitted by anyone that any one or more of the factors described in section 13241 somehow make any specific provisions of the permit inappropriate. Nevertheless, in response to these comments, the Regional Board is releasing an internal study, entitled "Economic Considerations of the Proposed (February 25, 2008) State of California, Regional Water Quality Control Board, Los

Responsiveness Summary – MS4 Waste Discharge Requirements
Comment Due Date: April 10, 2009

No.	Author	Date	Comment	Response
				Angeles Region, Order 08-XXX, NPDES Permit No. CAS004002, Waste Discharge Requirements for Storm Water (Wet Weather) and Non-Storm Water (Dry Weather) Discharges From the Municipal Separate Storm Sewer Systems Within the Ventura County Watershed Protection District, County of Ventura, and the Incorporated Cities Therein." The author of the report has confirmed that the analysis remains accurate for the current version of the draft permit (released February 24, 2009). The study contains a detailed analysis of the economic considerations related to the MS4 permit. The Regional Board is further releasing the following documents, which relate to the others of

No.	Author	Date	Comment	Response
				the section 13241 factors: "VENTURA MS4 Section 13241 Considerations"
2.2	BIA	04/10/09	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	The Regional Board has not asserted that the permit provisions are preempted by federal law, but rather that the permit requirements implement federal law. It is the commenters who are asserting, without evidence, that the permit requirements are beyond federal law. The Regional Board has not argued that it is precluded from considering the 13241 factors (indeed it has considered the factors). The Regional Board has contended, as held in City of Burbank, that consideration of the factors will not allow the Regional

No.	Author	Date	Comment	Response
			burden is on the party asserting a federal preemption defense). Therefore, if the Board asserts (as the 4th Draft Permit suggests it will) that federal law preempts the consideration and application of the Porter-Cologne Act's factors, the Board would bear the burden of demonstrating, as a matter of law, that actions required of it under its enabling state law are preempted. Armed with this understanding of the law, the Board cannot reasonably maintain that the federal law precludes application of the California Water Code § 13241 balancing factors to the weighty policy choices before it. But the 4th Draft Permit's betrays a failure - an admitted failure - to consider the section 13241 factors. As explained below, many of the proposed permit conditions in the 4th Draft Permit would not survive a fair consideration of the section 13241 factors.	Board to issue a permit that is less stringent than federal law requires (e.g., less stringent than MEP.) Furthermore, the commenter's failure to proffer evidence that any particular permit requirement is somehow unwarranted in view of any of the factors supports the analysis undertaken by the Regional Board.
2.3	BIA	04/10/09	As proposed, the 4th Draft Permit's EIA requirement violates both the "Natural Flow Doctrine" and the Clean Water Act's overall objective to "Restore and Maintain" the natural integrity of the water cycle. One aspect of the 4th Draft Permit is especially radical and objectionable. That is the New Development/Redevelopment Performance Criteria on page 55 of 121. Particularly, section 5.E.III.1(c), states that the proposed 5% EIA requirement could generally be met only by the "infiltration and stor[age] for reuse" of the volume of a design storm. As proposed, the provision would seemingly impose, for the first time, a generally-applicable	EIA stands for "effective" impervious area. The EIA language has been clarified in the Revised Tentative Permit to show that biofiltration can also be used to meet the EIA standard. The permit provides alternative compliance methods for meeting the EIA requirement.

No.	Author	Date	Comment	Response
			requirement that *no storm water (from a design storm) should leave a parcel that has been developed or redeveloped.*	
2.4	BIA	04/10/09	Rejecting the use of LID BMPs for filtration - and instead, as a general proposition, requiring that no storm water (except in the largest rains) can leave a developed or redeveloped parcel - is a radical measure that should not be undertaken. It would violate millennia (literally) of civil law concerning flows of storm water (called "diffuse surface water"). Specifically, the law in California - which itself is derived from the laws of the ancient Roman Empire - has long favored what is called the *"natural flow doctrine,"* which states that diffuse surface flows should be permitted to flow from all lands to their natural water course. *See Gdowski v. Louie,* 84 Cal.App.4th 1395, 1402 (2000) ("California has always followed the civil law rule. That principle meant `the owner of an upper ... estate is entitled to discharge surface water from his land *as the water naturally flows.* As a corollary to this, the upper owner is liable for any damage he causes to adjacent property *in an unnatural manner....* In essence each property owner's duty is to leave the natural flow of water undisturbed.'" - emphasis added by the court, quoting *Keys v. Romley,* 64 Cal.2d 396, 405-06 (1966)). The "natural flow doctrine" has been altered by the California courts in recent decades to facilitate reasonable land development and protect private and public land owners. Replacing . the natural flow doctrine is *a "modern reasonableness test."* Property owners (public and private) may alter the natural flow of diffuse and/or discrete surface water, but only if they are reasonable when doing so, and downstream owners can then trump the reasonable efforts of the	The common law requirements referenced by the commenter relate to the doctrines of nuisance and trespass with respect to adjoining or down-gradient properties. They have no application to restrict the administrator or the state when implementing modern environmental law based upon federal statutory mandates. Infiltration is beneficial for the region in that it recharges the groundwater table for reuse in areas generally arid in nature, and simultaneously sequesters pollutants that would otherwise impair surface waters. Infiltration will be increasingly necessary as water supplies dwindle due to climate

No.	Author	Date	Comment	Response
			upstream owner if they also take reasonable defensive steps. *See Locklin v. City of Lafayette,* 7 Cal.4th 327, 337 (1994). Juxtaposed against both the natural flow doctrine and the modern reasonableness test is a third, much less favored doctrine, called the *"common enemy doctrine."* The common enemy doctrine stands for three propositions, that (i) individual property (development) rights are paramount, (ii) storm water is a common scourge, and (iii) each property owner may act "for herself or himself" and take steps to alter the natural or unnatural flow of such waters for the protection of his or her property, without regard for the effect on neighbors. *See Skoumbas v. City of Orinda,* 165 Cal.App.4th 783, 792 (2008). Although the common enemy doctrine is sometimes still applied in a few other states, the common enemy doctrine has been largely discredited and criticized by progressive courts, environmentalists, academics, and concerned policy makers because of the obvious and very negative implications for the broader community and for the preservation and restoration of natural flows. *See Keys x.Romley,* 64 Cal.2d 396, 40003 (1966) (Mosk, J., concurring). Of these three doctrines (the *natural flow* doctrine, the *modern reasonableness* test, and the *common enemy* doctrine), the *natural flow* doctrine - which seeks to *maintain the natural flows* of diffuse and discrete surface water - is the doctrine that conforms best to the federal Clean Water Act's overarching objective to "restore and *maintain"* the natural integrity of waters .2 *See* 33 U.S.C. § 1251(a). Accordingly, we would, of course, expect the Board and the non-governmental organizations that defend natural resources to prefer strongly the *natural flow doctrine,* and to deviate from it (if at all)	change and population growth.

No.	Author	Date	Comment	Response
			only as reasonably necessary to accommodate competing societal goals. Rather than favor the natural flow doctrine, however, the 4th Draft Permit - with its seeming refusal to allow generally (i) the *filtration* of diffuse surface water, and (ii) any discharge across property lines - would establish a new and different doctrine, a *"universal retention doctrine,"* standing for the general proposition that no diffuse surface water should leave any parcel that has been developed or redeveloped, except in very large storms.	
2.5	BIA	04/10/09	The permit requirements still need to be better integrated into the California Environmental Quality Act. As our industry representatives have noted before, California law has long established CEQA as the mechanism for evaluating - and mitigating - the environmental impacts of land development. The CEQA process evaluates all environmental impacts and provides a consistent process for their mitigation, with opportunity for input from a wide cross-section of agencies and public interests. Moreover, CEQA continues to evolve as science and policy imperatives drive it to do so. (For example, several years ago, green house gas emissions were never a focus of CEQA; now they certainly are.)	*County of Los Angeles v. SWRCB* held that Water Code section 13389 provides a complete exemption from CEQA for issuing MS4 permits.
3.1	NRDC	04/10/09	The administrative decision must be accompanied by findings that allow the court reviewing the order or decision to "bridge the analytic gap between the raw evidence and ultimate decision or order." *(Topanga Ass 'n for a Scenic Cmty. v. County of Los Angeles* (1974) 11	The obligations of *Topanga* require the Regional Board to bridge the analytical gap between the evidence and

No.	Author	Date	Comment	Response
			Cal.3d 506, 515.) This requirement "serves to conduce the administrative body to draw legally relevant sub-conclusions supportive of its ultimate decision ... to . facilitate orderly analysis and minimize the likelihood that the agency will randomly leap from evidence to conclusions." *(Id.* at 516.) "Absent such roadsigns, a reviewing court would be forced into unguided and resource-consuming explorations; it would have to grope through the record to determine whether some combination of credible evidentiary items which supported some line of factual and legal conclusions supported the ultimate order or decision of the agency." *(Id* at 517 n.15.) In the case of the Tentative Order, the findings and Tentative Order Fact Sheet provide no support for the Regional Board's decision not to apply a 3% effective impervious area limitation to all regulated projects, nor any support for the Regional Board's decision to allow redevelopment projects (and other projects where onsite implementation is a concern) to comply merely with the SUSMP treatment criteria. They also do not explain or substantiate the failure to address the other issues described in this letter.	its order. It does not require the Regional Board to include findings explaining why it rejected alternative proposals from other stakeholders. Board staff have added a finding regarding EIA to the Revised Tentative Permit. The record shows that the EIA standard is not universally supported in the technical community as an appropriate standard for LID. Through discussions with NRDC staff, it was conveyed that they found a 3% EIA standard technically appropriate. In fact, this is the standard the NRDC proposed in its alternative permit proposal. With a technical record not supporting either specific number, staff used Best Professional Judgment in selecting a 5% EIA standard. Staff had vetted a 5% standard rather than a

No.	Author	Date	Comment	Response
				3% standard during development of a third draft. Staff found that that there was scant information that a 3% standard provides greater stormwater benefits relative to a 5% standard. The Revised Tentative Permit provides a finding detailing the technical controversy regarding EIA standards.
3.2	NRDC	04/10/09	The degree to which staff apparently have not critically reviewed the Permitees' submissions (despite including them in the Permit) is evidenced by the Tentative Order's incorporation of the same typographical and syntactical errors as the Permittees' redline submission-e.g., "BMP pollutant *removalperformance;"*[15] "[E]ach Permittee shall require *that* during the construction of a single-family home, the following measures *to be* implemented..."[16] These facts suggest that Regional Board staff simply accepted the Permittees' revisions *verbatim* and did not read these insertions critically. The result: the Permittees have been allowed in the Tentative Order *literally* to write vast portions of their own permit. This is a serious violation of law that undermines public confidence in the Regional Board. To the extent that the apparent delegation of regulatory duties to the permit applicants is the result of an oversight or is otherwise explained, this error must be fully corrected prior to issuance of the Permit.	Staff carefully and critically reviewed the substance of all language proposed by stakeholders that was incorporated into the permit. Staff conducted more than 8 detailed and lengthy meetings with stakeholder to discuss the permit and review language. Staff apologizes for any typographical errors that inadvertently appeared in the Tentative Order. Staff obtain a variety of proposals from a variety of sources, including

No.	Author	Date	Comment	Response
				permittees, other stakeholders, and as the commenter itself knows, environmental organizations. Staff is free to incorporate any of those proposals deemed appropriate into the staff recommendation. Irrespective of whether it is permittees, environmental organizations, or staff that created language proposed in the ultimate staff recommendation, it is the final permit that is adopted by the Regional Board that is significant, not the entity that proposed the language.
3.3	NRDC	04/10/09	The Tentative Order's Planning and Land Development Program Provisions Do Not Meet the Clean Water Act's "Maximum Extent Practicable" Standard for Stormwater Pollution Reduction ' As discussed above, the Tentative Order represents in many regards a significant weakening of the requirements that previous drafts of the permit would have imposed. Now, unfortunately, the Tentative Order's provisions are far from legally adequate to meet the Clean Water Act's MEP standard, and they must be revised accordingly.	The commenter's assertion that they have "demonstrated" that an onsite retention of stormwater is technologically feasible throughout Ventura County does not pass technical muster. The "demonstration" cited in the

No.	Author	Date	Comment	Response
			The MEP Standard Requires that the Tentative Order Impose More Stringent Stormwater Control Measures and Performance Criteria Section 402(p) of the Clean Water Act establishes the MEP standard as a requirement for pollution reduction in stormwater permits. "[T]he phrase `to the maximum extent practicable' does not permit unbridled discretion. It imposes a clear duty on the agency to fulfill the statutory command to the extent that it is feasible or possible." *(Defenders of Wildlife v. Babbitt (D.D.C.* 2001) 130 F.Supp.2d 121, 131 (internal citations omitted); *Friends of Boundary Waters Wilderness v. Thomas* (8th Cir. 1995) 53 F.3d 881, 885 ("feasible" means "physically possible").) As one state hearing board held: [MEP] means to the fullest degree technologically feasible for the protection of water quality, except where costs are wholly disproportionate to the potential benefits.... This standard requires more of permittees than mere compliance with water quality standards or numeric effluent limitations designed to meet such standards.... The term "maximum extent practicable" in the stormwater context implies that the mitigation measures in a stormwater permit must be more than simply adopting standard practices. This defmition applies particularly in areas where standard practices are already failing to protect water quality... *(North Carolina Wildlife Fed. Central Piedmont Group of the NC Sierra Club v. N. C. Division of Water Quality* (N.C.O.A.H. October 13, 2006) 2006 WL 3890348, : Conclusions of Law 21-22 (internal citations omitted).) The North Carolina board further found	letter is no more than one opinion that is based on an analysis which in turn is based on many simplifying assumptions that do not account for the wide range of site conditions that exist throughout Ventura County. EIA has not been demonstrated in information on the record to be equivalent to MEP.

No.	Author	Date	Comment	Response
			that the permits in question violated the MEP standard both because commenters highlighted measures that would reduce pollution more effectively than the permits' requirements and because other controls, such as infiltration measures, "would [also] reduce discharges more than the measures contained in the permits." *(Id.* at Conclusions of Law 19.) Similarly, in Ventura County, we have demonstrated that an onsite retention standard based on the effective impervious area of a site would be a technologically feasible approach that would reduce stormwater discharges and pollution far better than conventional BMPs, which are now allowed for a large class of projects under the Tentative Order.[37] Additionally, the Tentative Order and its supporting documents have not offered concrete evidence that a single site in Ventura County could not meet the otherwise applicable 5% EIA standard or the 3% EIA standard supported by the record. The Tentative Order also has not justified the wholesale weakening of the permit's requirements in many other respects, as set forth above, to the significant detriment of water quality.	
3.4	NRDC	04/10/09	'While the Tentative Order repeatedly states that it "incorporates provisions to assure that Ventura County MS4 permittees comply with WLAs and other requirements of TMDLs covering impaired waters impacted by the permittees' discharges" (Tentative Order ¶ 6.I),[43] it seems to allow Permittees to "attain the storm water WLAs . . . by implementing BMPs in accordance with the MS4 effluent quality workplan and source identification approved by the Executive Officer." (Tentative Order IF 6.11.) This appears to	Staff has revised the Tentative Order to include the statement that, "The Permittees shall comply with the following Wasteload Allocations, consistent with the assumptions and

No.	Author	Date	Comment	Response
			be a requirement not fully consistent with the basic requirement that a permit must assure the imposition of adopted WLAs and compliance therewith as a basic and clearly stated condition of the permit. Further, while the Regional Board may view implementation of BMPs as a means of achieving WLAs, U.S. EPA policy requires that a permit "demonstrate that the BMPs are expected to be sufficient to comply with the WLAs."[44] There is nothing in the Tentative Order or its supporting documents to demonstrate that the management practices it requires will result in compliance with the WLAs, or even that the practices were designed to do so or to address specific pollutants of concern 45 Hence, even if the Regional Board means to require only compliance with specified management practices as a means of meeting a WLA (which we contend is a degree of separation that is flatly unlawful), it could in any case only do so based on evidence that it has not referenced and that does not exist regarding the expected control efficacy of the specifically required BMPs. For example, the Tentative Order's implementation of the TMDL for Organochlorine (OC) Pesticides, Polychlorinated Biphenyls (PCBs) and Siltation for Calleguas Creek, its Tributaries, and Mugu Lagoon states only vaguely that Permittees "shall implement BMPs to achieve the interim WLAs" identified in the Tentative Order, and then requires only compliance monitoring, creation of a "Pesticide Collection Program," and performance of a series of future studies targeted at the pollutants addressed by the TMDL. (Tentative Order ¶ 6.V.3.) The specific implementation provisions for the TMDL for	requirements of the Wasteload Allocations documented in the Implementation Plans, including compliance schedules, associated with the State adoption and approval of the TMDL at the compliance points established in each TMDL (40CFR122.44(d)(1)(vii)(B)." The requirements of the Order are not limited to the specific BMPs in the Permit, but in addition, the BMPs specified in the Basin Plan Amendments which adopted the TMDLs are also required. Regarding the OC pesticide, PCB, and Siltation TMDL, the TMDL plan is appropriate. OC pesticides have been banned and staff found that

No.	Author	Date	Comment	Response
			Bacteria in Harbor Beaches of Ventura County require even less since, while compliance monitoring must be conducted by the permittees, "compliance with the TMDL may be either through structural and non-structural BMPs or implementation of other measures," and "[s]pecial studies are not required . . . though conducting special studies is within the discretion of the responsible parties." (Tentative Order IT 6.V.8.) For both TMDLs, the Permit requires only the use of further BMPs in the event that WLAs are not achieved, stating "[i]f any WLA is exceeded at a compliance monitoring site, permittees shall implement BMPs in accordance with the TMDL Technical Reports Implementation Plans or as identified in the Basin Plan Amendment." The Permit must state that compliance with the WLAs is required. (Tentative Order ¶ 6.V.3.(b)(2); ¶ 6.V.8.(b)(2).) The U.S. EPA has noted that, "given the uncertainties in the performance of many of the BMPs commonly used for stormwater pollution control, it is often difficult to make ... a determination" that selected BMPs will comply with WLAs.[46] The Tentative Order, in setting out a program of poorly defined requirements for TMDL implementation, does not demonstrate that BMPs to be implemented by the Permittees will achieve such compliance. Thus, the Tentative Order must be revised to state explicitly that implementation of BMPs does not in itself constitute compliance with WLAs. Effectively, the Order should "explicitly state that the wasteload allocations (WLAs) established by . . . TMDLs are intended to be enforceable permit effluent limitations and that compliance is a permit requirement." The Tentative Order fails to meet this obligation, and should be revised accordingly.	the collection program is one of the most effective means of dealing with legacy pollutants. The TMDL contains findings showing that erosion from agricultural lands is the largest source, not MS4 discharges. The Ag Waiver program is addressing these exceedances. Regardless, if it is found that urban sources are also contributors of these pollutant, MS4 must comply with the WLAs at date certain regardless of the BMPs selected. The commenter fails to note that the TMDL also includes a compliance schedule that is very clear as to when the WLAs must be complied with. This TMDL has interim WLAs that must be complied with when the MS4 permit is adopted. The Regional

No.	Author	Date	Comment	Response
				Board provided time in the Ventura Harbor TMDL to conduct the studies needed to implement an appropriate BMP. The schedule puts a strict limit on the time allowed to complete those studies and implement the appropriate BMPs.
3.5	NRDC	04/10/09	Tentative Order Allows the Discharge of Pollutants from New Dischargers and Sources Approval of the Tentative Order will authorize the discharge of pollutants to impaired water bodies from "new sources" or "new dischargers" in violation of the CWA's implementing regulations. 40 C.F.R. § 122.4(i) explicitly prohibits discharges from these sources, stating that: No permit may be issued: (i) To a new source or a new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards. The owner or operator of a new source or new discharger proposing to discharge into a water segment which does not meet applicable water quality standards or is not expected to meet those	New buildings, developments, and construction projects are not “new discharges” or “new dischargers” unless there is an associated “discharge of pollutants”. 40 CFR 122.2 defines “discharge of a pollutant” as “Any addition of any ‘pollutant’ … to ‘waters of the United States’ from any ‘point source.” Addition of pollutants onto surface area which is thereafter mobilized by surface runoff and drainage, or directly into surface runoff and

No.	Author	Date	Comment	Response
			standards ... and for which the State or interstate agency has performed a pollutants load allocation for the pollutant to be discharged, must demonstrate, before the close of the public comment period, that: (1) There are sufficient remaining pollutant load allocations to allow for the discharge; and (2) The existing dischargers into that segment are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards. (40 C.F.R. § 122.4(i).) Under 40 C.F.R. § 122.2, a "new discharger" is defined as "any building, structure, facility, or installation: (a) From which there is or may be a `discharge of pollutants;' . . . (c) Which is not a `new source;' and (d) Which has never received a finally effective NDPES permit for discharges at that `site.' (40 C.F.R. § 122.2.) A "new source" is defined as "any building, structure, facility, or installation from which there is or may be a `discharge of pollutants ..."' that may be subject to applicable standards of performance under section 306 of the Clean Water Act. (40 C.F.R. § 122.2.) Thus, the Tentative Order may not authorize the development or redevelopment of any building or structure, including, without limitation, a new subdivision, industrial facility, or commercial structure, within the Permittees' jurisdiction, if runoff from the new discharge adds any pollutant to discharges from the MS4 that "will cause or contribute to the violation of water quality standards" for a water body impaired for that pollutant.	drainage, that is thereafter channeled into a point source that ultimately discharges into waters of the United States is not itself a discharge of pollutants into waters of the United States. In other words, the definition of "new discharge" or "new discharger" was not intended to reach each and every construction project that is up gradient of an MS4 permit. The various construction projects and restraints thereon in the construction and MS4 permits are not regulated directly as NPDES facilities under CWA section 402 subds. (a) and (b), but rather, under sudbs. (p)(2)(E) and (p)(3) because they may contribute pollutants to storm water that is discharged from a point source to waters of the

No.	Author	Date	Comment	Response
			Furthermore, the applicant for the permit must prove the availability of any exception to this provision, as set forth above. In *Friends of Pinto Creek v. US. E.P.A.,* the Ninth Circuit Court of Appeals vacated an NPDES permit issued by the U.S. EPA to a new discharger on the grounds that the Permittees' "discharge of dissolved copper into a waterway that is already impaired by an excess of the copper pollutant" would violate the CWA. ((9th Cir. 2007) 504 F.3d 1007, 1011.) Citing 40 C.F.R. § 122.4(i), the court stated that "The plain language of the first sentence of the regulation is very clear that no permit may be issued to a new discharger if the discharge will contribute to the violation of water quality standards." *(Id.* at 1012.) The court noted that a single exception to this rule exists where a TMDL has been performed, and the "new source can demonstrate that, under the TMDL, the plan is designed to bring the waters into compliance with applicable water quality standards." (Id.) Thus, where no TMDL has been completed for a specified water body and pollutant, new discharges that add pollutants that will cause or contribute to a violation of water quality standards are prohibited absolutely. Additionally, the court in *Friends of Pinto Creek* observed that unless a TMDL explicitly provides that existing discharges into the impaired water body are "subject to *compliance schedules* designed to bring the segment into compliance with applicable water quality standards," issuance of a permit for new discharge is also prohibited under 40 C.F.R. § 122.4(i). *(Id.* at 1013.) In effect, a permit for new discharges may not be issued, even when a TMDL for the relevant pollutant exists, unless it firmly establishes that "there are sufficient remaining pollutant load allocations under existing circumstances." *(Id.* at 1012.)	United States—not because they are themselves point source discharges of pollutants to waters of the United States. As such, the *Friends of Pinto Creek* case is not on point.

No.	Author	Date	Comment	Response
			For the reasons set forth, under the holding of *Friends of Pinto Creek,* the Regional Board is prohibited from approving a permit that allows new sources or dischargers of any pollutant to waterbodies already impaired by that pollutant, unless the Tentative Order demonstrates that an existing TMDL specifically provides sufficient waste load allocations for the discharge.	
3.6	NRDC	04/10/09	The Tentative Order Fails to Include Provisions that Effectively Prohibit all Non-Stormwater Discharges, as Required by the Clean Water Act The Tentative Order Is Inconsistent with the Clean Water Act and Regulations Federal law requires that MS4 permits "shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers." (33 U.S.C. § 1342(p)(3)(B)(ii).) However, the Tentative Order and Tentative Order Fact Sheet state that "the federal regulations . . . included a list of specific non-storm water discharges that `need not be prohibited.' (Tentative Order Fact Sheet at 15.) This exception violates the clear language of the CWA and its implementing regulations. Section 402(p)(3)(B)(ii) of the CWA requires that permits for discharge from municipal sewers "effectively prohibit non-stormwater discharges," 33 U.S.C. § 1342(p)(3)(B)(ii), and does not create any authorization for exemption of such discharges.	The exceptions are proper, and the provisions as a whole implement the requirement to "effectively" prohibit non-storm water discharges into the storm sewers. Discharges from NPDES permitted facilities are as a matter of law required to comply with water quality standards. The remaining exceptions only apply if the discharges are not a source of pollutants that exceed standards. The word "effectively" recognizes the limitations of the existing infrastructure and provides the flexibility to authorize some types of non-storm

No.	Author	Date	Comment	Response
			The Tentative Order states that "[t]he Permittees shall, within their respective juridictions, effectively prohibit non-storm discharges into the MS4 and watercourses, except where such discharges . . . (b) Are covered by a separate individual or general NPDES permit, or conditional waiver for irrigated lands; or (c) Fall within one of the categories [identified in the Tentative Order], are not a source of pollutants that exceed water quality standards, and meet all conditions where specified by the Regional Water Board Executive Officer." (Tentative Order ¶ 1.A.1.) However, section 402(p) places a clear, mandatory duty on the Permittee to prohibit non-stormwater discharges to the MS4 system. The Permittee, or Regional Board, has no discretion to deviate from this requirement. In ascertaining the meaning of a statute, construction must begin with the text. *(Duncan v. Walker* (2001) 533 U.S. 167, 172.) "If there is no ambiguity, then we presume the lawmakers meant what they said, and the plain meaning of the language governs." *(Day v. City of Fontana* (2001) 25 Cal.4th 268, 272.) There is no ambiguity present in the CWA's requirement that a permit "effectively prohibit nonstormwater discharges," and the Tentative Order's provision of categorical exceptions stands in clear violation of its terms. Further, the Tentative Order's attempt to allow exemptions from the prohibition against non-stormwater discharges to MS4 systems is not supported by the CWA's implementing regulations under 40 C.F.R. § 122.26(d)(2)(iv)(B)(1), as the Tentative Order Fact Sheet implies. This provision states the circumstances under which the Permittee must specifically design a program to prevent certain illicit discharges: "the following category of non-storm water	water drainage when it does not adversely affect the quality of storm water in the MS4. The commenter neglects to recognize the import of the words “identified by the municipality…” in the analysis. Notably, the commenters intervened in support of the

No.	Author	Date	Comment	Response
			discharges or flows shall be addressed where such discharges are identified by the municipality as sources of pollutants to waters of the United States." The cited regulation, providing for an enforcement program to "prevent illicit discharges," does not support the construction, seemingly implemented by the Tentative Order, that such non-stormwater discharges "need not be prohibited." (Tentative Order Fact Sheet at 15.) Even if the regulations did allow some conditional exemption, they do not provide that non-stormwater discharges are permissible when they fall into a specified category and "are not a source of pollutants *that exceed water quality standards."* (Tentative Order ¶ 1.A.1(c) (emphasis added).) The regulations explicitly state that the identified non-stormwater discharges "shall be addressed where such discharges are identified by the municipality *as sources of pollutants to waters of the United States"* in any quantity, whether or not they result in the exceedence of water quality standards. (40 C.F.R. 122.26(d)(2)(iv)(B)(1).) Indeed, the interpretation adopted in the Tentative Order, allowing for categorical exemptions for non-stormwater discharges, is not found in the plain language of the regulation, and both the Tentative Order and staff's gloss place the regulations in direct conflict with the overlying statute. As written, the entire scheme in the Tentative Order is inconsistent with both the regulations and the statute that they purport to implement.	2001 Los Angeles County MS4 permit in *County of Los Angeles v. State Water Resources Control Board,* and that permit contained similar exemptions from the prohibition as reflected in this draft permit. The commenter has offered no proposals on how the Regional Board would implement the law and regulations as interpreted by the commenter.
3.7	NRDC	04/10/09	The Tentative Order Is Also Inconsistent with Facts in the Record Even if the Tentative Order's non-stormwater scheme were	See response to comment 3.6.

No.	Author	Date	Comment	Response
			conceptually lawful, the exemptions provided are unsupportable because they contradict facts in the record evidencing the pernicious water quality impacts of some of the exempted discharges and fail to impose controls adequate to ameliorate those impacts. Of particular concern is the Tentative Order's exemption of "reclaimed and potable landscape irrigation runoff' even though pollutants from theses sources are a known, significant source of impairment to waters in the Ventura region. A finding that these discharges are "not []sources of pollutants to receiving waters," as required under 40 C.F.R. 122.26(d)(2)(iv)(B)(1), simply has not been and cannot be made here, as it would be inconsistent with facts in the record.	
3.8	NRDC	04/10/09	The Permit Application Is Incomplete for Failure to Include an Assessment of Controls A permit application for discharge from a large- or medium-sized MS4 must contain an assessment of controls, including "[e]stimated reductions in loadings of pollutants from discharges of municipal storm sewer constituents from municipal storm sewer systems expected as the result of the municipal storm water quality management program." (40 C.F.R. § 122.26(d)(2)(v).) While the Permit explicitly states that "[t]he Regional Water Board has prepared this Order so that implementation of provisions contained in this Order by Permittees will meet the requirements of the federal NPDES regulations at 40 CFR 122.26," (Tentative Order finding C.4.), neither the application, the Tentative Order, the Tentative Order Fact Sheet, nor other supporting documents include any required information or other discussion of the amount of pollution that will be reduced through its controls. The approval of the	Staff defers to EPA guidance cited in the comments. However, this permit contains requirements that BMPs selected based on their pollutant load reduction performance. The estimated pollutant load reductions are provided in Table C. Staff disputes, and the commenter has failed to demonstrate, how the permit is less stringent than the previous draft. In fact,

No.	Author	Date	Comment	Response
			Tentative Order without this information fundamentally violates basic precepts of administrative procedure, not only because required evidence in the record is lacking, but also because the findings and related subfindings in the record are therefore devoid of necessary guideposts as to why and how provisions were included or rejected. The Tentative Order does not provide sufficient evidence to demonstrate that the management practices included in the Tentative Order are adequate to meet relevant requirements and water quality standards. The U.S. EPA has previously released guidance purporting to "allow[]. permitting authorities to develop flexible reapplication requirements that are site-specific." (61 F.R. 41698.) However, nothing in the CWA's implementing regulations permits such flexibility, and this or other guidance cannot reduce or remove the regulatory requirement that the Tentative Order include estimated reductions in pollutant loadings. It is axiomatic that where agency guidance is inconsistent with an unambiguous statutory scheme or its enabling regulations, the regulations must govern. *(See, e.g., Christensen v. Harris County* (2000) 529 U.S. 576, 588 ("To defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation"); *Davis v. Florida Power & Light Co.* (11th Cir. 2000) 205 F.3d 1301, 1307 (rejecting agency policy guidance as inconsistent with its overlying statutory scheme).) In order for the Tentative Order application to meet the requirements of the CWA, the Tentative Order must include an estimate of the pollutant load reduction that it is expected to achieve.	by including sizing language to the EIA and BMP performance requirements, the Tentative Permit is substantially stronger than the previous draft.

No.	Author	Date	Comment	Response
			Even if the guidance were not in direct conflict with the regulations, the guidance does not in itself specifically exempt permits from including this information. The guidance states that "as a practical matter, *most* first-time permit application requirements are unnecessary for purposes of second round MS4 permit application;" it does not state that all such information is unconditionally unnecessary. (61 F.R. 41698 (emphasis added)) The omitted pollutant reduction estimates represent a fundamentally different type of information from that required by *most* of the other provisions of 40 C.F.R. § 122.26(d)(2), such as identifying already identified "major outfalls," for which repeating the exercise "would be needlessly redundant," especially "where it has already been provided and has not changed." (61 F.R. 41698.) Instead, the required pollutant load reduction estimates are self-evidently relevant to crafting and assessing the core requirements of the new permit. Such estimates are an essential means of determining whether or not the permit will ensure that water quality standards will be met and what improvements can be expected; they are not merely an administrative detail that has no effect on the permit's functionality. Tellingly, these estimates are not found in the Report of Waste Discharge cited to in the Tentative Order as "partially complete" in their application process "under the reapplication policy for MS4s issued by the United States Environmental Protection Agency . . (61 Fed. Reg. 41697)." (Tentative Order findings C.3-4.) The missing information is further indispensable when, as here, the Tentative Order and the provisions included in it represent not only	

No.	Author	Date	Comment	Response
			a substantial change from the previously adopted permit,[68] but also a substantially weakened version in comparison to prior drafts of the current Tentative Order. Given changes from both the prior Permit and prior drafts of this Tentative Order, the necessity of basing the Tentative Order on information about its estimated efficacy should be clear. The Tentative Order and application must be revised to include the required estimates.	
			"Of all the revisions to the Planning and Land Development Program section requested by the Permittees and implemented by Regional Board staff, as noted above, every single one applies to a provision that has remained essentially unchanged through three drafts of the permit, with the exception of the grandfather provision, which came into being in the second draft. (Compare First Draft, Second Draft, and Third Draft Ventura County MS4 Permit with Tentative Order.) This combined with the apparent reassignment of the lead permit author who is a National Academy of Sciences-level expert on stormwater, highlights the extent to which the recent revisions to the permit are arbitrary and do not reflect the application of agency expertise. (See e.g., CBS Corp. v. F.C.C. (3rd Cir. 2008) 535 F.3d 167, 188 (agency interpretation set aside because no reasoned basis for departure from prior policy was provided…)."	The comment includes several unsupportable assumptions. Specifically: Prior iterations of a draft permit do not constitute "prior policy" of the Regional Board; The Regional Board's storm water expertise does not reside in any one member of the agency's staff; The reasons that any individual staff members may or may not be participating on any particular project involve personnel and management decisions under the supervision of the Executive Officer, which are not appropriate for

Responsiveness Summary – MS4 Waste Discharge Requirements
Comment Due Date: April 10, 2009

No.	Author	Date	Comment	Response
				public comment. The insinuations underlying the comment are ad hominem. The commenter is invited to direct its comments instead to the substance of the draft permit. Further, by including sizing language to the EIA and BMP performance requirements, the Tentative Permit is substantially stronger than the previous draft.