STATEWIDE STORMWATER COALITION

December 17, 2012

Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
1001 I Street 24th Floor
Sacramento, CA 95814

RE: COMMENT LETTER – REVISED DRAFT PHASE II SMALL MS4 PERMIT

Dear Ms. Townsend:

On behalf of forty-seven statewide entities and public agency members of the Statewide Stormwater Coalition (Coalition), we hereby submit comments to the revised draft of the Phase II Permit for small Municipal Separate Storm Sewer Systems (MS4s).

The Coalition appreciates many of the revisions made to the revised Phase II permit, especially those revisions which better balance implementation timelines and streamline annual reporting requirements. However, important issues still need to be addressed.

Best Best & Krieger has submitted a separate letter (**Attachment A)** detailing legal concerns with portions of the revised draft. The California Stormwater Quality Association (CASQA) has provided comments separately on technical issues needing resolution. The Coalition joins in these comments.

While the Coalition continues to have concerns with the cost of compliance, its members recognize the ongoing efforts of the State Water Resources Control Board (State Water Board) to evaluate costs through its resource alignment project.

The Coalition's number one concern: Inappropriate Use of Permit and Excessive Standards for Region 3 MS4s

The Central Coast MS4s have been "carved-out" and are required to implement post-construction standards that exceed those required for other permittees, and in fact even exceed the requirements of Phase 1 permittees. This "carve-out" is inappropriate given the nature of a general permit which is to be

one permit of general application. The inclusion of the Region 3, Joint Effort Post-Construction Requirements in the permit (Attachment J) and the inclusion of the statement on page 39 of the Fact Sheet, footnote 31, appear to make an end-run around the due process rights of the three Regional 3 cities that have recently petitioned the State Water Board on these requirements. The State Water Board should evaluate these petitions in separate quasi-judicial hearings, as the petitions address the basis and appropriateness of regulations imposed without adequate time for review or public comment.

With respect to the Attachment J standards, the necessity of retaining and infiltrating more than the 85th percentile, 24-hour storm is not clear. While the 95th percentile storm is used on federal projects, federal regulations provide an alternative in cases where less than the 95th percentile storm can be shown to represent the undeveloped infiltration capacity of the land. This alternative has not been incorporated into the requirements found in Attachment J. Additionally, application of the multiplier 1.963 to both the Water Quality 85th percentile treatment requirement and the 95th/85th percentile infiltration requirement is excessive and should be evaluated prior to adoption of this permit by the State Water Board. Comments from CASQA to the Central Coast Regional Water Quality Control Board (dated July 6, 2012 and included as **Attachment B** to this letter) concerning the Central Coast specific post-construction standards related to the 95th percentile event state that the requirement is *"unreasonable, infeasible for many projects, has no demonstrated additional environmental benefit, and are not cost-effective."*

Developers will likely abandon efforts to create infill and smart growth projects in existing urbanized areas where it appears that retention measures must cover at least 10% of a project's Equivalent Impervious Surface Area, in favor of new development projects in rural areas outside of designated MS4s where these requirements do not apply. The loss of agricultural lands and open space, and resulting sprawl development, could easily negate any hoped-for water quality benefit. We recommend Attachment J be removed from the permit and Region 3 MS4s be allowed to implement the Post-Construction Provisions (E.12).

The Coalition's number two concern: Reluctance to Provide Compliance Pathway for MS4s

The revised permit added reopener language to address compliance with water quality standards in the receiving water or other provisions addressing an iterative process. The Coalition continues to urge the State Water Board revise the Receiving Water Limitations language and set forth clear processes for agencies to maintain permit compliance through an iterative process. This issue is further elaborated upon in Attachment A.

The Coalition's number three concern: Unrealistic Education Expectations

The revised permit requires use of "environmental and place-based, experiential learning" to educate school-aged children. Examples include the Splash (www.sacsplash.org) or the Effie Yeaw Nature Center (www.sacnaturecenter.net). These types of programs are

managed and directed by a non-profit organization not affiliated with a permittee. It is unclear how permittees are to show educational compliance through organizations they do not manage and over which they have not control. While these programs are an educational asset to the local community they serve, these programs may only have an indirect connection to stormwater quality education, at best. For example the Effie Yeaw Nature Center's mission statement is as follows:

> *"The American River Natural History Association (ARNHA) and the Effie Yeaw Nature Center are dedicated to bringing awareness of the beauty and diversity of the natural world to children, families, and the community through education initiatives that foster appreciation, enjoyment, and stewardship of the unique natural and cultural resources for the Sacramento region"*

Nowhere on the Effie Yeaw Nature Center website are there any indications of clear or direct connections to stormwater quality issues. Supporting programs that are not directly linked to stormwater quality and the local permittee's community do not appear to be an effective use of program funds.

The permit further indicates that if this kind of local learning program does not exist, it is suggested the permittee use the "California Education and Environmental Initiative Curriculum (www.californiaeei.org) or equivalent. The CEEI curriculum is geared for teachers and not for stormwater program managers. Accessing the curriculum through the website requires information from teachers such as grade currently teaching, school name, district name etc. As documented in past comment letters on this topic, local stormwater program managers have limited, if any, ability to impact school curriculum even if curriculum material is made available.

The Coalition's number four concern: Ambiguous or Inconsistent Requirements

While improved over the last version, the revised permit continues to include ambiguous, inconsistent or illogical requirements. Following are specific items of the permit needing clarification or correction.

- Section A of the Order requires a renewal permittee to file a Notice of Intent (NOI) and pay its annual stormwater fee to the State Water Board. The permit does not state when the NOI and fees must be submitted for renewal permittees. Is one to assume the NOI and fees must be paid by renewal permittees within six months of the General Permit effective date as this is the requirement set forth for new permittees? The ambiguity improperly burdens permittees with the additional risk inherent in having to act on inferences and assumptions.

- It is unclear what the "effective date" of the permit will be. Attachment I, Glossary, includes a definition for "Permit Effective Date" and states, "The date at least 50 days after General Permit adoption, provided the Regional Administrator of U.S. EPA Region 9 has no objection." Are permittees to assume the effective date will

be 50 days (are these calendar days?) from the State Water Board Hearing where the permit is adopted? If not, how will permittees be notified as to the "effective date" of the permit? Many requirements within the permit are tied to this date.

- Section E.6.b (ii) (e) requires a permittee to certify within the first year that it will implement enforcement actions consistent with the Enforcement Response Plan (ERP) developed according to Section E.6.c. However the ERP is not required until the third year. How is a permittee to certify implementation of a document that does not yet exist? Why is this particular certification even necessary?

- Section E.7 states "The Regional Board Executive Officer shall notify Permittees within three months of the permit adoption date…" It appears compliance timelines within the permit are tied to the permit effective date. Why is this tied to the permit adoption date? Additional confusion and difficulty with compliance are likely to result.

We appreciate the opportunity to comment and for all of the reasons detailed in the Best, Best & Krieger letter, as well as these additional practical considerations, the State Water Board should:

- Remove Attachment J and allow Central Coast MS4s to comply with the general order post-construction standards;

- Revise Receiving Water Limitations language prior to permit adoption rather than including a reopener to address the topic at some unknown time in the future;

- Revise the educational requirements to match those previously included in the 2nd draft of the permit;

- Revise language to clear up ambiguous or inconsistent requirements as detailed in this letter and within Attachment A.

Sincerely,

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Attachment A - Letter from Best Best & Krieger
Attachment B – CASQA Comment Letter

cc:
Governor Jerry Brown
Matt Rodriquez, Cal EPA Secretary

State Senator Anthony Cannella
State Senator Noreen Evans
State Senator Ted Gaines

State Senator Hannah-Beth Jackson
State Senator Cathleen Galgiani
State Senator Ricardo Lara
State Senator Bill Monning
State Senator Curran Price
State Senator Lois Wolk
State Senator Leland Yee

Assembly Member Katcho Achadjian
Assembly Member Luis Alejo
Assembly Member Franklin Bigelow
Assembly Member Wes Chesbro
Assembly Member Brian Dahle
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Assembly Member Adam Gray
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December 17, 2012

VIA E-MAIL [COMMENTLETTERS@WATERBOARDS.CA.GOV]

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State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814

Re: Comment Letter - Revised Draft Phase II Small MS4 Permit

Dear Ms. Townsend:

Best Best & Krieger LLP ("BBK") has been retained by the City of Roseville ("City") to provide legal comments on the revisions to both the Revised Draft Phase II Small MS4 Permit ("Draft Permit") and the Draft Fact Sheet for the Draft Permit ("Draft Fact Sheet") made since May 21, 2012. These comments support and supplement other comments made by the City, and this letter is submitted as an attachment in support of the comments of the Statewide Stormwater Coalition ("SSC"), a group in which the City is an active member.

In accordance with the Revised Notice of Opportunity to Comment, these comments only address revisions to the Draft Permit and Draft Fact Sheet made since May 21, 2012. Each comment is linked to the specific revision in question by a reference to the applicable section and page number of the Draft Permit or Draft Fact Sheet. The Draft Permit contains many revisions that were requested in our comment letter of July 19, 2012, and we thank the State Board staff for making those changes. The remainder of this letter focuses on issues of concern with other revisions to the Draft Permit and Draft Fact Sheet.

I.
Summary of Key Issues

Sections II and III of this letter provide detailed comments on specific revisions to the Draft Permit and Draft Fact Sheet, and set forth proposed changes that we believe would make the Draft Permit and Draft Fact Sheet clearer and easier to implement. This Section I of the letter summarizes more broadly the key areas of concern that remain regarding the Draft Permit and Draft Fact Sheet. These key areas of concern may be organized into the four categories discussed below.

1. **The Draft Permit's Reopener and the Draft Fact Sheet's Revised Discussion of the Receiving Water Limitations Language.**

The City and the SSC have commented throughout the Phase II permit development process on the need for the State Board to address the receiving water limitations language found in Section D, pages 19-20 of the Draft Permit. The City and the SSC appreciate the State Board's recent workshop on the matter and look forward to a State Board resolution of this issue of vital statewide importance. Because of the significance of the receiving water limitations language, we have concerns about both the permit reopener language in Section I, page 140 of the Draft Permit and the discussion of the issue in Section XI, pages 25-26 of the Draft Fact Sheet.

First, rather than include the reopener that is contained in Section I, page 140 of the Draft Permit, the State Board should address the issue now before adopting the final Permit. As Permittees move forward with implementation of the final Permit, they need regulatory certainty about Permit compliance. In light of the uncertainty surrounding the State Board's Orders WQ 99-05 and 2001-15 and the recent 9th Circuit decision, resolving this issue before adoption of the final Permit would provide needed regulatory certainty. The reopener only creates more uncertainty, both by allowing the current language to remain unaddressed and by putting in place a process that might reopen the new Permit on this crucial issue soon after Permit adoption. This approach simply defers resolution of this key issue.

Second, Section XI, pages 25-26 of the Draft Fact Sheet adds unnecessary language that conflicts with the reopener concept and with the State Board's ongoing consideration of the receiving water limitations language. Of particular concern is the sentence that reads as follows: "The Ninth Circuit holding is consistent with the position of the State Water Board and Regional Water Boards that exceedances of water quality standards in an MS4 permit constitute violations of permit terms subject to enforcement by the Boards or through a citizen suit." This sentence is inconsistent with the language of State Board Order WQ 2001-15, which makes clear that the State Board's precedential language "does not require strict compliance with water quality standards" and that compliance is to be "achieved over time, through an iterative approach requiring improved BMPs." Notably, the Draft Fact Sheet does not even mention Order 2001-15, even though Order 2001-15 is the State Board's last official policy statement on the issue.

The revised discussion of the receiving water limitation language in the Draft Fact Sheet is also inconsistent with the undeniable reality, as reflected in multiple TMDL implementation plans for a wide variety of pollutants, that compliance with many water quality standards will take time, as much as twenty years in some cases. Given the ongoing State Board process to consider the receiving water limitations language, the State Board should not include

policy statements on the issue in the Draft Fact Sheet. If the State Board does not address the issue before Permit adoption, the Draft Fact Sheet need only say that the receiving water limitations language in the Draft Permit is based on State Board Order WQ 99-05, and note that the State Board is currently engaged in a process to consider whether that precedential language needs to be updated.

For these reasons, the State Board should delete the new reopener related to the receiving water limitations language and address the issue now. At a minimum, the State Board should instruct staff to eliminate the language in the Draft Fact Sheet that "prejudges" the issue and prevents the State Board from continuing to have an open and productive dialogue on the need for regulatory certainty regarding compliance with water quality standards in MS4 permits.

2. Inclusion of the Central Coast Region's Post-Construction Requirements.

State Board staff has revised Section E.12.j (page 82) of the Draft Permit and has added Attachment J to the Draft Permit with the stated intention of having the State Board adopt, as part of the Permit, the Post-Construction Stormwater Management Requirements for Development Projects in the Central Coast Region ("Post-Construction Requirements"). The import of the State Board's proposed adoption of the Post-Construction Requirements is further explained on page 39 of the Draft Fact Sheet, especially in footnote 31. These revisions to the Draft Permit and Draft Fact Sheet raise significant issues of concern.

First, in addition to the many technical problems with Attachment J itself, which are fully explained in the CASQA comment letter, the State Board's adoption of Attachment J creates procedural concerns. Many stakeholders in the Central Coast Region supported the process leading up to the development of the Post-Construction Requirements, but objected to the final document, particularly to key portions that were added late in the process, without an opportunity for meaningful public comment. To adopt these requirements itself, the State Board must rehear all of these issues and cannot simply adopt the Post-Construction Requirements on its own as part of the Phase II Permit, without a much larger public process and defensible record.

In addition, if the State Board were to adopt the Post-Construction Requirements as its own, amendments at the Regional Board level would be prohibited, and needed corrections or refinements of the document would thereby be precluded. The State Board would have to amend the document. This approach might lead to different versions of the Post-Construction Requirements being used. In fact, we are informed and believe that the language in Attachment J does not accurately reflect the language of the document actually being used by the Central

Coast Regional Board, because the Central Coast Regional Board staff has already discovered and made needed corrections to the document.

To avoid all of these issues, a better approach would be to eliminate the express "carve out" for the Central Coast Region, and merely adopt the other post-construction requirements already contained in the Draft Permit. The Central Coast Regional Board could use its own authority and other language in the Draft Permit to decide how it will implement its recently adopted Post-Construction Requirements.

Second, the concerns expressed above are compounded by the discussion of the issue contained on page 39 of the Draft Fact Sheet, especially footnote 31. Among other things, footnote 31 purports, through this permitting action, to reject an entirely separate quasi-judicial petition process that some of the Central Coast Permittees have commenced to challenge the Post-Construction Requirements. Moreover, the footnote expresses an intent to apply the Post-Construction Requirements in the future to the "remainder of the State." Given the large diversity of watersheds and corresponding watershed processes in the State, such an approach is not warranted.

For these reasons, the State Board should not incorporate the Post-Construction Requirements or include the Central Coast Region "carve-out". In addition, the State Board should delete the discussion of the issue in the Draft Fact Sheet, especially footnote 31.

3. Role of Regional Board Executive Officers.

Revisions to Section E.1.b on pages 20 and 21 and Section E.7 on page 28 of the Draft Permit attempt to establish procedural constraints on the unilateral power of a Regional Board Executive Officer ("EO") to compel deviations from the uniform standards of the Permit. Specifically, the revisions to Section E.1.b establish a process for the compelled continuation of existing SWMPs and the revisions to Section E.7 now require an EO to at least provide a "statement of reasons" when implementation of Community-Based Social Marketing ("CBSM") is compelled. Although these revisions provide better guidance on how the EO's unilateral power may be exercised, they underscore the basic problem with this unilateral approach. Continuation of existing SWMPs should be elective to the Permittee, subject to Regional Board EO review and approval. The authority to compel use of CBSM should be deleted.

For these reasons, the State Board should amend Section E.1.b to make continuation of existing SWMPs elective to the Permittee, subject to Regional Board EO review and approval, and should delete the reference to CBSM in Section E.7.

4. Dispute Resolution Process.

Section H on pages 139-140 of the Draft Permit adds a new dispute resolution process. This informal administrative review process may be useful to both Permittees and the Water Boards in efficiently resolving disputes in a voluntary fashion. As noted on page 17 of the Draft Fact Sheet, this informal review process might also provide some level of statewide consistency to the interpretation of the Permit. However, both Section H of the Draft Permit and page 17 of the Draft Fact Sheet need to be further revised to acknowledge that participation in this dispute resolution process would be voluntary and that the process is not, and cannot be, a replacement for the right to petition provided in Water Code section 13320. To the extent a Permittee has a legal right to challenge an action of the Regional Board or an action of a Regional Board EO, the State Board cannot deprive a Permittee of that right merely by including this new dispute resolution process in the Draft Permit. Of course, the State Board cannot amend the Water Code.

For these reasons, Section H on pages 139-140 of the Draft Permit and page 17 of the Draft Fact Sheet should be revised to acknowledge that the dispute resolution process is voluntary and does not negate the rights of a Permittee to use the formal petition process found in Water Code section 13320.

II.
Specific Comments on the Revisions to the Draft Permit

As stated in our July 19, 2012 letter, the final Permit must be drafted with the legal precision of a contract and with the understanding that all permit conditions are legally enforceable.[1] Many of the revisions to the Draft Permit honor these key principles and have made the Draft Permit more precise and more understandable. However, we have the following remaining specific comments on certain other revisions to the Draft Permit:

1. Finding 31 (Page 10).

Finding 31 has been revised to refer to the power of a Regional Board EO to compel a Permittee to continue its existing SWMP. For the reasons expressed in Section I.3 of this letter, the revisions to Finding 31 should be deleted or revised to make the continuation of a SWMP elective to the Permittee, subject to Regional Board EO review and approval.

[1] See Russian River Watershed Protection Comm. v. City of Santa Rosa (9th Cir. 1998) 142 F.3d 1136, 1141 and Nw. Envtl. Advocates v. City of Portland (9th Cir. 1995) 56 F.3d 979, 986.)

2. **Finding 38 (Page 11).**

Finding 38 has been revised to add references to the November 20, 2012 workshop on receiving water limitations and the addition of the Section I reopener. For the reasons expressed in Section I.1 of this letter, these revisions to Finding 38 should be deleted and the State Board should address the receiving water limitations language before adoption of the Permit.

3. **Finding 39 (Page 11).**

Finding 39 has been revised to explain how the Draft Permit addresses the requirement of Section 402(p)(3)(B)(ii) of the Clean Water Act that all MS4 permits "include a requirement to effectively prohibit non-stormwater discharges *into* the storm sewers . . . ." (Emphasis added.) Most notably, Finding 39 states that the Draft Permit "effectively prohibits non-storm water discharges *through* an MS4 into waters of the U.S." (Emphasis added.) The Draft Fact Sheet, on page 23, explains that State Board staff recommends the use of the word "through" rather than the word "into" as used in the Clean Water Act because staff believes that the word "allows the Permittees greater flexibility with regard to utilizing dry weather diversions."

State Board staff's attempt to allow for flexibility regarding dry weather diversions is appreciated. However, it is recommended that the Draft Permit use the express words required by the Clean Water Act. The Clean Water Act requires that MS4 permits include a requirement to effectively prohibit non-stormwater discharges *into* (not *through*) the storm sewers. Using a word different than required by the Act creates ambiguity and may be interpreted to broaden the "effectively prohibit" requirement. State Board staff could address any concerns about dry weather diversions by adding express language in the Draft Permit that non-storm water discharges into the MS4 that are diverted to the sanitary sewer system are not prohibited. This would be a better approach to addressing any concerns about dry weather diversions without creating ambiguity or deviating from the express language of the Clean Water Act.

4. **Finding 42 (Page 12).**

Finding 42 has been revised to explain that the State Board will, during the Permit term, delineate watershed management zones, develop watershed process-based criteria and consider reopening the Permit to incorporate those watershed process-based criteria in the future. Finding 42 then explains that Regional Boards which already have approved watershed process-based criteria will be permitted to continue requiring Permittees to implement those criteria. This part of Finding 42 does not appear to accurately reflect how the Draft Permit handles and

attempts to adopt the Central Coast's Post-Construction Requirements. As explained in Section I.2 of this letter, by adopting the Central Coast's Post-Construction Requirements as State Board requirements, the State Board would be committing itself to specific and unique watershed process-based criteria that it did not develop. Not only would this restrict the State Board's consideration of the issue but it would also limit the ability of the Central Coast to amend or refine the Post-Construction Requirements. To avoid both of these results, the State Board should delete the Central Coast "carve out" and should not adopt the Post-Construction Requirements as its own.

5. A.1.a (Page 15).

Section A.1.a has been revised to provide that Renewal Permittees must electronically file an NOI via SMARTS and pay the appropriate application fee to the State Board. It is recommended that Section A.1.a include a specific date or time period in which Renewal Permittees must take these actions.

6. B.3 (Page 17).

Section B.3 has been revised to provide that discharges "through the MS4" shall be effectively prohibited. For the reasons explained in Section II.3 of this letter in connection with Finding 39, please use the word "into" rather than the word "through." To address the dry weather diversion issue, please expressly provide in Section B.3 that dry weather diversions do not violation the "effectively prohibit" requirement.

7. B.4 (Page 18).

Section B.4 has been revised to attempt to clarify both what constitutes incidental runoff which, if controlled, is not prohibited non-stormwater and what constitutes prohibited excess runoff. However, the revisions to Section B.4 are ambiguous. Section B.4 provides that discharges "in excess of an amount deemed to be incidental" shall be controlled. But Section B.4 also provides that non-storm water runoff discharge that is not incidental (that is, which is "excess" runoff) is prohibited. These two provisions create an ambiguity about whether "excess" runoff is permitted, subject to controls, or is prohibited. The first part of Section B.4 suggests the former but the second part of Section B.4 states the latter.

A similar ambiguity exists regarding what runoff is subject to the controls described in Sections B.4.a-d. Section B.4 first provides that Permittees must require parties responsible for the runoff to control the "incidental runoff" by taking the steps outlined in Sections B.4.a-d. It then provides that parties responsible for controlling "runoff in excess of incidental runoff" shall take the steps described in Sections B.4.a-d. These two provisions create

an ambiguity about whether the steps described in Sections B.4.a-d address incidental runoff or excess runoff and whether taking the steps outlined in Section B.4.a-d makes the runoff excusable.

These ambiguities should be clarified. What the ambiguities reveal is that a better approach to irrigation runoff would be to allow the Permittees to address controls on such non-stormwater in their own ways within the context of their own programs.

8. E.1.b (Page 20).

Section E.1.b adds new procedures that must be followed when a Regional Board EO unilaterally compels a Permittee to continue its SWMP. For the reasons expressed in Section I.3 of this letter, these new procedures should only apply when the Permittee requests to continue its SWMP.

9. E.6.a.(ii).(a) (Page 23).

Section E.6.a.(ii).(a) has been revised to delete the words "and eliminate" and to add the word "through" regarding the need for legal authority to implement the "effectively prohibit" requirement. The deletion of the words "and eliminate" is appreciated. For the reasons expressed in Section II.3 of this letter regarding Finding 39, the word "through" should be replaced with the word "into" as provided in the Clean Water Act. In addition, please insert the word "effectively" before the first word "prohibit" in this provision.

10. E.6.b.(i) (Page 25).

Section E.6.b.(i) has been revised to require a certification of legal authority within the first year of the Permit. This revision appears to create ambiguities because certain aspects of the required legal authority are not required until later in the Permit cycle. These timing ambiguities should be addressed. While Renewal Traditional MS4s likely have sufficient existing legal authority to implement many of the requirements of the Permit, New Traditional MS4s will not immediately have that authority in many cases. More time should be provided to make the required certification or the certification requirement should be restated so that the Permittee certifies that it has, or will have when required, and will maintain, full legal authority to implement and enforce the requirements of the Permit.

11. E.7 (Page 28).

Section E.7 has been revised to require a Regional Board EO to provide a "statement of reasons" why a Permittee must implement Community-Based Social Marketing

("CBSM") and further revised to provide that such a decision may be reviewed by the State Board EO upon a request of the Permittee. For the reasons explained in Section I.3 of this letter, these revisions should be deleted along with any reference to the CBSM approach.

12. E.7.a.(ii).(j) (Page 30).

Section E.7.a.(ii).(j) has been revised to require Permittees to "effectively educate school-age children about storm water runoff and how they can help protect water quality habitat in their local watershed(s)." Traditional MS4s are not responsible for education of school-age children; education of school-age children is in obligation of the State. It is not appropriate to push the education of school-age children onto Traditional MS4s, especially because the State Board has elected to exempt school districts from the Permit. It may very well be that Permittees decide that such education is an important part of their programs, but that decision should be left to the Permittees.

13. E.7.b.2.(a).(ii).(a) and (b) (Pages 32-33).

Section E.7.b.2.(a).(ii).(a) and (b) has been revised to clarify the requirement to have both a QSD and a QSP on staff. The added language that a "designated person on staff" who possesses the required credential(s) provides some needed flexibility to Permittees. However, particularly as it relates to New Traditional MS4s, these requirements may still be a large burden on many Permittees. The State Board should consider including an exemption for certain Permittees, especially New Traditional MS4s.

14. Sections E.9.a and E.9.c (Pages 36-41).

Sections E.9.a and E.9.c have been revised to clarify outfall mapping requirements and outfall field sampling obligations. These revisions and all other requirements of the Draft Permit that are linked to the term "outfall" should be reconsidered in light of the new definition of "outfall" contained in Attachment I, which is based on the definition contained in 40 CFR 122.26(b)(9). The newly added definition makes an "outfall" any "point source". This new definition, if directly applied to Section E.9.a and E.9.c, could dramatically expand the Permit's obligations. Having to map and sample "any discernible, confined, and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, vessel or other floating craft from which pollutant are or may be discharged" at the point where the MS4 discharges to waters of the United States might be an impossible task. It is recommended that a more reasonable definition of outfall, based on pipe size, be used in Sections E.9.a, E.9.c and other related provisions of the Permit.

15. Section E.9.b.(ii).(e) (Page 39).

Section E.9.b.(ii).(e) on page 39 has been revised to add back into the Draft Permit a form of industrial and commercial inspection program. The revisions would require Permittees to inspect certain designated industrial and commercial facilities at least once during the Permit term. These revisions should be deleted from the Draft Permit. Indeed, the Draft Fact Sheet represents on page 11 that the industrial and commercial inspection program has been deleted from the Draft Permit to reduce costs. Such a program, even in this revised form, should not be added back into the Draft Permit.

16. Section E.10.c.(ii) (Page 47).

Section E.10.c.(ii) on page 47 has been revised to insert certain "recommended" construction inspection frequencies. To avoid ambiguity about the enforceable requirements of the Draft Permit, these "recommended" inspection frequencies should be deleted. This would be consistent with the statement on page 11 of the Draft Fact Sheet that the "mandatory" construction inspection frequencies have been deleted from the Permit. If the State Board believes that it is important to provide a "recommendation" about when inspections should occur, it should include those "recommendations" in the Fact Sheet or other guidance document, not in the Permit itself.

17. E.11.j.(ii).(b).(2).(h) (Page 58).

Section E.11.j.(ii).(b).(2).(h) has been revised to require that Permittees prohibit application of pesticides, herbicides and fertilizers "as required by the regulations recently enacted by the Department of Pesticide Regulation." This added phrase is ambiguous. It could be interpreted to refer to specific regulations adopted near the time the State Board adopts the Permit or it could impose a continuing obligation on Permittees. Please clarify this ambiguity.

18. E.12.g.(i) and (ii).(a) (Pages 74-75).

Sections E.12.g.(i) and (ii) have been revised to require an O&M Verification Program for certain "Regulated Project greater than 5,000 square feet." This creates a potential ambiguity because Section E.12.c.(ii) of the Draft Permit defines "Regulated Projects" to mean "all projects that create and/or replace 5,000 square feet or more of impervious surface." Because the term "Regulated Projects" is defined as projects that create and/or replace 5,000 square feet or more of impervious surface, it is unclear why the phrase "Regulated Project greater than 5,000 square feet" is used, since all Regulated Projects should have that minimum impervious surface size. To avoid the implication that there are Regulated Projects less than

5,000 square feet in size, it is recommended that the defined term "Regulated Project" be used consistently.

19. E.12.i.(i) (Page 79-80).

Section E.12.i.(i) has been revised to, at least in part, better recognize that planning and land use are a municipal function within the discretion of municipalities, subject to applicable law. However, Section E.12.i.(i) uses the term "landscape code", which is not necessarily a uniform "term of art" that all Permittees follow. The State Board may wish to clarify this term so the scope of the related requirements is clear.

20. E.12.j (Page 82).

Section E.12.j has been revised to incorporate new Attachment J and thereby adopt the Post-Construction Requirements of the Central Coast. For the reasons stated in Section I.2 of this letter, these revisions, as well as the entire Section E.12.j and Attachment J, should be deleted.

21. E.13.(1)-(4) (Pages 82-83).

Section E.13.(1)-(4) has been revised to attempt to clarify monitoring requirements. Specifically, the following new sentence has been added: "Traditional Small MS4 Permittees that are already conducting monitoring of discharges to ASBS, TMDL *and* 303(d) impaired water bodies are not required to perform additional monitoring as specified in E.13.a and E.13.b." (Emphasis added.) The use of the emphasized word "and" creates an ambiguity and appears to be used in error. It would appear that the word "or" should be used. That would eliminate the ambiguity and remain consistent with Section E.13.(4), which uses the word "or". This change would make it clear that the additional monitoring in E.13.a and b only apply to Traditional MS4 Permittees with a population greater than 50,000 that are not already conducting ASBS, TMDL *or* 303(d) monitoring.

22. E.13.a.(i) (Page 84).

Section E.13.a.(i) has been revised to address receiving water monitoring requirements. The revised language states, in part, that Permittees "may establish a monitoring fund into which all new develop contributes on a proportional basis . . . ." The ability of Permittees to establish such a fee on new development is governed by State law and this reference should be deleted.

23. Section E.14.a.(ii).(9) (Page 93).

Section E.14.a.(ii).(9) has been revised to require that the Program Effectiveness Assessment and Improvement Plan must include the "[i]dentification of long-term effectiveness assessment, to be implemented beyond the permit term." This new provision should be deleted since it seeks to impose requirements beyond the limited term of the Permit.

24. Section E.15.c (Page 98).

Section E.15.c has been revised to require the Regional Boards to review the TMDL-specific permit requirements in Attachment G and to develop or propose revisions, after consultation with Permittees and State Board staff, within one-year rather than six months. Providing additional time to consider TMDL conditions is appropriate. The State Board should consider further revisions to Section E.15.c to provide guidance on how TMDL-specific permit requirements should be addressed. Specifically, TMDL-specific permit requirements should be addressed through BMP-based approaches to achieving the WLAs of the TMDL. They should also be consistent with the requirements of the implementation plans for the TMDL, and should not change the approaches and timeframes contained in those plans.

The State Board should also address, at this time, the relationship between TMDL-specific permit requirements and the receiving water limitations language. Based upon comments at the November workshop, there appeared to be general consensus, including from U.S. EPA, that a Permittee should not be considered to be in violation of the receiving water limitations language when the Permittee is acting in compliance with an implementation plan for a TMDL. In light of this consensus, the State Board should include language in Section E.15 and Section D of the Draft Permit that verifies that compliance with an implementation plan for a TMDL also is compliance with the Permit, including with the Permit's receiving water limitations provisions.

25. Section E.16.c (Page 99).

Section E.16.c has been revised to authorize a Regional Board EO to require detailed written online annual reporting or an in-person presentation of the annual report. This new provision is unnecessary. In accordance with Water Code section 13267, Regional Boards already have certain authority to require technical or monitoring program reports in connection with their review of any waste discharge requirements. Rather than having this language in the Permit, Regional Boards should follow the requirements of Water Code section 13267. This would allow Regional Boards to require additional reporting in the unique cases when it is needed, but would not encourage over-reporting, which would likely be the result of the revisions to Section E.16.c.

26. Section H (Page 139).

Section H has been added to create a dispute resolution process. Based upon the more detailed comments in Section I.4 of this letter, Section H should be revised to make clear that this process is voluntary and does not change the rights of a Permittee under Water Code section 13320 to petition to the State Board in specified cases.

27. Section I.4 and 5 (Page 140).

Sections I.4 and I.5 have been added to create reopeners to address the receiving water limitations language and watershed based criteria for hydromodification measures. For the reasons expressed in Sections I.1 and I.2 of this letter, these reopeners should be deleted or modified. The State Board should address the receiving water limitations language before Permit adoption, and thus the reopener on this issue is not required. The reopener regarding watershed based criteria should be eliminated to allow Permittees the full five-year Permit term to implement the provisions in Section E.12.

28. Attachments A and B.

Attachments A and B do not appear to correlate with the revisions made to the designations on pages 74-81 of the Draft Fact Sheet. They also do not appear to accurately reflect the revised monitoring provisions of Section E.13. Attachment A and B should be revised accordingly.

29. Attachment E.

Based upon the comments above regarding the revisions to Section E.7, Attachment E should be deleted.

30. Attachment G.

Attachment G has been revised to amend certain TMDL-specific permit requirements and to add references to TMDLs from Region 4. As explained in Finding 41 and provided in Section E.15.b, the provisions of Attachment G are intended to be enforceable requirements of the Permit. However, Attachment G is incomplete and continues to contain ambiguities regarding TMDL-specific permit requirements and the manner in which a Permittee is to comply with these enforceable requirements. It is recommended that only fully developed TMDL-specific permit requirements be included in Attachment G. It is further recommended that each TMDL-specific permit requirement be clear regarding the manner of compliance. Finally, as more fully explained in Sections I.1 and II.24 of this letter, the provisions of

Attachment G should be linked to the receiving water limitations provisions contained in Section D.

31. Attachment I.

Attachment I has been revised to, among other things, include a definition of the term "outfall." The definition of the term is taken from 40 CFR 122.26(b)(9). Because of the breadth of this definition, which makes an outfall any "point source" as defined in 40 CFR 122.2, it is recommended that the State Board consider adding a separate definition for "major outfall" or otherwise delineate a range of outfall sizes. Because Permittees are required to create and maintain an outfall map in accordance with Section E.9.a, perform sampling of outfalls in accordance with Section E.9.c and perform other activities at the "outfall", this newly added definition could significantly expand Permit requirements beyond reasonable implementation levels.

32. Attachment J.

Attachment J has been added to incorporate the Post-Construction Requirements of the Central Coast Region into the Draft Permit. For the reasons expressed in Sections I.2 and II.20, Attachment J should be deleted.

III.
Specific Comments on Revisions to the Draft Fact Sheet

40 CFR 124.8(a) requires that all NPDES general permits be accompanied by a fact sheet that meets the requirements of that section as well as the requirements of 40 CFR 124.56. We have the following specific comments on the Draft Fact Sheet.

1. Section II (Page 6).

A new paragraph has been added to Section II on page 6 of the Draft Fact Sheet to explain the authority of a Regional Board EO to require a Permittee to continue its SWMP. For the reasons stated in Section I.3 of this letter, this paragraph should be revised to make continuation of a SWMP a Permittee-driven process.

2. Section V (Page 16).

Section V on page 16 has been revised to explain why a Regional Board EO should have discretion to require expanded annual reporting, expanded educational programs and

other deviations from the terms of the Draft Permit. For the reasons explained in this letter, this discretion should be eliminated or constrained.

3. **Section V (Page 17)**.

Section V on page 17 has been revised to add a new paragraph regarding the new dispute resolution provisions of the Draft Permit. For the reasons set forth above in Section I.4 of this letter, this paragraph should be revised to acknowledge that the Draft Permit cannot amend the Water Code or deprive Permittees of any right to petition provided in the Water Code.

4. **Section VI (Pages 17-18)**.

Section VI on pages 17-18 has been revised to add an explanation of the process to be used when a Regional Board EO requires a Permittee to continue its existing SWMP. For the reasons set forth in Section I.3 of this letter, this discussion should be revised to make the continuation of the SWMP a Permittee-driven process.

5. **Section IX (Page 23)**.

Section IX has been revised to explain the use of the term "through the MS4" rather than "into the MS4" in connection with the requirement to effectively prohibit non-stormwater. For the reasons set forth in Section II.3 of this letter, the word "into" should be used and the use of dry weather diversion systems should be clarified to be a permitted non-stormwater discharge.

6. **Section XI (Page 25-26)**.

Section XI has been revised to explain the State Board's approach to the receiving water limitation language and the addition of the reopener in the Draft Permit to address this issue. For the reasons set forth in Section I.1 of this letter, Section XI should be revised to either reflect that the State Board has addressed the issue in the Permit or, at a minimum, to allow the State Board to consider the issue at the policy level without being locked into a policy statement about the issue. State Board Order WQ 2001-15 should also be included in this discussion.

7. **Section XII (Page 29)**.

Section XII on page 29 has been revised to add a discussion of the new language in the Draft Permit related to the education of children. For the reasons set forth in Section II.12 of this letter, this discussion should be deleted.

8. Section XII (Pages 38-39).

Section XII on pages 38-39 has been revised to add a discussion about the State Board's approach to hydromodification management, watershed management zones and the Central Coast Post-Construction Requirements. This discussion, especially footnote 31 on page 39 should be deleted or revised, as discussed in Section I.2 of this letter.

9. Section XII (Pages 43-55).

Section XII on pages 43-55 has been revised to explain the authority of a Regional Board EO to require detailed annual reporting. For the reasons set forth in Section II.25 of this letter, this discussion should be eliminated.

10. Section XIII (Page 56-57).

Section XIII has been revised to explain how the Draft Permit incorporates the TMDL-specific permit requirements of Attachment G. This discussion should be revised in two key ways. First, and most importantly, the following sentence must be revised: "This Order requires Permittees to comply with all applicable TMDLs approved pursuant to 40 CFR § 130.7 for which the Permittee has been assigned a WLA *or* that has been identified in Attachment G." (Emphasis added.) The "or" in this sentence should be changed to an "and". Only the provisions of Attachment G, which are intended to translate WLAs into permit conditions, should be enforceable provisions of the Draft Permit. Second, as discussed in Section II.30 of this letter, Attachment G should only include well-developed requirements, and the discussion of Attachment G in Section XIII should be revised accordingly.

11. Section XVII (Pages 74-81).

Section XVII on pages 74-81 has been revised to include additional or amended designations of both Traditional and Non-Traditional MS4s. However, these revisions do not appear to correlate to the designations contained in Attachments A and B. Section XVII and Attachments A and B should reflect the same designations.

IV.
Conclusion

The Draft Permit and Draft Fact Sheet include many positive revisions, including many based upon our comment letter of July 19, 2012. We thank the State Board staff for making those revisions. The comments in this letter on other revisions contained in the Draft Permit and Draft Fact Sheet are intended to assist the State Board staff in finalizing the Permit. It is

believed that these comments will help make the Permit clear and understandable to all parties. We appreciate the opportunity to provide these comments and look forward to revisions based upon them.

Very truly yours,

Shawn Hagerty
of BEST BEST & KRIEGER LLP

CASQA California Stormwater Quality Association
Dedicated to the Advancement of Stormwater Quality Management, Science and Regulation

July 6, 2012

Mr. Dominic Roques
California Regional Water Quality Control Board
Central Coast Region

Subject: Comments on the Draft Resolution Approving Post-Construction Stormwater Management Requirements for Developing Projects in the Central Coast Region

Dear Mr. Roques:

The California Stormwater Quality Association appreciates this opportunity to comment on the subject Draft Resolution Approving Post-Construction Stormwater Management Requirements for Developing Projects in the Central Coast Region ("Draft Resolution") and Attachment 1 of the Draft Resolution containing the Post-Construction Stormwater Management Requirements ("Post-Construction Requirements"). CASQA typically comments on regional requirements only when there is an issue of potential statewide significance. Accordingly, we are compelled to provide specific comments on some of the provisions of the Post-Construction Requirements for the Central Coast Region. However, before we provide our specific comments we offer the following observations and comments:

- CASQA is very concerned with the apparent escalation in permit requirements being conducted by the various Water Board permit writers in drafting provisions for land development. Over the last few years we have seen the ratcheting up of new development requirements in each MS4 permit renewal without allowing time to assess the impact/effectiveness of the prior development requirements. This lack of a cohesive approach and standard has created an uneven playing field for communities and developers. Furthermore, the clear absence of any consensus within the State on what the requirements are for land development (particularly with respect to Hydromodification Management) is damaging to the credibility of the entire stormwater program.
- The proposed Central Coast requirements ignore the 1993 State Water Board definition of maximum extent practicable (MEP)[1] that clearly established public acceptance and a reasonable cost:benefit calculation as fundamental tenets of MEP.

Our specific concerns are listed below and expanded upon in the remaining part of the letter:

1. The requirement to retain runoff from storm events up to the 95th percentile 24-hour rainfall event is unreasonable, infeasible for many projects, has no demonstrated additional environmental benefit and is not cost-effective.

[1] See E. Jennings, Office of Chief Counsel, 2/11/93 memo to A. Mathews, Division of Water Quality regarding "Definition of Maximum Extent Practicable".

2. The hydromodification management (HM) standard requiring matching post-project to pre-project peak flows for the 2- through 100-year events, in combination with a runoff retention standard, is inconsistent with HM studies and approaches to date and may not be as protective of creek channels as a flow duration control approach. There is no technical basis to deviate from the extensive study that has been completed on hydromodification elsewhere in the State.

3. The retention and HM requirements, and some of the LID requirements, are inconsistent and go beyond those of existing or proposed statewide, regional, or local Phase I or Phase II MS4 permits in California.

4. Schedules for adoption of the Draft Resolution and Draft Phase II Permit need to be better coordinated, and the adoption of the Draft Resolution should be delayed.

A discussion of our specific concerns is presented below:

1. **The requirement to retain runoff from storm events up to the 95th percentile 24-hour rainfall event is unreasonable, infeasible for many projects, has no demonstrated additional environmental benefit, and is not cost-effective.**

   The Draft Resolution designates 10 watershed management zones (WMZs) based on receiving water type, geology and percent slope. Projects that create and/or replace 15,000 square feet of impervious surface in WMZs 1 and 2, and portions of WMZs 4, 7, and 10 that overlie designated Groundwater Basins are required to retain runoff from storm events up to the 95th percentile 24-hour rainfall event. Based on Table 5 of the Draft Technical Support Document (Attachment 2 of the Draft Resolution), this requirement would apply to 72-86% of the Central Coast's urban area (depending on the extent of the groundwater basins), so this requirement will have a significant impact on development projects in the region.

   It is well established that water quality control measures are most economical and efficient when they target small, frequent storm events that over time produce more total runoff than the larger, infrequent storms targeted for design of flood control facilities. Typically, design criteria for water quality control BMPs are set to coincide with the "knee of the curve", i.e., the point of inflection where the magnitude of the event (and corresponding cost of facilities) increases more rapidly than the number of events captured. In other words, targeting design storms larger than this point will produce volume retention gains but at considerable incremental cost[2]. Capturing this additional incremental volume beyond the 85th percentile has not been demonstrated to be more protective than the standard adopted by the rest of the State.

   In fact, this is the very basis of the criteria in most Phase I MS4 permits and the draft Phase II permit for sizing stormwater control measures to capture the 85th percentile, 24-hour storm. This storm event was determined to be the "maximized" or "optimized"

[2] CASQA Stormwater BMP Handbook, New Development and Redevelopment, 2003.

capture volume based on studies by Urbonas, et. al. in the 1990s. These studies led to the development of an approach for estimating the maximized stormwater quality capture volume presented in "Urban Runoff Quality Management", which is referenced by most permits as one of the acceptable approaches for computing the water quality design volume[3].

The technical analysis of the feasibility of the 95th percentile storm standard did not take total facility cost or cost-effectiveness into account. The 95th percentile, 24-hour storm volume is approximately twice that of the 85th percentile 24-hour storm. A sensitivity analysis performed for the City of Denver showed that doubling the maximized capture volume results in a very small increase in the total annual runoff captured.[4] While doubling the size of a facility to retain the 95th vs. the 85th percentile storm may not completely double the capital cost of the facility, it will likely double the opportunity cost, i.e., the surface area of the site that must be used for the stormwater control measure and can't be used for other purposes.

During the public workshop on the Draft Resolution held on June 6, 2012, Mr. Robert Ketley of the City of Watsonville presented a case study demonstrating the difficulty of retaining the 95th percentile storm in the Central Coast development environment.[5] The case study involved a 3-acre commercial redevelopment project in Watsonville that would be 89% impervious (11% landscaped area). The site is in WMZ 1 and would have to retain the 95th percentile event (1.23 inches) by infiltration. The case study used median values for soil infiltration rates for Hydrologic Group A, B, C, and D soils and assumed a 72-hour maximum drawdown time. Given these assumptions, it was estimated that the surface area of the infiltration facilities would require 7% of the site area for A and B soils, 16% of the site area for C soils, and 69% of the site area for D soils. Water Board staff replied that these were conservative assumptions, and that by their estimates, type A/B soils, C soils, and D soils require about 5%, 10% and 40% of the site area dedicated to the BMP, respectively. However, these values are still significantly greater than the amount of the site needed for retention of the 85th percentile storm.

CASQA appreciates that the Draft Resolution includes some incentives for smart growth and redevelopment in currently urbanized areas of the Central Coast. These include allowing redevelopment projects to retain the runoff volume from only half of the replaced or new/replaced impervious surface (depending on whether or not the project is in an Urban Sustainability Area). However, retention of the 95th percentile storm will still be challenging for redevelopment projects, and infeasible for those with D soils.

The Draft Resolution's standard for retention of the 95th percentile storm seems to be based, in part, on the Technical Guidance on Implementing the Stormwater Runoff Requirements for Federal Projects under Section 438 of the Energy Independence and Security Act of 2007 (EISA). However, the Draft Resolution takes only part of the

[3] WEF Manual of Practice No. 23/ASCE Manual and Report on Engineering Practice No. 87, 1998.
[4] Ibid., Table 5.3, p. 174.
[5] See the workshop presentation posted on the Central Coast Water Board's website: http://www.waterboards.ca.gov/centralcoast/water_issues/programs/stormwater/docs/lid/workshop_2.pdf

Section 438 Technical Guidance and does not include specific language and options in the federal Act that could make implementation feasible. Specifically:

- Section 438 Technical Guidance provides an option for site specific hydrologic analysis to demonstrate a match to pre-development flow rates and volumes instead of using the generalized 95th percentile approach.

- Section 438 Technical Guidance always provides options of evapotranspiration and harvesting and reuse as opposed to the Draft Resolution, which requires only infiltration, be used for most areas where development will occur.

- Section 438 Technical Guidance includes specific conditions that can be used to justify a determination that it is not technically feasible to fully implement the criteria, such as small project sites, soils that cannot be sufficiently amended to provide for the requisite infiltration rates, and where rainwater harvesting and use is not practical.

- Where a determination of technical infeasibility has been made, projects can be approved based on implementation to the maximum extent technically feasible whereas the Draft Resolution requires off-site compliance regardless of whether a feasible off-site option is available to the applicant.

CASQA strongly requests that either the retention standard be reduced to the 85th percentile storm or that more flexibility be provided in implementing the standard up to a certain level of feasibility or cost.

2. **The hydromodification management standard requiring matching post-project to pre-project peak flows for the 2- through 100-year events, in combination with a runoff retention standard, is inconsistent with hydromodification management studies and approaches to date and may not be as protective of creek channels as a flow duration control approach. There is no technical basis to deviate from the extensive study that has been completed on hydromodification elsewhere in the State.**

The hydromodification management standard used in many Phase I permits throughout the State is that "increases in runoff flow and volume shall be managed so that post-project runoff shall not exceed pre-project peak flows, volumes and durations"[6]. Numerous studies have documented that matching peak flows alone for a range of storms is not protective of streams because flow durations are increased and can cause adverse erosive impacts. This fact is recognized by the Central Coast Water Board in Attachment 2 of the Draft Resolution, which states that:

[6] Example taken from the San Francisco Bay Region, Municipal Regional Stormwater NPDES Permit, Order No. R2-2009-0074, as revised November 28, 2011, Provision C.3.g.

> "Water Board staff recognizes that peak management alone is not sufficient to protect downstream receiving waters due to the extended flow durations that can still cause adverse impacts. However, Water Board staff anticipates that the Peak Management criterion, when used in combination with the Runoff Retention requirement, will achieve a broad spectrum of watershed process protection while also protecting stream channels from hydromodification impacts. Water Board staff's judgment is based on the fact that the retention requirement is expected to avoid gross changes in the distribution of runoff between surface and subsurface flow paths for smaller events, and that peak management is expected to provide critical stream protection from the larger events, starting conservatively at the 2-year storm event."

This combination standard has not been thoroughly studied as to its effectiveness in protecting streams, nor is it consistent with current approaches throughout the State that have been studied. We also have concerns about 1) using retention of the 95th percentile storm as the method to address the effects of smaller events, which appears to go beyond requirements to replicate the pre-project (as well as the pre-development) condition; and 2) requiring peak flow matching up to the 100-year event.

- Retention of the 95th percentile storm – The specific criterion that addresses the smaller events is to "prevent offsite discharge from events up to the 95th percentile rainfall event as determined by local rainfall data". This statement means that projects need to be designed to discharge runoff only during rare events. For example, in the City of Salinas, the 95th percentile rainfall event is 0.98 inches. There were only 42 days during the 30-year period from 1979 through 2008, an average of 1.4 days per year, when rainfall exceeded this depth[7]. Limiting discharge of runoff to an average of 1.4 days per year is not consistent with maintaining predevelopment hydrologic conditions in most areas. Pre-development conditions would have typically resulted in 10 to 20 percent of rainfall from the 95th percentile event becoming runoff, depending on soil type, and more of it would run off when the ground is saturated from previous rainfall. It is not reasonable, or environmentally beneficial, to require runoff to be reduced to less than pre-development conditions.

- Peak flow matching to the 100-year event – Discrete event criteria such as these have not been shown to be an appropriate basis for hydromodification management. This type of criteria may be appropriate to size detention basins to mitigate for potential impacts to local storm drainage systems, but because determination of peak flows is dependent on time of concentration, the approach is not generally applicable to a receiving stream that has a time of concentration significantly different than the site being developed. In addition, requiring discrete event matching up to the 100-year storm is excessive and not cost-effective. Studies conducted for the Santa Clara Valley Urban Runoff Program on the effects of increased flows on the erosion potential of streams showed that a significant amount of erosive "work done" (90-95%) on the channel bed and bank is associated

[7] Pers. comm. with Harvey Oslick, RBF Consulting, consultant to the City of Salinas, who conducted the rainfall analysis.

with flows up to the 10-year peak flow. Flows higher than the 10-year peak flow perform a very small percentage of the total work (5-10%) because they occur infrequently over the period of record.[8]

The flow duration control approach being used by Phase I communities in the State has proven to be feasible, numerous technical studies have shown that the approach is protective of streams, and technical tools such as the Bay Area Hydrology Model (BAHM) have simplified the use of continuous simulation models. Taking a similar approach to Phase I permits would also make implementation more straightforward for Central Coast MS4s that are Phase I MS4s (i.e., City of Salinas) as well as those adjoining Phase I MS4s (i.e., south Santa Clara County).

CASQA recommends that the Draft Resolution be revised to contain a HM approach that is consistent with other permits.

3. **The retention and HM requirements, and some of the LID requirements, are inconsistent with and go beyond those of existing or proposed state-wide, regional, or local Phase I or Phase II MS4 permits in California.**

The Draft Resolution states that the maximum extent practicable standard "is an ever-evolving, flexible, and advancing concept, which considers technical and economic feasibility", and that the proposed Post-Construction Requirements "are consistent with the evolving MEP standard." CASQA is very concerned that the "evolving MEP standard" expressed by the proposed Post-Construction Requirements is inconsistent with the MEP standard in all other California stormwater permits, is not technically well supported, and did not consider economic feasibility, as discussed earlier in our comments.

In addition to the concerns we have raised about the 95th percentile storm retention standard and the HM peak flow matching standard, we are also concerned about the following inconsistencies with other California permits:

- Thresholds for HM requirements are much lower than existing or proposed permits (15,000 square feet and 22,500 square feet of created/replaced impervious surface for runoff retention and peak matching, respectively).

- Post-project vs. pre-project peak matching is required up to the 100-year storm, which is beyond most existing requirements and more appropriate for flood control facilities.

- The options for LID treatment or runoff retention on project sites do not include infiltration trenches, basins, and drywells, and no explanation for this is provided in the Draft Resolution or attachments. The Draft Resolution states that these so-called "conventional designs" are only allowed for use in meeting retention

[8] SCVURPPP, 2005. Hydromodification Management Plan - Final Report.

requirements where LID measures are infeasible. When properly sited and designed, these facilities are considered acceptable in other permits as part of the suite of options for LID retention and/or treatment, and should be available options for Central Coast MS4s as well.

- A minimum planting media depth of 24 inches is required in a biofiltration system, which differs from other permits and guidance across the state, and no technical justification is provided.

CASQA strongly requests that the Post-Construction Requirements be revised to be more consistent with requirements in other Phase I and Phase II permits in the State and not be allowed to define an "evolving MEP" without sufficient technical and economic analysis and coordination with the State Water Board and other Regional Boards.

4. **Schedules for adoption of the Draft Resolution and the Draft Phase II Permit need to be better coordinated and the adoption of the Draft Resolution should be delayed.**

The Draft Resolution containing post-construction requirements for Central Coast MS4s is inextricably linked to the draft Phase II Permit, which is in a concurrent process of public review. Linkages or potential linkages include the following:

- Provision E.12.i of the draft Phase II Permit states that Central Coast small MS4s shall comply with the Central Coast post-construction requirements developed pursuant to the Central Coast Water Board Joint Effort for Hydromodification Control, in place of complying with the requirements set forth in Provision E.12 (except for two provisions on Planning and Building Document Updates and Source Control Requirements).

- Provision E.12.d.2.(ii)(3)c. of the draft Phase II Permit includes a reopener for LID requirements that states that the State Water Board Executive Director may evaluate newly available technical data and other information regarding the effectiveness of source control, runoff reduction, stormwater treatment, and baseline hydrograph modification management measures and may propose revisions to these criteria.

- Provision E.12.f. of the draft Phase II Permit states that, within the second year of permit implementation, the State and Regional Water Boards will determine whether the LID and hydromodification management requirements in E.12.d and E.12.e. are protective of specified watershed processes [similar to those identified in the Draft Resolution] or if modified criteria should apply.

Because of these linkages, and the possibility that Central Coast requirements could serve as model for modified criteria in the Phase II Permit, final adopted language in the Draft Resolution could affect final or future language in the Phase II Permit. The date for Central Coast Water Board consideration of adoption of the Draft Resolution is September 6, 2012, whereas the date for State Water Board consideration of adoption of

the draft Phase II permit is expected to be sometime in October 2012. The earlier adoption of the Draft Resolution could result in inconsistencies or preclude revisions to the Phase II Permit. In addition, there are many small MS4s in regions other than the Central Coast that may be unaware of the effect that the Central Coast requirements may have on their future Phase II requirements. There should be sufficient time allowed to raise awareness of these linkages at public hearings.

CASQA strongly recommends that the adoption of the Draft Resolution be delayed until after the adoption of the Phase II Permit.

We thank you again for the opportunity to provide our comments and we ask that the Central Coast Water Board carefully consider them. If you have any questions, please contact CASQA Executive Director Geoff Brosseau at (650) 365-8620.

Sincerely,

Richard Boon

Richard Boon, Chair

cc: Tom Howard, State Water Board
Jonathan Bishop, State Water Board
Vicky Whitney, State Water Board
Bruce Fujimoto, State Water Board
CASQA Board of Directors and Executive Program Committee