Building Industry Legal Defense Foundation
1330 South Valley Vista Drive
Diamond Bar, CA 91765
Phone: (909) 396-9993

Building Industry Association Orange County Chapter
17744 Sky Park Circle, Suite 170
Irvine, CA 92614
Phone: (949) 553-9500

via electronic mail and U.S. mail

January 24, 2008

John H. Robertus, Executive Officer
California Regional Water Quality Control Board
San Diego Region
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4353

jrobertus@waterboards.ca.gov

Reference: Revised Tentative Order No. R9-2008-0001; NPDES No. CAS0108740.

Subject: Building Industry Comments Concerning the South Orange County Proposed MS4 Provisions.

Dear Mr. Robertus:

Thank you for providing the Orange County Chapter of the Building Industry Association of Southern California, Inc. ("BIA/OC") and Building Industry Legal Defense Foundation ("BILD") with this additional opportunity to provide comments on Revised Tentative Order No. R9-2008-0001; NPDES No. CAS0108740 (hereinafter the "3d Draft Permit") and the responses provided by SDRWQCB staff on comments previously submitted. BIA/OC and BILD, along with the Construction Industry Coalition on Water Quality (CICWQ), which joins with BIA/OC and BILD in this letter, provided many detailed comments concerning the prior tentative order (correspondence dated April 4, 2007, and August 22, 2007).

We appreciate the fact that a number of our comments resulted in changes to the proposed permit language. However, the 3d Draft Permit still reflects some proposed permit language to which we object. This letter focuses on the few remaining issues about which we earnestly hope to persuade the Board to make changes before adopting the new MS4 requirements. Those issues are as follows, and each is explained in turn:

- The Board persists in its refusal to apply and reconcile the specific balancing factors set forth in Calif. Water Code section 13241;

- The proposed permit language concerning treatment control best management practice (BMP) requirements mandates that all "treatment control BMPs must be located so as to ***remove*** pollutants from runoff prior to its discharge…." *See* 3rd Draft Permit, p. 29, § D.1.d (6)(c) (emphasis added). The verb "remove" should be changed to "reduce," so as to avoid an suggestion of an extreme, absolute and unachievable permit requirement, and in order to comport with 33 U.S.C. section 1342(p)(3)(B)(iii) and the Porter-Cologne Water Quality Control Act;

- The hydromodification waiver provision set forth in the 3rd Draft Permit, p. 36, as Section D.1.h (3)(c)(i), is problematic in several important ways, including (a) the proposal addresses imperviousness myopically – only at a site-specific level, with no allowance for an appropriately circumspect analysis (for example, when a very small project could reside innocuously in a large watershed context); (b) the waiver language refers only to "total impervious coverage" without allowance for "effective imperviousness" or "connected imperviousness," concepts that reflect recognition of the fact that simple engineering solutions (e.g., disconnection) can mitigate the effects of impervious coverage; and (c) in any event, the proposed wording needs to be changed to make it clear that the "increased by less than 5% in new developments" language applies to the total area of the site at issue, rather than to the baseline (i.e., pre-construction) "total impervious cover on a site" – as it now reads;

- The second sentence of Section D.1.h (4), in the 3rd Draft Permit at p. 37, and similar provisions that would effectively delegate permitting powers to other agencies, would result in both (i) an improper delegation of regulatory authority, and (ii) a violation of administrative due process; and

- The mandate that co-permittees must consider requiring advanced treatment systems (ATS), which is set forth in the 3rd Draft Permit, Section D.2.d (1)(c)(i), p. 43, is problematic for two reasons. First, the list of site risk factors is problematic due to a foreseeable, likely conflict with the pending state-wide construction general permit. Second, the list of factors to be considered when contemplating the imposition of ATS is completely one-sided, and does not reflect the most important factors that would weigh against the requirement of ATS.

I. The 3d Draft Permit reflects the Board's continuing refusal to apply the six mandatory Porter-Cologne Act "balancing factors" (California Water Code § 13241).

In previous comments lodged by BIA/OC and BILD concerning the earlier drafts of the proposed permit, we consistently pointed out that the Board needs to balance and reconcile the six factors set forth in Calif. Water Code section 13241 when adopting the new MS4 permit requirements. The most recent responses to comments states the Board's ongoing position that it

"need not consider the factors listed in [Water Code section] 13241 in adopting the Tentative Order." Responses to Comments II, dated December 12, 2007 ("Responses II"), p. 7.

Specifically, the response states that "the requirements of the Tentative Order do not exceed federal law" and that the "California Supreme Court has determined that the factors listed in [Calif. Water Code section] 13241 must only be considered during adoption of permits if the permit requirements exceed federal law[,]" citing *City of Burbank v. State Water Resources Control Board*, 35 Cal.4th 613 (2005). Responses II, p. 7. The response continues:

> Technically, all NPDES requirements issued by the Regional Boards are promulgated in waste discharge requirements issued pursuant to [Calif. Water Code sections] 13260 and 13263. However, requirements issued for discharges of pollutants from point sources to waters of the United States, including requirements for discharges from MS4s, implement the provisions of the federal Clean Water Act and the federal NPDES regulations, as contemplated by Chapter 5.5 of the Porter-Cologne Water Quality Control Act (Section 13370, *et seq*.).

Id. (Responses II, p. 7).

For the reasons set forth below, and incorporating herein by reference our previous comments concerning this same legal issue, we maintain that the Board will err legally if it refuses to address, analyze, balance and reconcile the six balancing factors set forth in Calif. Water Code section 13241, as required by the Porter-Cologne Water Quality Control Act.

A. Because the EPA determined in 1973 that the implementation of California's Porter-Cologne Act is sufficient to meet the aims of the federal Clean Water Act, the Board – as an agency of the State – is now the principal decision-maker concerning the waste discharge requirements within its region.

Under the state-and-federal partnership established by Congress in the landmark Federal Water Pollution Control Act Amendments of 1972 (later amended and named the "Clean Water Act."), and consistent with the Porter-Cologne Water Quality Act, the Board itself – as both an agency of the State of California and an authorized surrogate for the Administrator of the U.S. Environmental Protection Agency ("EPA") – wields the principal decision-making power to regulate water quality within its region.

The federal interest in the nation's overall water quality soared in June 1969, when the Cuyahoga River (near Cleveland, Ohio) literally caught fire and burned. This televised embarrassment led to extensive congressional debate, culminating in what is now called the Clean Water Act. The Clean Water Act established the National Pollution Discharge Elimination System, or NPDES, which is a system of requiring a regulatory permit for most discharges of pollutants to the nation's waters.

Congress charged EPA with initially administering NPDES throughout the nation. However, as enacted in 1972, the federal statutes included a mechanism for any state to assume the primary responsibility of administering NPDES within its boundaries through an acceptable surrogate state program. Specifically, Congress took care to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251(b). Under the Clean Water Act, the states were entitled to qualify for – and, upon such qualification, to assume – the primary responsibility for the implementation and enforcement of NPDES. 33 U.S.C. §§ 1342(b) and 1370.

In 1978, the U.S. Ninth Circuit Court of Appeals explained the division of powers between EPA and the California water boards, and described the legal relationship as follows:

> [A]lthough the 1972 amendments gave the EPA the authority in the first instance to issue NPDES permits (33 U.S.C. § 1342(a)(1)), Congress clearly intended that the states would eventually assume the major role in the operation of the NPDES program.
>
> Under § 1342(b), a state may submit to the EPA a proposed permit program governing discharges into navigable waters within its borders. If the state can demonstrate that it will apply the effluent limitations and the [Clean Water Act's] other requirements in the permits it grants and that it will monitor and enforce the terms of those permits, then, unless the Administrator of the EPA determines that a state program does not meet these requirements, he must approve the proposal (§ 1342(b)).… Upon approval of a state program, the EPA must suspend its own issuance of permits covering those navigable waters subject to the approved state program (§ 1342(c)). However, while the direct federal regulatory role largely ceases following EPA approval of a state program, the EPA does retain a review authority over the states. The EPA may veto particular [individual] permits issued by the state (§ 1342(d)) if it finds that federal requirements have not been met, or it may withdraw approval of the entire state program upon a determination, after notice and an opportunity to respond, that the [overall] program is not being administered in compliance with the mandates of federal law (§ 1342(c)). Despite this residual federal supervisory responsibility, the federal-state relationship established under 33 U.S.C. § 1342 is "a system for the mandatory approval of a conforming State program and the consequent suspension of the federal program [which] creates a separate and independent State authority to administer the NPDES pollution controls." *Mianus River Preservation Committee v. Administrator, EPA* (2d Cir. 1976) 541 F.2d 899, 905.
>
> ***California has adopted a plan for the issuance of NPDES permits [i.e., the Porter-Cologne Act] which has been approved by the EPA.*** 39 Fed.Reg. 26,061 (1973). The California State Water Resources Control Board … and its nine subsidiary regional boards thus have primary responsibility for the enforcement of the [Clean Water Act]… in California.

Shell Oil Co. v. Train, 585 F.2d 408, 410 (9th Cir. 1978) (emphasis added).

In 1973, California became the first state that EPA authorized to implement NPDES within its boundaries. Following such authorization, EPA: (a) reviews the permits issued by the state surrogates (the water boards), (b) may veto inadequate permits (i.e., a relatively passive and reactive role), and (c) may revoke entirely the overall state implementing authority if it concludes that the state is generally implementing the NPDES program inadequately. *See* 33 U.S.C. § 1342(d); 40 C.F.R. § 123.44; *Save the Bay, Inc. v. U.S. E.P.A.*, 556 F.2d 1282, 1285-87 (5th Cir. 1977). Understanding this state-and-federal partnership is central to the instant question concerning the applicability of the Calif. Water Code section 13241 balancing factors to the pending permit here.

B. The state enabling statute obligates the Board to apply and reconcile the six Porter Cologne Act "balancing factors" (Water Code section 13241) when establishing MS4 waste discharge requirements.

The Porter-Cologne Act contains one – virtually only one – section of substantive direction whereby the California Legislature thoughtfully circumscribed the water boards' discretion and sought to shape eventual water quality regulations. The Legislature's substantive direction is a non-exclusive list of balancing factors that the water boards must apply and reconcile when establishing and revising water quality objectives and/or waste discharge requirements. The balancing factors are set forth in Water Code § 13241. They are applicable to waste discharge requirements proposed here pursuant to Water Code § 13263.

Under §§ 13241 and 13263, the Board must balance and reconcile six factors when establishing or revising waste discharge requirements for MS4 operators. The six § 13241 factors are:

(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.

(f) The need to develop and use recycled water.

Section 13241 expressly provides that the six balancing factors are set forth as *non-exclusive* factors for consideration: "Factors to be considered by a regional board in establishing water quality objectives [or – pursuant to Section 13263 – waste discharge requirements] *shall*

include, but shall not necessarily be limited to, all of the following…." Calif. Water Code § 13241 (emphasis added). Thus, the Legislature specified that the water boards *must* necessarily consider all six of the listed factors, but *may* consider any and all other possible factors as well.

As noted above, the latest responses to our comments (Responses II) state that the § 13241 balancing factors should not apply to the Board's pending action here because of the California Supreme Court's holding in *Burbank v. State Water Resources Control Bd.*, 35 Cal.4th at 627-28. Respectfully, we believe that the Board's position springs from a misinterpretation of the *Burbank* opinion.

The *Burbank* opinion discusses three scenarios concerning the interplay between federal and state water quality regulation and the applicability (or not) of the § 13241 balancing requirement to the establishment of waste discharge requirements. To understand the three scenarios, one must first assume that the federal government has prescribed a certain minimum legal requirement. Notably, the California Supreme Court remanded the case specifically for further ascertainment concerning this key assumption. The opinion reads:

> "[W]hether the … Regional Board should have complied with sections 13263 and 13241 of California's Porter-Cologne Act by taking into account 'economic considerations,' such as the costs the permit holder will incur to comply with the numeric pollutant restrictions set out in the permits, depends on whether those restrictions meet or exceed the requirements of the federal Clean Water Act. *We therefore remand this matter for the trial court to resolve that issue*."

Id. at 627 (emphasis added).

Setting aside the fact that the important threshold question about the existence and extent of any federally-prescribed requirement was at issue, the Court in the *Burbank* opinion answered the legal question about when Section 13241 might come into play where a federal minimum requirement is indeed prescribed. The Court explained as follows:

- First, the water boards **may not impose anything less than** a federally-prescribed minimum requirement. The U.S. Constitution's "Supremacy Clause" operates to prevent the State, acting through the water boards, from relaxing any prescribed federal minimum requirement. *Burbank*, 35 Cal.4th at 626-27.

- Second, if a California water board **merely imposes** a federally-prescribed minimum requirement – but imposes no more than the federally-prescribed minimum requirement, then the water board is not required to undertake the balancing and reconciliation required under Water Code § 13241, because the refusal to balance under Porter-Cologne is of no moment. In other words, because the water board would be doing no more than conforming to the federally-prescribed minimum requirement, the water board effectively would be imposing no discretionary waste discharge requirement upon the regulated community. And because the water boards can impose *no less* than the prescribed federal

requirement (pursuant to the first (the Supremacy Clause) principle stated above), they need not provide any rationale such an imposition. In such a scenario, the water board is not required to justify its determination to the burdened regulated community by balancing and reconciling the § 13241 factors. *Id.* at 626 ("Because section 13263 cannot authorize what federal law forbids, it cannot authorize a regional board, when issuing a wastewater discharge permit, to use compliance costs to justify pollutant restrictions that do not comply with federal clean water standards.").

- Third, however, whenever the water boards impose any waste discharge requirement that **goes beyond mere conformity** to a federally-prescribed minimum requirement, then the water boards must apply and reconcile the § 13241 balancing factors, in accordance with the Porter-Cologne Act. *Id*. at 627-28.

Concerning the *Burbank* opinion, the Board seemingly fails to understand that the waste discharge requirements proposed in the 3d Draft Permit are <u>not</u> the result of mere conformity to any federally-prescribed minimum requirements. Instead, whenever the Board adopts MS4 waste discharge requirements, the Board exercises of its own broad discretion. Obviously, the 3rd Draft Permit reflects many specific, proposed MS4 waste discharge requirements that are not mandated by any identified federal prescription. Notably, many of the proposed requirements are imposed nowhere else in the state, nation or world.[1] Therefore, if the Board were to adopt the proposed provisions, the adoption would be far from mere *conformity* to a federally-prescribed minimum requirement of the type that the *Burbank* opinion indicates should be excused from a reconciliation of the Porter-Cologne balancing factors.

It therefore seems that the Board has confused (i) the federal authority and obligation to impose waste discharge requirements (which requires an act of discretion), with (ii) the mere conformity to an identifiable, federally-prescribed minimum requirement. There is an important difference. The difference is that the Board is indeed compelled to determine and establish appropriate waste discharge requirements (it is specifically charged with doing so); and – in doing so – the Board fulfills certain obligations of the State as the surrogate administrator under the federal NPDES. **The Board is generally free, however, to choose among various possible waste discharge requirements as it deems appropriate, consistent with federally-prescribed minimum requirements – *if and to the extent that they exist*.** Whenever doing so, it must

[1] The Board's responses to our comments provide no indication of which particular federally-prescribed minimum requirements might justify its refusal to balance and reconcile under Section 13241. Instead, the latest response merely concludes that the proposed permit conditions – without differentiation – "implement the provisions of the federal Clean Water Act and the federal NPDES regulations." Responses II, at p. 7. If the Board maintains its refusal to balance and reconcile pursuant to Section 13241, then we respectfully ask the Board both (i) to indicate plainly, in response to these comments, which federally-prescribed minimum requirements (i.e., which "provisions of the federal Clean Water Act and the federal NPDES regulations") compel the Board to dismiss the mandates of its enabling statute, the Porter-Cologne Act, and (ii) to logically connect, to whatever degree the Board possibly can, the asserted federally-prescribed minimum requirement(s) to individual proposed permit conditions.

balance and reconcile the § 13241 factors, as the California Legislature specified, concerning any waste discharge requirements that are not federally prescribed. In other words, state and federal law compels the Board (as EPA's surrogate) to impose MS4 requirements; but the California law goes further and commands the Board more prescriptively about ***how*** it must approach the determination of which requirements to impose.

The two mandates (federal and state) are not inconsistent. Instead, they complement one another. This is particularly true because Section 13241 expressly provides that the six balancing factors specified therein are set forth as *non-exclusive* factors for consideration: "***Factors to be considered*** by a regional board in establishing water quality objectives [or – pursuant to Section 13263 – waste discharge requirements] ***shall include, but shall not necessarily be limited to, all of the following***…." Calif. Water Code § 13241 (emphasis added).

The Board refers (in the Responses II) to Chapter 5.5 of the Porter-Cologne Water Quality Control Act as support for the Board's stated position. But, within that chapter, Calif. Water Code section 13372 explains the "construction and application" of the same Chapter 5.5, and provides, in relevant part:

> (a) This chapter shall be construed to ensure consistency with the requirements for state programs implementing the Federal Water Pollution Control Act and acts amendatory thereof or supplementary thereto. ***To the extent other provisions of this division [i.e., including Sections 13241 and 13263] are consistent with the provisions of this chapter [5.5] and with the requirements for state programs implementing the Federal Water Pollution Control Act and acts amendatory thereof or supplementary thereto, those provisions apply to actions and procedures provided for in this chapter***.

Calif. Water Code § 13372 (emphasis added).

The appreciation and utilization of the Section 13241 balancing factors is completely consistent with the Board's exercise of broad discretion in accordance with 33 U.S.C. section 1342(p)(3)(B)(iii) and the regulations promulgated under it. Accordingly, Chapter 5.5 of the Porter-Cologne Water Quality Control Act does not justify the Board's refusal to apply and reconcile the Section 13241 balancing factors.

C. Under federal law, the definition of "maximum extent practicable" ("MEP") is necessarily a balancing exercise, requiring the exercise of broad discretion.

Whenever the Board establishes requirements for MS4 operators through revised permit conditions in accordance with federal law, the Board is exercising broad discretion. *See Arkansas v. Oklahoma*, 503 U.S. 91, 105 (1992) ("Congress has vested in the [EPA – or, as here, a surrogate state agency] broad discretion to establish conditions for NPDES permits."); *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1166-67 (9th Cir. 1999) ("Under [the MEP standard set forth in Clear Water Act section 402(p)(3)(B)(iii)], the EPA's choice to include …

limitations in [NPDES] permits [for MS4s] was within its discretion."); *City of Abilene v. U.S. E.P.A*, 325 F.3d 657, (5th Cir. 2003) ("The plain language of [CWA section 402(p)] clearly confers broad discretion on the EPA [or, as here, a surrogate state agency] to impose pollution control requirements when issuing NPDES permits.").

Indeed, the relevant provision of the Clean Water Act (33 U.S.C. § 1342(p)) indicates that any authorized state EPA surrogate wields discretion when prescribing MS4 pollution-reduction requirements to the MEP:

> (3) Permit requirements
>
> (B) Municipal discharge
>
> Permits for discharges from municipal storm sewers--
>
> (iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, ***including … such … provisions as the Administrator or the State determines appropriate for the control of such pollutants***.

33 U.S.C. § 1342(p)(3)(B)(iii) (emphasis added).

Through such statutory language, Congress has authorized states (as EPA's surrogates) to determine the "appropriate" degree of control of pollutants from MS4 systems.[2] The wielding of such discretion is inconsistent with the Board's claim that it is merely "implementing" provisions of federal statutes and regulations.[3] The Board is free to *determine*, from time to time, what it deems the appropriate requirements for the "maximum extent practicable" (MEP) reduction of pollutant discharges; and the Board can only do so by considering and then *balancing* any number of relevant factors.[4] Therefore, the federal law, in essence, compels the Board (as EPA's

---

[2] *See Building Industry Ass'n of San Diego County v. State Water Resources Control Board*, 124 Cal.App.4th 866, 883 (2004) ("[T]he language of [§ 402(p) – i.e., the MEP standard] does communicate the basic principle that the EPA [or its state surrogate] retains the discretion to impose 'appropriate' water pollution controls….").

[3] The verb "implement" is different from the verb "determine." To "implement" something connotes effectuating a course of action that has been already determined, and its etymology derives from the much earlier noun "implement" (*i.e.*, a tool or instrument). Here, the Board is determining – and therefore not now implementing – the MS4s' prospective waste discharge requirements, which (assuming they are not vetoed by EPA) will eventually serve as federal requirements under the NPDES for purposes of the Clean Water Act.

[4] The MEP statutory language should be interpreted as a congressional mandate to seek a reasonably *balanced* level of regulation, and should not be interpreted as requiring the Board to

authorized surrogate) to go forth and strike a balance.[5] At issue here is whether, when doing so, the Board must demonstrably consider the balancing factors specified in Calif. Water Code section 13241. We believe that the Board must meet the minimal demands of its enabling statute

---

reduce the discharge of pollutants to "the maximum extent ***possible***." As one court recently explained:

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

Conservation Law Foundation v. Evans, 360 F.3d 21, 28 (1st Cir. 2004). Therefore, the federal statute under which the Board re-establishes from time to time MEP standard does not necessarily function as a harsh regulatory ratchet, to be used to impose always upon the MS4 operators as much as possible – regardless of how burdensome the impositions become. Instead, the Board should use good sense and make only the reasonable impositions – by striking reasonable balances.

[5] In other regulatory contexts as well, the determination of what is the "maximum extent practicable" requires the striking of a reasonable balance, sometimes using prescribed factors. For example, 40 C.F.R. section 300.430 contains federal regulations for studying and selecting remedial measures to deal with pollution at so-called "Superfund" toxic waste sites. It contains the following language:

> Each remedial action shall utilize permanent solutions and alternative treatment technologies or resource recovery technologies to the maximum extent practicable. This requirement shall be fulfilled by selecting the alternative that satisfies paragraph (f)(1)(ii)(A) and (B) of this section and provides the best balance of trade-offs among alternatives in terms of the five primary balancing criteria noted in paragraph (f)(1)(i)(B) of this section.

40 C.F.R. § 300.430(f)(1)(ii)(E). "The five primary balancing criteria are long-term effectiveness and permanence; reduction of toxicity, mobility, or volume through treatment; short-term effectiveness; implementability; and cost." 40 C.F.R. § 300.430(f)(1)(i)(B). Similarly, 40 C.F.R. section 60.54c(a) provides specified, non-exclusive balancing factors related to locating medical waste incinerators in places "that minimize, on a site-specific basis, to the maximum extent practicable, potential risks to public health or the environment." Here, the Board must respect the California Legislature's decision to mandate consideration of the Section 13241 factors when promulgating waste discharge requirements.

by considering (i.e., balancing and reconciling) the Section 13241 factors, and also providing an analytical roadmap sufficient to demonstrate such compliance.

D. Federal law does not preempt the Board's state law obligation to apply and reconcile the Porter-Cologne Section 13241 balancing factors.

The entire body of state and federal case law that governs questions of federal preemption strongly supports our view that the Board cannot use its role in "implementing" federal law as an excuse to avoid its statutory duty to apply and reconcile the Section 13241 balancing factors. The question of whether federal preemption exists is always 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 federal statutory language or from federal regulations that are 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).

The burden of demonstrating to a court that preemption should result rests with the party asserting the preemption (here, that would be the Board) – because federal preemption is an affirmative defense. *See Bronco Wine Co. v. Jolly*, 33 Cal.4th 943, 956-57 (2004) ("The party who claims that a state statute is preempted by federal law bears the burden of demonstrating preemption."); *see also United States v. Skinna*, 931 F.2d 530, 533 (9th Cir.1990) (stating that the burden is on the party asserting a federal preemption defense). Therefore, if the Board here were to assert that federal law preempts the application of the Porter-Cologne Act's Section 13241 balancing requirements, the Board would bear the burden of demonstrating that, as a matter of law, the actions required of it under its enabling state law (here, the prescribed balancing) are preempted.[6] To date, the Board has failed to provide any indication of which

[6] Compelling legal scholarship explains that a regulatory agency should be entitled to no judicial deference (*i.e.*, so-called *Chevron* deference) when it comes to legal questions about preemption, federalism, and the scope of agency powers in inter-governmental contexts. *See, e.g.*, Jack W. Campbell IV, *Regulatory Preemption in the Garcia/Chevron Era*, 59 U. Pitt. L. Rev. 805, 832 (1998); Nina A. Mendelson, *Chevron and Preemption*, 102 Mich. L. Rev. 737, 741-42 (2004); Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 331 (2000); Howard P. Walthall, Jr., *Chevron v. Federalism*, 28 Cumb. L. Rev. 715, 717-18 (1998). Indeed, it would be very strange if a state court were to defer to the Board's (a state agency's) determination that it could ignore the California Legislature's mandates – those set forth in the agency's enabling statute – in light of the Board's contrary determination about the effects and reach of *federal* statutory and regulatory authority. The courts are better able to decide the abstract legal question objectively and *de novo*.

federal provisions would preempt the Board's ability to apply the Section 13241 balancing factors to which proposed waste discharge requirements.[7]

If the Board were to assert that federal law preempts the Porter-Cologne Act's Section 13241 balancing requirements, it would face a steep uphill battle. The Supreme Court of the United States has opined that courts should always attempt to reconcile the clash of federal and state laws to avoid federal preemption. *See Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 127 (1973); *see also Rice v. Norman Williams Co*., 458 U.S. 654, 659 (1982) ("[T]he inquiry is whether there exists an irreconcilable conflict between the federal and state regulatory schemes."). Both state and federal courts generally recognize a presumption against finding preemption, even when there is express preemptive language. *See, e.g., Washington Mutual Bank, FA v. Superior Court*, 75 Cal.App.4th 773 (1999):

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

Id. at 782, *citing Cipollone v. Liggett Group, Inc*., 505 U.S. 504, 523 (1992) and *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

In the absence of express federal preemptive language, the presumption against federal preemption is even stronger:

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

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

Armed with understanding of both the strong presumption against preemption and the principles that preemption is both an affirmative defense and a question of law, the Board cannot reasonably claim that the federal regulatory scheme at issue here precludes the Board's *non-exclusive* application of the California Water Code § 13241 factors to the determinations before it. First, there is no express federal preemption here that would preclude § 13241 balancing. To the contrary, 33 U.S.C. section 1342(p)(3)(B)(iii) expressly authorizes the State to establish MS4

---

[7] One appellate court erred last year (albeit in dicta) in *City of Rancho Cucamonga v. Regional Water Quality Control Bd. – Santa Ana Region*, 135 Cal.App.4th 1377 (2006), when it both erroneously regarded federal preemption as a factual, evidentiary question (rather than a legal question) and erroneously rested upon the petitioner the burden of disproving preemption, rather than placing the burden on the party asserting the federal preemption: "The … trial court found there was no evidence that the 2002 permit exceeded federal requirements and Rancho Cucamonga [petitioner] does not explain now how it does so." *Id*. at 1386.

requirements as it "determines appropriate." Because there is no express preemption, if the preemption exists, it must be implied. The Board must therefore overcome the very strong presumption against preemption. 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 statutory scheme here elevates the State to the level of the "major" or primary governmental actor, wielding broad discretion, albeit subject to EPA review and veto power.

In light of the above, we respectfully urge the Board to reconsider the proposed permit requirements in light of the Section 13241 balancing factors. We believe that, after doing so, the Board will return with more appropriately *balanced* permit requirements.

II. Treatment Control BMP Requirements (§ D.1.d (6)(c)).

The 3rd Draft Permit reflects a proposed further change in the permit language concerning treatment control best management practice (BMP) requirements. Specifically, in the previous draft, the proposed language required treatment control BMPs to be located so as to "infiltrate, filter, or treat runoff prior to its discharge…." The 3rd Draft Permit's proposed language would instead require that all "treatment control BMPs must be located so as to ***remove*** pollutants from runoff prior to its discharge…." *See* 3rd Draft Permit, p. 29, § D.1.d (6)(c) (emphasis added).

The verb "remove" should be changed to "reduce," so as to avoid an suggestion of an extreme, absolute and unachievable permit requirement, and to comport with 33 U.S.C. section 1342(p)(3)(B)(iii). The latter federal statute provides that:

> B. Permits for discharges from municipal storm sewers –
>
> (iii) shall require controls to ***reduce*** the discharge of pollutants to the maximum extent practicable, including … such … provisions as the [EPA] Administrator or the State [as surrogate] determines appropriate for the control of such pollutants.

33 U.S.C. § 1342(p)(3)(B)(iii) (emphasis added).

The relevant federal statute therefore requires the Board to strike a reasonable balance in order to *reduce* the discharge of pollutants. Similarly, the Porter-Cologne Water Quality Control Act (in the preamble to Water Code section 13241) specifies that "it may be possible for the quality of water to be changed to some degree without unreasonably affecting beneficial uses." Therefore, any suggestion that the co-permittees must remove ***all*** pollutants is plainly inappropriate. Moreover, any such suggestion would be incompatible with at least two of the Section 13241 balancing factors. *See* Water Code § 13241(c) (requiring consideration of "[w]ater quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality"); and Water Code § 13241(d) (requiring consideration of economics).

Rather than leave the permit language indicating that the Board wishes to improperly impose an unmanageable burden, we respectfully ask that the word "remove" be changed to "reduce" – in accordance with both the federal statutory directive and the State enabling statute.

III. Onsite Hydromodification Control Waiver Provisions. (§ D.1.h (3)(c)(i)).

We are very concerned that the hydromodification waiver provision set forth in the 3rd Draft Permit, p. 36, as § D.1.h.(3)(c)(i) is problematic in several important ways. First, the proposed language would seemingly allow for a waiver from an absolute zero hydromodification requirement by looking myopically only at total impervious cover on a specific site – no matter how small the site, without regard to adjacent and surrounding lands and waters. Our previous comments explained at length that the better scientific understanding reflects an appreciation of the fact that questions of impervious cover and hydrology are best considered at a watershed scale. We ask the Board to expressly state in the eventual permit language that the co-permittees may make waivers to an absolute prohibition against "adverse physical changes to downstream stream channels" when a more circumspect analysis of the watershed indicates that the adverse physical changes to downstream stream channels would not rise to the level of environmental significance.

Second, the first sentence of the same waiver language refers only to "total impervious coverage" without sufficient allowance for "effective imperviousness" or "connected imperviousness." As we explained in our earlier comments and the attachments thereto, the gross measure of "total impervious coverage" is viewed by geo-technical scientists as a relatively poor measure for use in hydromodification analysis. Instead of using total impervious coverage, the Board should incorporate waiver language that defines "effective impervious" coverage (i.e., recognizing that impervious coverage can be rendered effectively pervious through disconnection and engineering) or "connected imperviousness" (i.e., roughly arriving at the same point).

We recognize and appreciate that the Board attempted to respond to our concerns about directly-connected impervious area and effective impervious area by adding what is now the last sentence of proposed section § D.1.h (3)(c)(i). However, that provision itself is problematic because it essentially constitutes an improper deferral and delegation of the Board's regulatory powers and responsibilities, as is discussed in the next section below.

Finally, in any event, the proposed wording in the last sentence of proposed section § D.1.h (3)(c)(i) needs to be changed to make it clear that the "increased by less than 5% in new developments" language applies to the total area of the site at issue. The 3rd Draft Permit now reads, in relevant part, that a waiver would be available for new developments only where the "total impervious cover … is increased by less than 5%...." This language suggests that there is some amount of *preexisting* total impervious cover (which may or may not exist naturally at a *new* development site – but presumably such imperviousness would cover far less than the entire site). The language then effectively limits the availability of the waiver to situations where that amount (i.e., the *preexisting* impervious cover) could be increased only less than 5%.

Therefore, even if the Board were to reject the first two comments above, the language should at least be changed to state something like this" "Waivers may be implemented in new developments ***where the total impervious cover being added would cover less than 5% of the site***." However, as indicated above, we believe that such language should be further amended to read: "Waivers may be implemented in new developments where the total ***connected*** impervious cover being added would cover less than 5% of the site, ***or where an analysis of the watershed or sub-region indicates that the hydromodification impacts of the project would be less than significant***." Such changes are needed to provide an appropriately balanced imposition on the co-permittees and their citizens, consistent with – for example – Calif. Water Code section 13241(e) (requiring consideration of the need for developing housing within the region).

IV. The Improper Delegation of Regulation to SCWRRP and others.

In at least two provisions, the Board proposes to delegate its regulatory authority and responsibility to the Southern California Coastal Water Research Project (SCWRRP) and others. First, in § D.1.h (3)(c)(i) of the 3rd Draft Permit, p. 36, the Board proposes to defer to future studies that might be supplied by the Storm Water Monitoring Coalition, SCWRRP, or to "other local studies," and – concerning "directly-connected" and "effective" impervious areas, to "hydromodification studies based in Southern California.

We appreciate that future analyses will often be crucial to proper determinations about land use planning and project design and approval. For example, the California Environmental Quality Act, Calif. Pub. Res. Code section 21000, *et seq*. (CEQA), can and will be utilized to require the study of the reasonably feasible mitigation of hydromodification impacts of plans and individual projects. One reason that our members can accept such CEQA processes is that, although the CEQA process is sometimes arduous and vexing, it provides project applicants with ample procedural due process – in the form of public hearings, a record of evidence, reviewable findings, and the like. In addition, the deferral of site-specific determinations about mitigation measures pursuant to mandatory CEQA analyses is consistent with an appropriately balanced level of imposition by the Board.

However, the Board should not adopt and incorporate into the pending permit future findings and conclusions arrived at by SCWRRP and others which do not provide for administrative due process. *See* Calif. Government Code § 11425.10 (California's Administrative Adjudicative Bill of Rights). The 3rd Draft Permit proposes to do so. Specifically, both the second sentence of Section D.1.h (3)(c)(i) of the 3rd Draft Permit, p. 36, and the second sentence of Section D.1.h (4), at p. 37, would effective allow any relevant conclusion drawn by SCWRRP in the future to suddenly spring into effect by operation of the MS4 permit, without any opportunity for public comment, administrative due process, etc.

We also believe that this extreme and uncritical level of abrogation of regulatory authority is inconsistent with the State enabling statutes (particularly Water Code sections 13263 and 13241), which require the Board to establish waste discharge requirements, and the federal responsibility to "require controls to reduce the discharge of pollutants to the maximum extent

practicable, including … such … provisions as the Administrator or the State [here, the Board] determines appropriate." 33 U.S.C. § 1342(p)(3)(B)(iii).

V. Advanced Treatment System Provisions.

BIA/OC and BILD again urge the Board to modify portions of the 3rd Draft Permit, Section D.2.d (1)(c)(i), p. 43, concerning best management practice (BMP) implementation, for two reasons:

1. The specific risk factors set forth within Section D.2.d (1)(c)(i), 3rd Draft Permit, p. 43, will potentially conflict with a site risk assessment process that – we believe – is likely to be contained in the forthcoming California General Construction Permit (CGP) for stormwater discharges. Accordingly, the Board should consider including language that would effectively defer to any future CGP provisions concerning the appropriateness of applying an advanced treatment system (ATS).

2. The proposed permit conditions fail to mandate explicitly the consideration of certain critical factors when determining whether an ATS is an appropriate construction site BMP. Specifically, there are problematic omissions in the list of relevant factors that should be considered when a co-permittee is contemplating requiring the use ATS to control construction site sediment runoff. *See* § D.2.d (1)(c)(i)[h]. Of particular concern is the fact that there are no references to the need to consider both (i) the potential toxic impacts of ATS, and (ii) the natural variability of background concentrations and loads of sediment within the receiving water body. Not only are these criteria omissions problematic in their own right, they also will likely set up a conflict with the pending CGP, which (we understand) will likely have a more complete list of criteria.

Regarding the first aspect, we are informed that the State Water Resources Control Board (SWRCB) is planning to include in the pending draft CGP a process for determining the relative risk of sediment runoff from construction sites. As we understand it, the proposed process will utilize a two-step approach whereby site-specific factors indicating potential pollution risk (i.e., utilizing a modified MUSLE approach) are integrated with relevant information concerning the receiving water's location, condition and susceptibility to change (SWRCB, 2007). When combined, the site-specific and receiving water factors will be integrated, using a matrix scoring system, to determine a relative site risk (low, standard, or high risk). Then, based on the specific characteristics of the construction site, ATS may be used as one or a number of standard or enhanced BMPs to control the amount of sediment that is discharged from a construction site regardless of risk.

Therefore, we recommend that the MS4 permit should include language to assure that any ATS ascertainment process specified in a newly promulgated CGP will supersede and supplant any conflicting provisions in the MS4 permit. For example, the permit section at issue, D.2.d (1)(c)(i), might begin with a sentence such as follows: "Unless and until the State Water Resources Control Board promulgates construction general permit requirements concerning the

assessment and potential utilization of advanced treatment systems at construction sites, the following provisions shall apply to the Copermittees."

Regarding the second concern, if the Board chooses to mandate that co-permittees must require the use of ATS when an exceptional threat to water quality exists, then we urge the explicit listing of additional factors for consideration which, where they are of significant weight, could indicate the *impropriety* of using ATS. Specifically, we believe that that certain potentially *negative* factors, such as potential toxicity, certainly should be given consideration when determining ATS suitability. We have pointed out these considerations to the Board in our previous comments on April 4, and August 22, 2007; and the SWRCB has issued similar warnings in the Blue Ribbon Panel Report (July 2006), which stated that focused research into system performance is still needed before ATS is implemented widely at construction sites.

In our previous comments (including those of CICWQ), we discussed the many technical issues that remain unresolved concerning the potential implementation of ATS for construction sites. These concerns include potential adverse water quality and biological impacts due to the toxicity of ATS discharges, adverse hydromodification and biological impacts due to ATS discharges that deprive alluvial systems of natural and ecologically beneficial sediment loads, the infeasibility of operating an ATS at some construction sites, and unclear and unavailable cost information. In addition, the findings and recommendations of the Blue Ribbon Report set forth at least five prerequisite studies and conditions that need to precede imposition of ATS to control construction site runoff, including consideration of issues about toxicity associated with active treatment systems, issues associated with long-term use of chemicals, and consideration of runoff flow and peak volume (e.g., a design storm) in establishing design and performance parameters.

Because of our prior comments about such concerns, we were disappointed to see a short and entirely one-sided list of factors that the Board would require to be considered when a co-permittee contemplates imposing ATS requirements at construction sites. Therefore, we are compelled once again to bring to your attention important and relevant scientific findings on the nature of receiving waters in California and the potential toxic effects of using ATS systems. We realize that the proposed permit language includes a catch-all factor: "any other relevant factors." However, we believe that this catch-all provision fails to indicate sufficiently the importance of the potential negative factors that should be considered. Therefore, we respectfully ask that you add to the list (above the catch-all provision) two additional factors for consideration: (i) the potential toxicity of ATS in light of site-specific characteristics, and (ii) the approximate degree to which ATS would result in deviation from the background natural loading of sediment to receiving waters.

These critical factors should be specified in any list of considerations used to determine whether ATS is appropriate to impose, because their listing would assure appropriate focus on how the ATS could negatively impact the environment. For sediment control, all BMPs need to achieve a level of performance relative to the natural background conditions of the receiving water. For aquatic resource protection, BMPs need to be tailored to the sensitivity of the resource. It is therefore unreasonable to encourage the *uncritical* use of a potentially harmful BMP such as ATS, when the reason ATS might be appropriately required is to achieve some

level of sediment reduction to protect a resource. The Board should not invite co-permittees to ignore nature or the potential side-effects ATS implementation.

The extreme variability of natural loads and concentration of sediment cannot be ignored when establishing the level of construction site BMP performance, including whether or not ATS is an appropriate BMP. Recent work by SCCWRP has pointed out the extreme variability that exists in natural, undeveloped watersheds with respect to sediment loads and concentrations (Stein and Soon, 2007).[8] Natural sediment concentrations during storm events have been measured as high as 103,000 mg L^{-1} and some streams can export huge amounts of sediment on an annual basis depending on watershed location and hydrology (e.g. Sespi Creek, Ventura County). Moreover, the work of Yoon (2006), Ackerman and Schiff (2003), and Inman and Jenkins (1999), clearly establish the wide range of sediment concentrations and sediment loads that exist in natural and urbanized watersheds in southern California. All of this data, recent and historical, points to the need to apply ATS as a construction site BMP cautiously, and to use it in only in the most extreme circumstances where very low sediment discharge is the natural background condition during storms.

As the principal stakeholder responsible for implementation of Section D.2 (Construction Component), we are extremely concerned about the potential effects of ATS discharges on sensitive aquatic resources when the principal goal of Section D.2.d (1)(c) is the very protection of those aquatic resources within watersheds containing 303(d) listed water bodies for sediment or ecologically sensitive areas. Clearly, extreme care must be exercised when using ATS systems; and it is therefore unwise to mandate that co-permittees consider requiring the use of ATS without expressly requiring consideration of the nature of the receiving water (chemical and biological).

We have twice submitted detailed comments on the topic of ATS toxicity, and will not repeat that entire discussion here. However, we are disappointed that none of our suggestions were embraced and reflected in the 3rd Draft Permit. We must emphasize to the Board the potentially toxic nature of some ATS discharges due to the polymers used and dosage rates as established in the scientific literature (Liber et. al. 2005; Bullock et. al. 2000). Moreover, the Board and staff should know that the SWRCB is establishing a process to determine the operating requirements for ATS systems, including the performance of toxicity testing necessary to operate an ATS system. Thus, we are seriously concerned that the Board is moving in a direction that is: (i) likely to be inconsistent with that of the SWRCB, and (ii) does not emphasize the key technical considerations that can and should appropriately moderate the use of ATS.

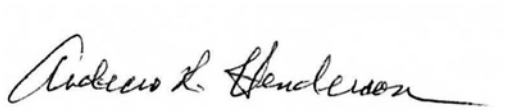
//

//

[8] This scientific study and the others cited in the remainder of the text above have been lodged with the Board by CICWQ under a separate cover letter.

Thank you, the Board, and the staff for the opportunity to provide these comments. Thank you all for the great effort and thought that is apparent in the 3rd Draft Permit. We hope that these further comments are well received, and will result in appropriate changes to the permit before its issuance. Most especially, we look forward to working with the Board and staff going forward.

Respectfully,



Andrew R. Henderson
General Counsel
Building Industry Legal Defense Foundation

cc: Jeremy Haas (via electronic mail)
David C. Smith, Esq.
Richard J. Lambros
Kristine Thalman
Mark Grey, Ph.D.
Mary Lynn Coffee, Esq.