City Council
311 Vernon Street
Roseville, California 95678

December 14, 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 and Members of the Board:

Thank you for the opportunity to submit comments on the State Water Resources Control Board's ("Board") revised draft of the Phase II Small MS4 General Permit ("3rd draft Permit") to regulate small municipal separate storm sewer systems ("MS4s"). This letter presents the City of Roseville's continuing concerns with the 3rd draft Permit, as well as incorporates by reference, a legal opinion by Best, Best & Krieger (Attachment A). The City of Roseville also supports and joins in comments sent separately by the California Stormwater Quality Association (CASQA) and the Statewide Stormwater Coalition (SSC).

We appreciate the efforts of State Board staff to respond to our last round of comments and to continue to engage in discussion on permit concerns. The 3rd draft Permit includes many positive revisions. While discussions facilitated though the California Stormwater Quality Association (CASQA) Phase II subcommittee have resulted in general agreement on many areas of the permit, issues and concerns remain. We are particularly concerned with the following topics.

Attachment J – Central Coast Specific Post-Construction Requirements

We urge the State Water Board to delete reference to mid-permit term incorporation of the Region 3 Central Coast standards included as Attachment J with in the Tentative Order. We further request the State Water Board delete the carve-out for Region 3 permittees. The post-construction requirements contained in Section E.12 should be applicable to all statewide Phase II permittees. The E.12 provisions have been through a thorough review process including CASQA professionals, environmental NGOs, Permittees, and Water Board staff. By appending the Region 3 requirements, and stating, "the Water Board expects to amend this Order to incorporate similar requirements for Permittees in the remainder of the State", the Water Board has introduced an entirely new set of rules which have not had the same public review opportunities as have Section E.12 provisions. The magnitude and scope of the Region

3 requirements are not appropriate and should be deleted. Specifically:

- Appendix J conflicts with ongoing efforts to provide consistency in Phase I and Phase II permits in both scope and magnitude.

- Phase II permittees will have just begun implementing E.12 when the State will reopen and amend the Order to incorporate watershed based hydromodification criteria based on the Region 3 model. A full permit term (5 years) should precede any revisions to the E.12 regulations, so that projects can be reviewed, permitted, constructed, and evaluated by Permittees

- The Appendix J standards are the most stringent, complex, and as-yet unproven hydromodification requirements. There is no demonstrated environmental benefit from retaining a 95th percentile storm event in urban areas. The volume of runoff retention would be infeasible for many projects, in particular green field development outside of an urban core.

- Permittees, such as the City, have only had 30 days, this public review period, to fully evaluate the potential impacts of implementing Attachment J requirements within their region. It is insufficient time to fully understand the complexity and impact upon development within our community.

Section I – Permit Reopeners to Address Receiving Water Limitations and Hydromodification Measures

We urge the State Water Board to delete the reopener language associated with receiving water limitations and states efforts to develop watershed based criteria for hydromodification measures. The State Water Board held a workshop on November 20th to receive testimony from stakeholders on the issues of receiving water limitations. Permittees from across the state expressed their concern over the liability they could incur without clear language that sets forth a compliance pathway for addressing exceedances of water quality standards. Until this issue is resolved, Phase II permittees are open to state enforcement and/or third party litigation should water quality monitoring indicate contribution to or exceedance of a water quality standard, regardless of the permittee's good faith efforts to implement its stormwater program. It is well recognized by the State Water Board that complying with water quality standards will take time. As such it is imperative the permit be adopted with language that allows a means for permittees to comply with their permits. This issue is not new; it has been raised to the State Water Board since the first draft of the Phase II permit in 2011. This issue should not be held at bay any longer but should be addressed prior to permit adoption.

The 3rd draft of the permit requires MS4s from outside Region 3 to implement new design standards to comply with E.12 provisions. Implementing new standards will

require the expenditure of funds and staff time to develop and incorporate these standards into new projects. The idea the City would develop new standards only for the permit to be reopened and the State Water Board require implementation of yet another set of new standards is objectionable. Permittees should be provided the full permit term to implement and assess the E.12 standards prior to new standards being required. Beyond impacts to permittees, there will be significant impact upon the development community statewide to incorporate new standards into projects. Changing design standards mid-permit term will cause significant frustration for permittees and the development community.

Section E - Regional Water Board Discretion

Several areas within the revised 3rd draft Permit serve to complicate and confuse the efforts of permittees by allowing the Regional Water Boards discretion on a variety of topics. Specifically, the Regional Board may determine whether a Permittee's current implementation of stormwater Best Management Practices (BMPs) is equal or more effective at reducing pollutant discharges than the implementation of the requirements of a given subsection (E1.b). The permit allows the Regional Board Executive Officer to notify the Permittee within three months of their determination to require Community Based Social Marketing (CBSM) (E.7). Lastly, each Permittee that discharges to a 303(d) listed water body shall consult with the Regional Water Board within one year of the adoption of the permit to assess whether monitoring is necessary and if so, determine the monitoring study design and an implementation schedule (E.13. (3)). In order to provide for more consistency throughout the Regions of the State and to encourage sharing and comparison of data, these issues should be more definitively addressed through requirements contained within the Permit rather than determined by Regional Board discretion. At a minimum, criteria for addressing these discretionary decisions should be included in the Permit to guide Regional Water Board actions.

In summary we respectfully request the State Water Board:

- Delete attachment J from the Phase II permit and allow all Phase II permittees the opportunity to implement the proposed E.12 post-construction requirements for the full 5-year permit term;

- Delete the reopener language associated with the receiving water limitations language and address permittees' concern by providing a clear compliance pathway prior to permit adoption;

- Eliminate Regional Water Board discretion or at a minimum develop, through a public process, clear criteria associated with Regional Water Board decision making authority.

- Revise the permit to address comments provided for in Attachment A to this letter.

Sincerely,

Susan Rohan
Mayor

ATTACHMENTS

A: BB&K Legal Opinion dated December 17, 2012

cc: Senator Ted Gaines
Assembly Member Beth Gaines
Assembly Member Jim Nielsen
Jason Gonsalves, Joe A. Gonsalves & Son

Indian Wells
(760) 568-2611
Irvine
(949) 263-2600
Los Angeles
(213) 617-8100
Ontario
(909) 989-8584

BEST BEST & KRIEGER
ATTORNEYS AT LAW

655 West Broadway, 15th Floor, San Diego, CA 92101
Phone: (619) 525-1300 | Fax: (619) 233-6118 | www.bbklaw.com

Riverside
(951) 686-1450
Sacramento
(916) 325-4000
Walnut Creek
(925) 977-3300
Washington, DC
(202) 785-0600

Shawn Hagerty
(619) 525-1327
shawn.hagerty@bbklaw.com
File No. 82510.00117

December 17, 2012

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

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:

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