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#31

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VIA EMAIL TO COMMENTLETTERS@WATERBOARDS.CA.GOV PRIOR TO NOON

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

Re: Comments - July 2013 Draft Industrial General Permit

Dear Ms. Townsend and Board Members:

On behalf of several of Downey Brand LLP's clients regulated by the industrial storm water general permit, we provide the following comments and raise the following issues related to the July 2013 Draft of the Industrial Storm Water General Permit ("Draft Permit").

Primarily, we would like to thank the State Water Resources Control Board (State Board) for listening to the stakeholders and making adjustments to the Draft Permit. However, we believe that there are several other issues, which we present below for the State Board's consideration, that should be addressed in order to make the Draft Permit more clear as well as more concise in relation to compliance expectations and water quality improvement outcomes.

General Comments:

1. **Prescriptive Nature of Draft Permit:** While the State Board describes the Draft Permit as performance-based, the performance required is in reality very prescriptive and extremely complex.[1] In other cases, the Draft Permit makes it very difficult to determine what is actually being required as opposed to being suggested. While we appreciate that consideration was given to the fact that many covered facilities will be small businesses, we fear that many entities may lack the sophistication to understand or interpret the Draft Permit's voluminous requirements. In many cases, the State Board has developed permit requirements based on an incomplete understanding of the realities of operating a small business or inaccurate assumptions and estimates related to actual rainfall conditions and operating costs, as well as the onerous regulatory climate currently in place by all regulatory agencies, not just the Water Boards. As

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[1] Some of the prescriptive requirements may, in fact, violate the requirements against the Water Boards dictating the manner of compliance. (Cal. Wat. Code §13360(a).)

currently written, we are concerned that the Draft Permit offers no true or clear endpoint for demonstrating compliance.

2. **Incomplete Data Consideration:** Many of the assumptions made by State Board staff are based on data provided by facility submissions made through the SMARTS system. However, only a small percentage of regulated facilities appear to have been regularly using the SMARTS system. Apparently, most of the data available through the paper submission of Annual Reports have not been evaluated or considered in the development of the Draft Permit. Entities find it disconcerting to discover that decades of monitoring efforts have not been adequately considered.

2

3. **Training:** It is unclear why the Draft Permit requires all covered facilities, no matter the size or complexity to have or engage a trained and certified QISP for the preparation of documents and on-site compliance activities. This represents a very burdensome requirement and based on the staff estimates of facility compliance levels, many regulated facilities would be required to have documents and actions prepared by a QISP. Since many facilities would not be likely to have a QISP on staff, this would create significant expense to hire outside personnel. To date, no clear information has been presented on the type of training required, the cost of the training, and location and availability of the training. The State Board would be better served by making workshops available, where the regulated community could obtain information on a voluntary basis when required as many other regulatory agencies do.

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4. **Time Concerns:** By the State Board staff estimates, the time required for annual compliance activities would amount to approximately 1100 hours for facilities that reach the ERA Level 2 compliance threshold. Board staff estimates that between 20 and 50% of facilities covered would reach at least Level 1 compliance status, while 10 to 25% would reach Level 2 status. Thus, facilities will be obligated to have facility staff devote a significant amount of time to attend to these regulatory requirements on top of the burden of other regulatory compliance obligations. There has been no correlation provided between these annual compliance activities and improved water quality to justify the additional burden. Thus, we request that the State Board consider ways to reduce the time burden on small businesses with very few staff.

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5. **Costs of compliance:** The preliminary cost estimate data provided by State Board staff seriously underestimates the real costs of compliance. Assuming staff estimates of the percentage of permitted facilities that will find themselves at Level 1 or Level 2 compliance status, and using the numbers of covered facilities provided by staff documents the projected cost of compliance for only a small percentage of covered facilities may well reach a level of $100,000,000.00 or higher. Staff estimates of costs are extremely low. As an example, staff estimates for the installation of a media filtration system (which may be required for at least 25% of the regulated facilities) is $185,000.00 at the high end. This number is substantially lower than the cost which some of our clients incurred within the last year in order to settle a citizen suit by

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a factor of two. The State Board should re-do the economic analysis and perform a more rigorous analysis like those required for regulations under S.B. 617.

Specific Comments:

1. **Globally throughout the Draft Permit** - Change the word "discharger" to "permittee" to be consistent with the fact that these discharges are permitted. The term "discharger" connotes that nothing of value is being achieved by the Best Management Practices (BMPs) in place prior to discharge. Additionally, this change would be consistent with federal regulations that refer to "the permittee." (*See e.g.*, 40 C.F.R. §122.41(a).) 6

2. **Pgs. 3, 15-16**: The permit must maintain compliance with the Homeland Security Act and must not require maps and/or SWPPPs to be sent to the Water Boards if facilities are subject to the Homeland Security Act or U.S. Department of Homeland Security CFATS regulations. Thus, we respectfully request that, for these facilities, the maps and SWPPP need only remain on site, and be available for State or Regional Board inspection upon request, instead of having redacted documents submitted. 7

   In addition, for other facilities that must provide non-redacted copies of the SWPPP and site map, the transmitted information may contain private confidential information or trade secrets. Therefore, the State Board needs to take additional measures, such as segregating these documents from the public file, to ensure that these documents remain confidential so as to not transform these documents into public records that might be subject to public disclosure and might reveal trade or business secrets. (*See* Wat. Code §13267(b)(2); Gov. Code §6254(k); Evid. Code §1060. Information may be a trade secret if disclosure of the information would cause a competitive disadvantage. (Uribe v. Howie (1971) 19 Cal.App.3d 194.).)

3. **Pgs. 5-6:** The concept of Reasonable Potential (RP) must be included whenever discussing effluent limitations. Under federal regulations, no NPDES permit must contain effluent limitations for any pollutant *unless and until* a discharge is proven to demonstrate the reasonable potential to cause or contribute to an in-stream exceedance of an applicable water quality standard. (40 C.F.R. §122.44(d)(1)(i)-(iii).) This includes situations where a Total Maximum Daily Load (TMDL) and Wasteload Allocation (WLA) apply because the regulations first require the reasonable potential analysis and then "when developing water quality-based effluent limitations," the permitting agency must consider any available WLA for the discharge. (*Id.* at (i) and (vii)(B).) 8

The following changes are requested:

Para. 34. Federal regulations at 40 Code of Federal Regulations section 122.44(d) also requires that NPDES permits include Water Quality Based Effluent Limitations (WQBELs) where

reasonable potential exists in order to attain and maintain applicable numeric and narrative WQS for receiving waters.

Para. 38 … Discharges addressed by this General Permit are considered to be point source discharges, and therefore, if reasonable potential exists, must comply with effluent limitations that are "consistent with the assumptions and requirements of any available wasteload allocation for the discharge prepared by the state and approved by U.S. EPA pursuant to 40 Code of Federal Regulations section 130.7." (40 C.F.R. §122.44(d)(1)(i) and (vii)(B).)

4. **Pg. 5, Receiving Water Limitations Finding:** The last sentence in Paragraph 37 should be removed because it is not clear what "in some cases" applies to and when permittees would be required to "implement controls that are more protective than the controls that are necessary to meet the technology-based requirements in this General Permit." While the NALs are "not intended to serve as technology-based or water quality-based numeric effluent limitations (Draft Permit at 11, Para. 63), the BMPs that are adopted in order to comply with the NALs could be characterized as being "in lieu" of WQBELs since such limitations are not feasible, and are not required for stormwater discharges. (*See accord* 40 C.F.R. §122.44(k)(1)(BMPs for plant site runoff under CWA Section 304(e)); (k)(2)(authorized under CWA Section 402(p) for stormwater discharges); (k)(3)(where numeric effluent limitations are infeasible); and (k)(4)(are reasonably necessary to achieve effluent limitations); *see also* SWRCB Order No. 98-01 ("Storm water permits must achieve compliance with water quality standards, but they may do so by requiring implementation of BMPs in lieu of numeric water quality-based effluent limitations"); and SWRCB Order Nos. 91-03, 91-04, and 96-13.).)

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5. **Pg. 9:** To address previous comments about the SWPPP, the third sentence of Paragraph 54 should be modified to read:

Para. 54 …. Except for facilities subject to the Homeland Security Act and in accordance with the Permit Provision II.B.3c., the SWPPP must be submitted electronically via SMARTS. ~~, and a~~ A copy of the facility's SWPPP must always be kept at the facility.

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6. **Pg. 9:** The citation in Paragraph 55 should be changed to section 122.44(i)(4) to reference the requirements for storm water discharges associated with industrial activity.

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7. **Pgs. 10-11, 41, 47**: The "instantaneous" designation on the maximum Numeric Action Levels (NALs) should be removed from Paragraph 62, Table 2, and Provision XII.A.2. as inaccurate since *two or more exceedances* are needed in order to trigger this NAL, not one single instantaneous event. Perhaps these NALs should just be called "Maximum" or "Duplicate Maximum" values in order to provide a more accurate description and name. For these reasons, the terminology needs to be modified for accuracy.

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In addition, the term Instantaneous Maximum or even Maximum is not applicable to pH, which has an acceptable *range*, not just a maximum value. It is also not clear why pH could not be contained in the Annual NALs since 2 "exceedances" could be one below the acceptable range and one above the acceptable range, which would dictate two different and conflicting remedies. Instead, the values should be averaged and then compared to the Annual NALs as is done in the U.S. EPA benchmark monitoring under the MSGP.

8. **Pg. 11:** We appreciate the inclusion of Paragraph 66, which is consistent with the U.S.EPA Multi-Sector General Permit (MSGP) and provides that non-industrial sources of pollutants should be excluded when considering whether NAL exceedances have occurred. However, the Draft Permit should expressly allow for groups or regions to submit an area-wide or jurisdiction-wide Non-Industrial Source Pollutant Demonstration where local soils are naturally high in metals or where local conditions would otherwise exceed NALs. Allowing for such coordination and not requiring every permittee to "reinvent the wheel" where such occurrences are well-known and widespread in an area would represent a substantial cost savings for small businesses and others subject to the Draft Permit. 13

9. **Pg. 12** – It is unclear why the municipal Standard Urban Storm Water Mitigation Plan (SUSMP) program is used for setting the appropriate "design storm" for industrial stormwater treatment BMPs. Has the State Board determined that these levels can be met and are attainable statewide, even in the North Coast that gets much more rain? What is the consequence of having a rain event larger than the design storm? The Permit must make clear that these treatment BMPs are technology-based requirements and that an upset defense would apply in rain events larger than a design storm. Alternatively, the permit should make clear that rain events above the design storm are expected to include so much dilution that the industrial constituents in storm water should be rendered insignificant. 14

10. **Pg. 12** – Paragraph 72 should delineate exactly what specific light industries are being referenced that "were previously excluded from coverage." Is a No Exposure Certification (NEC) required for businesses that are have their industrial processes completely contained in a building where the only "industrial-like activity" is the loading and unloading of trucks into and out of that building? This is not currently clear and should be better clarified. Also, the difference between needing an NEC and a Notice of Non-Applicability (NONA) should be described in the findings. 15

11. **Pg. 15:** In relation to the previous comments about Homeland Security compliance and trade secret protection, Provisions II.B.3.c. and d. should be modified as follows to avoid duplication and make the requirements more clear: 16

II.B.3.c. ~~Any information provided to the Water Boards by t~~The ~~Discharger~~ Permittee shall ~~comply~~ not be required to submit any PRDs, including a SWPPP or site map, if submittal of that information would conflict with requirements of the Homeland Security Act and other federal or state laws that addresses security in the United States~~; any information that does not comply should not be submitted in the PRDs~~. Instead, the Permittee shall certify that it has the required PRDs available on site for Regional Water Board review.

d. If PRDs are submitted, but redacted, due to concerns about Homeland Security or other security requirements, or to redact trade secrets, t~~T~~he Permittee~~Discharger~~ must provide justification to the Regional Water Board ~~regarding~~ for providing redacted information within any submittal. ~~d. Dischargers may redact trade secrets from required submittals.~~ ~~Dischargers~~ Permittees who certify and submit redacted information via SMARTS must also include a general description of any redacted information ~~and the basis for the redaction in the submittal that includes the information~~.

e. Where redacted information is submitted via SMARTS, Permittees ~~Dischargers~~ must submit complete and un-redacted paper copies of the information to the Regional Water Board within 30 days of the ~~of the~~ redacted information submittal per this Section. These un-redacted versions will be held separate from the public file and will not be subject to public disclosure.

12. **Pg. 16**: We appreciate the fact that this section states that a facility that receives a Notice of Termination (NOT) before January 1, 2015 will not be subject to the ISWGP. However, it is not clear what happens to facilities that receive an NOT after this date or that receive a NONA approved by the Water Boards. The Draft Permit should be clarified to state that these facilities are also not subject to the ISWGP.

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13. **Pg. 18:** It is not clear why a facility moving from an NEC to a full Notice of Intent to be covered by the Permit (NOI) would have to pay the full NOI fee and not just the difference in cost. This appears to be inconsistent with the approach for facilities going from an NOI to an NEC. Further, it appears excessive to require annual fees and certifications for continuing NEC coverage. The requirement should be to pay an initial fee for NEC coverage, and that certification and fee is all that is required for the normal 5-year term of the NPDES permit unless the situation at the site changes. Requirements for annual fees and certification seem overly punitive and unnecessary.

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14. **Pg. 19:** It is not clear how facility can "satisfy" the conditions in IV.B.1. and 2. As currently proposed, these provisions seem to require permittees to prove a negative, that the facility is not in violation of water quality control plans or ordinances. For clarity and in order to be able to demonstrate compliance, Provisions B.1. and B.2. should become a component of Provision B.3. as follows:

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IV.B. The NSWDs identified in Section IV.A. are authorized by this General Permit if the ~~Discharger~~ Permittee satisfies the following conditions:

1. ~~The authorized NSWDs are not in violation of any Regional Water Board Water Quality Control Plans (Basin Plans) or other requirements, or statewide water quality control plans or policies requirement.~~

2. ~~The authorized NSWDs are not~~ ~~in violation of any municipal agency ordinance or requirements.~~

~~3.~~ BMPs have been included in the SWPPP ~~and~~ that were designed and implemented to:

a. Prevent or reduce the contact of unauthorized NSWDs with materials and equipment that are potential sources of pollutants in order to address the applicable water quality standards and requirements contained in Regional Water Board Water Quality Control Plans (Basin Plans), statewide water quality control plans or policies, and applicable municipal agency ordinances.

b. Minimize to the extent practicable, the flow or volume of authorized NSWDs; and

c. ~~Ensure that authorized NSWDs do not contain quantities of pollutants that cause or contribute to an exceedance of a WQS;~~[2]

~~d.~~ Prevent or reduce discharges of pollutants in authorized NSWDs in a manner that reflects best industry practice considering technological availability and economic achievability.

15. **Pg. 20:** What is the definition of "Best Industry Practice considering technological availability and economic achievability" contained in Provision V.A.? Many
20 technologies for pollutant removal exist and some facilities may have these technologies in place. If one facility is using a technology or if a technology is commercially available, how will the Water Board determine economic achievability? Will it be some percent of profit, or something else? This needs to be clarified and potentially standardized so small businesses are not required to install the same technologies as Fortune 500 companies.

16. **Pg. 20:** Clarifying language is needed in Provision V.C. The following change should
21 be made:

C. ~~Dischargers~~ Permittees located within a watershed for which a Total Maximum Daily Load (TMDL) has been approved by U.S. EPA, shall comply with any applicable TMDL-specific permit requirements ~~that~~ after such requirements have been incorporated into this General Permit….

[2] This subsection duplicates the requirement to comply with Basin Plans and statewide plans, which include water quality objectives and standards.

17. **Pg. 21:** As with the other stormwater permits in California, the Receiving Water Limitations language in Provision VI. needs to be revised. How does a facility "ensure" compliance with these requirements? The current permit's language should be retained for this section, or the following changes should be made to this section:

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VI. RECEIVING WATER LIMITATIONS

Permittees shall design, update as necessary, and timely implement the facility's BMPs and other requirements of the facility's SWPPP so that industrial storm water discharges and authorized NSWDs from the facility are not found by the Water Boards to:

A. ~~Dischargers shall ensure that industrial discharges and authorized NSWDs do not~~ eCause ~~or contribute to~~[3] an exceedance of any applicable WQS in any affected receiving water.

B. ~~Dischargers shall ensure that industrial discharges and authorized NSWDs do not~~ aAdversely affect human health or the environment.

C. ~~Dischargers shall ensure that industrial discharges and authorized NSWDs do not~~ eContain pollutants in quantities that threaten or cause pollution or a public nuisance.

23

18. **Pg. 22:** Why does Provision VII.B.3.(1) require meeting water quality standards at the end of pipe when there may be available dilution, particularly in a storm event? Dilution should be allowed and wet weather standards should be considered for adoption statewide. At least the following change should be made:

VII.B.3.(1) the discharge complies with WQS at the point of discharge considering available dilution….

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19. **Pg. 23:** Provision IX.A.2. contains information about the appeal of a rescinded QISP registration, which seems odd to include in an NPDES permit. This should be removed and placed in a separate policy or other place besides the permit.

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20. **Pg. 24:** There seems to be an inconsistency between Provision X.B.2 and B.3 One (B.2) requires that SWPPP revisions be submitted and certified within 30 days, but the other (B.3.) says facilities are not required to submit SWPPP revisions more than once every three months in the reporting year. However, if a SWPPP is revised often, B.2. could be violated since B.3. does not say "notwithstanding the requirements in B.2." This provides another reason why SWPPPs should not be submitted to SMARTS. To correct this problem, the following change should be made:

[3] The words "or contribute to" are not required by federal law except in the context of performing a reasonable potential analysis. (40 C.F.R. §122.44(d)(1)(i) and (ii).) Therefore, these words should be removed from this provision.

B.3. Not be required to submit SWPPP revisions more than once every three (3) months in the reporting year notwithstanding the requirements in Provision X.B.2.

21. **Pg. 24:** Provision X.D.1. requires every facility to have a "Pollution Prevention Team." However, many facilities are small and may not have enough people for a team. This section should be reconsidered to allow for a designated "Pollution Prevention Person" at all facilities that are not big enough to support a team.

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22. **Pg. 26:** The term "areas of industrial activity" in Provisions X.E.3.e. needs to be more carefully defined to be uncovered industrial activities or industrial activities otherwise exposed to stormwater. To clarify this point, the following change should be made:

27

e. Areas of industrial activity subject to this General Permit. Identify all uncovered or other exposed storage areas and storage tanks, shipping and receiving areas, fueling areas, …..

23. **Pg. 32:** The term "personnel" in Provision X.H.1.g.i. needs to be narrowed to the appropriate, relevant, stormwater-related individuals, not secretaries, telemarketers, etc. Thus, the following or similar changes should be made:

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i. … If a ~~Discharger~~ Permittee enters Level 1 status, all appropriate personnel with storm water-related duties shall be trained by a QISP.

24. **Pg. 32:** It is not clear whether advanced BMPs are "necessary" if NALs are being met. Thus, the heading for Provision X.H.2. should be revised to specifically state that this section applies only where Permittees are in Level 1 or Level 2 status.

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X.H.2. Advanced BMPs for Permittees in Level 1 or Level 2 status

25. **Pg. 33:** The temporary suspension requirements whenever a facility may be closed for 10 or more consecutive days seems excessive. Many small businesses close for holidays and vacations, meaning industrial activities have ceased during that period. Additional SWPPP provisions should not be required if the other normal BMPs are in place.

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26. **Pg. 35:** For flow-based BMPs, a safety factor of 2 is unnecessary and has not been adequately justified if the BMPs are properly engineered. A properly engineered flow-based BMP, set for a particular design storm, should be adequate for most all storm events except those overwhelmed with dilution. Furthermore, the safety factor makes the design storm irrelevant since an artificial doubling is added. Finally, this design storm concept needs to explicitly state that where rain events are larger than the design storm, they are considered to contain so much dilution that discharges in that event are considered to be compliant.

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27. **Pg. 37:** Definition of Qualifying Storm Event (QSE). We appreciate the change requiring that an actual discharge occurs instead of arbitrarily tying the event to a certain amount of rain that may or may not produce a discharge. However, other portions of the previous definition must be maintained, including the requirement that "Sample collection is only required of storm water discharges that occur during scheduled facility operating hours" and "during daylight hours." Small businesses do not have the staffing or resources to send employees back to the facility to catch rain events after work hours, and requiring people to go out in the dark to often precarious sampling locations may violate Cal-OSHA requirements. For these reasons, the former permit's caveats about sampling during business and daylight hours should be maintained and referenced in this section.

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1. A Qualifying Storm Event (QSE) is a precipitation event that can be sampled in accordance with the restrictions in Provision XI.C.6. and that: ….

28. **Pg. 37:** The previous permit contained a requirement for two samples, one from the first storm event of the wet season, and one from at least one other storm event in the wet season. (Order No. 97-03-DWQ at 26.) The Draft Permit is proposing **twice as many samples**, which seems excessive particularly for long-time permittees that have been diligent in monitoring and have adequately characterized their industrial-related discharges. Thus, existing facilities should be maintained at 2 storms per year and the additional monitoring should be reserved for new facilities/operations so that these facilities can adequately characterize their stormwater discharges.

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29. **Pg. 39:** Provision XI.B.9 on this page (which states that "samples from different discharge locations shall not be combined or composited prior to field measurements or laboratory analysis") is inconsistent with Provision XI.C.5.a. on page 43 (which states "the Discharger may authorize the lab to combine samples of equal volume from as many as four (4) discharge locations…."). This inconsistency needs to be resolved to modify Provision XI.B.9 to allow for combined and composited samples.

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30. **Pg. 39:** Provision XI.B.11. states that if a lab resulted is detected, but not quantified (DNQ), the value will be presumed to be the arbitrary halfway point between the Method Detection Level (MDL) and the Minimum Level (ML). First, an ML is the lowest quantifiable concentration or the lowest point on the calibration curve and values should not properly be extrapolated below this value. (*See accord* State Implementation Policy (SIP) at Part 2.4.2 (even though not directly applicable for stormwater, the SIP indicates that values lower than the ML are not reliable).) Instead, the presumed value should be zero. At most, such data should be labeled DNQ and the Permit could provide the j-flagged value that represents the "estimated" chemical concentration for information, but not for compliance, purposes.

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31. **Pg. 41, Table 2:** Setting the Numeric Action Levels (NALs) at the same values as the U.S. EPA benchmark values is inappropriate because those levels were based in many cases on national criteria that may have no application in California. Because exceedances of the NALs may trigger an Exceedance Response Action (ERA), which can be an expensive process and may require actions unrelated to the exceedance, the NALs should not be set at levels where nearly half of the regulated community will automatically trigger ERAs. The statistical analysis of data provided in the supporting documentation for the Draft Permit shows that more than 40% of facilities were above the proposed NALs for total copper and for total zinc, which are likely due to copper in brake pads and zinc in tires over which an industrial facility has no true ability to control. This information and data should be reviewed and more attainable NALs should be incorporated into the Draft Permit.

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As an example, in Washington State, the action levels are set at approximately two times the U.S. EPA benchmark levels. Even so, a statistical analysis of Washington data still showed an exceedance rate of 21% for total zinc, again most likely from tire wear. If the State Board intends to allow for tire tread wear to be excluded from industrial activities, then this should be added to Paragraph 66 and Provision XI.D.2.b.iv. as other examples of "non-industrial pollutant sources."

Finally, we recognize and appreciate that the Draft Permit does state that NALs are not effluent limitations and exceedances of the NALs do not constitute a violation of the permit if required actions are taken to address those exceedances. (*See* Paragraph 63.) However, the data being generated may be used to allege violations of the permit's Receiving Water Limitation (RWL) requirements. We have provided language above to attempt to address this RWL concern, but permit holders are wary of collecting additional data that will just be used against them in a lawsuit when they are taking all appropriate and required actions to address these exceedances. Therefore, making clear what does and doesn't constitute a violation is very important.

32. **Pg. 41:** The State Board should address the underlying assumptions for the NALs, which are based on EPA's benchmarks. Many of EPA's benchmarks assume the following:

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Assumptions:
Receiving water temperature - 20 C.
Receiving water pH -7.8.
Receiving water hardness CaCO3 100 mg/L.
Receiving water salinity - 20 g/kg
Acute to Chronic Ratio (ACR) -10. (*See* 65 Fed. Reg. 64768 (Oct. 30, 2000).)

If the actual site conditions differ from these assumptions, then these values should not be used without correcting the underlying assumptions. Further, many of these values are based on recommended aquatic life criteria or secondary treatment regulations that have no direct application to storm water discharges. (*See* 65 Fed. Reg. 64767 (Oct. 30,

2000).) Thus, the State Board should carefully consider whether the NALs should be altered to reflect application in California to industrial storm water directly.

33. **Pg. 41:** The proposed aluminum NAL is inappropriate for much of California because of the high volume of aluminum found naturally in the sediment that cannot be controlled by facilities. A higher value should be used, particularly because there are few if any impairments for aluminum in California waterways. In addition or alternatively, metals in natural soils should be included in Paragraph 66 as other instances of "non-industrial pollutant sources." 38

34. **Pg. 43:** The Draft Permit at Provision XI.C.3. requires permittees to identify alternative discharge locations where current outfalls are "difficult to observe or sample." However, there is no guidance on how the State Board suggests designating an alternate sample where the outfall pipe is submerged at the outlet and BMPs are contained in the drop inlet to that pipe. If samples are taken before the BMPs, then an inaccurate and higher reading can be registered that is not representative of outflow quality. This happens in many cases and a potential solution should be included in the permit. 39

35. **Pg. 43:** We appreciate the inclusion of Provision XI.C.4, which provides the ability for permittees to qualify for Representative Sampling Reduction (RSR). However, the Draft Permit allows Regional Boards to "reject the RSR justification" without any standards for that rejection. (Provision XI.C.4.d.). This section and similar language in Provisions XI.C.5.d. and XI.C.7.f. should be modified as follows: 40

Provision XI.C.4.d. … The Regional Water Board may reject the RSR justification for good cause and/or request additional supporting documentation in accordance with the requirements of Water Code section 13267.

Provision XI.C.5.d. … The Regional Water Board may reject the QCS justification for good cause and/or request additional supporting documentation in accordance with the requirements of Water Code section 13267.

Provision XI.C.7.f. The Regional Water Boards may reject a SFR certification for good cause and/or request additional supporting documentation in accordance with the requirements of Water Code section 13267….

36. **Pg. 44:** We appreciate that there are conditions specified when samples should not be taken and this should be expanded to include non-daylight hours. Although some industrial facilities may operate around the clock, it may be dangerous to try to access outfalls in the dark to obtain samples. Thus, the following should be added to Provision XI.C.6.: 41

Provision XI.C.6.a.i. During non-daylight hours or during dangerous weather conditions, such as flooding or electrical storms; or

37. **Pg. 45:** We have the following comments on Provision XI.C.7:

42 Provision XI.C.7.a.i. – The Draft Permit should allow for sampling under the previous permit to be used to justify Sampling Frequency Reduction (SFR). For example, if the facility has not exceeded EPA benchmarks for the last 4 samples for Pollutant x, then they should be able to reduce the sampling for that pollutant.

Provision XI.C.7.b. – The language in this section related to the permittee being "subject to an enforcement action" should be limited to Water Board enforcement only, and be amended as follows:

7.b. The Regional Water Board may notify a ~~Discharger~~ Permittee that it may not reduce the number of QSEs sampled each reporting year if the ~~Discharger~~ Permittee is subject to ~~an~~ Water Board enforcement action.

Provision XI.C.7.f. – This provision is inconsistent with the 4.d. and 5.d. construct that puts the alternative program in place until rejected. In this instance, a SFR certification is not valid until the SFR certification is approved. Since these documents are certified (presumably under penalty of perjury) and submitted through SMARTS, it is not clear why this alternative request should be treated differently than the RSR or QCS requests.

Provision XI.C.7.g. – This sentence must clarify that the SFR is only lost for the pollutant with an exceedance, not for all monitoring. For example, if all pollutants were below NALs for 4 QSEs, then the entire facility would be allowed an SFR for all pollutants. However, if there is one NAL exceedance for Pollutant X (which is not the same as one sample exceeding the NAL), the SFR would continue for everything except Pollutant X, which would be monitored 4 times a year until 4 clean samples occur again. This is the way that this provision was being interpreted, so it should be clarified to confirm or change that interpretation. The confirmatory language would be as follows:

Provision XI.C.7.g. A ~~Discharger~~ Permittee loses its SFR for an individual parameter if an NAL exceedance occurs (as defined in Section XII.A1. and A.2.).

38 43 **Pg. 49**: There is a typographical error in Provision XI.D.2.a.ii. – There should be "an" not "An" and the word "all" does not properly modify "pollutant source." Thus, this section should be modified as follows:

Provision XI.D.2.a.ii. Shall include ~~A~~an evaluation of ~~all~~ the pollutant source(s) associated with industrial activity that are or may be related to the NAL exceedance(s);

39. **Pg. 52:** It is not clear why Provisions XI.D.4.b.i.-iii. prohibits permittees from returning to baseline status if they make an industrial activity BMP demonstration, a non-industrial source demonstration or a natural background demonstration. If the facility has demonstrated that attaining the NALs is infeasible or not caused by industrial activities, that should be enough to return to baseline status or some other currently undefined status level besides Levels 1 and 2. Perhaps an annual certification on infeasibility or the cause of the exceedances could be added to ensure that nothing changes, but the facility should be allowed to return to baseline or a lower level status than Level 2.

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40. **Pg. 59:** The Draft Permit at Provision XVII.A. states that "[d]ischarges of storm water which have not been exposed to industrial activity are not industrial storm water discharges." Based on this language, it is not clear why an NEC is required if the stormwater is not regulated by the industrial stormwater program, and would instead be part of a municipal separate storm sewer system (MS4) discharge, or merely be unregulated stormwater runoff if outside of an MS4's jurisdiction. (33 U.S.C. §1342(p)(1).) Instead, it would appear that a Notice of Non-Applicability (NONA) might be a better fit.

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However, if the NEC approach is being used in order to provide Waste Discharge Requirements (WDR) and/or NPDES permit coverage to protect against allegations of unpermitted stormwater discharges, that intent should be made more clear.

41. **Pg. 62:** Provisions XVIII.A.1.c. and d. are virtually identical and could be collapsed into one provision c. that covers both "collection and/or storage" as follows:

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XVIII.A.1.c. Plastics Facilities shall use durable, sealed containers designed not to rupture under typical loading and unloading activities at all points of plastic transfer and storage.

~~d. Plastics Facilities shall use durable, sealed containers designed not to rupture under typical loading and unloading activities at all points of plastic storage.~~

42. **Pg. 63:** Provision XVIII.A.2.b.i. Training should be just for "relevant" employees as discussed in issue 23 above.

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Provision XVIII.A.2.b.i. Plastics Facilities shall annually train relevant employees handling Plastic Materials that may be exposed to storm water.

43. **Pg. 64:** There appears to be a typographical error in Provision XIX.F. where the phrase "is appropriate" should be "as appropriate."

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44. **Pg. 65:** Provision XX.B.1. should remove the phrase "in violation of Receiving Water Limitations" since a violation can only be determined after an adjudicatory hearing.

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Instead this section should state the following that is more consistent with the changes proposed to the RWL provisions previously:

XX.B.1. Upon determination by the ~~Discharger~~ Permittee or written notification by the Regional Water Board that industrial storm water discharges and/or authorized NSWDs contain pollutants that are inconsistent with the ~~violation of~~ Receiving Water Limitations (Section VI), the ~~Discharger~~ Permittee shall: …

45. **Pg. 65:** Provision XX.B.2. should be modified consistent with the comments made related to issue 34 above:

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Provision XX.B.2 The Regional Water Board may reject the ~~Dischargers~~ Permittee's water quality-based corrective actions for good cause and/or request additional supporting documentation in accordance with the requirements of Water Code section 13267.

46. **Pg. 65:** The Draft Permit's characterization of a NONA in Provision XX.C. is too narrow, covering just the "no discharge" requirements. The State Board's NONA form provides seven different justifications for submittal of a NONA besides no discharge. These include: 1) Closed Facility; 2) No Storm Water Discharge and/or Exposure; 3) Not Required to be Permitted under Federal Law;[4] 4) Regulated by Another Permit; 5) New Facility Operator; 6) Never Operated Facility; and 7) Other Reason for Non-Applicability. These justifications would and should carry over into the new Draft Permit and should be added to Provision XX.C.

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47. **Pgs. 66-71:** The standard upset and bypass provisions must be included in Provision XXI. (Standard Conditions) of this Draft Permit, particularly because technology-based BMPs and treatment can fail. *See accord* 40 C.F.R. §122.41 (The following conditions apply to all NPDES permits)(m) (Bypass) and (n)(Upset); *see also FMC Corp. v. Train,* 539 F.2d 973 (4th Cir.1976) and *Marathon Oil v. EPA,* 564 F.2d 1253 (9th Cir. 1977). In the *Marathon Oil* case, the Ninth Circuit Court of Appeal concluded that a facility using proper technology operated in an exemplary fashion would not necessarily be able to comply one hundred percent of the time, and thus an upset defense in the permit was necessary. Further, in the *Marathon Oil* case, the Ninth Circuit Court of Appeal concluded an upset defense in the permit was necessary and could be used to cover instances of equipment failure and human error. (*Id.* at 1273.)

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[4] Under the Clean Water Act, an NPDES permit is not required under Section 402(p) for discharges composed entirely of stormwater. (33 U.S.C. §1342(p)(1)(General Rule).)

In summary, while many positive changes have been made, we believe the Draft Permit continues to impose very large economic burdens on California businesses and public entities that are or will be covered by this permit. We hope that the additional suggested changes can be made as proposed to attempt to lessen these burdens while still providing benefits and improvements to water quality and the environment.

Respectfully submitted,

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