June 10, 2008

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

Re: Comments on the March 18 2008 Draft SWRCB Order No. 2008-XX-DWQ National Pollutant Discharge Elimination System ("NPDES") General Permit No. CAR000002 – Waste Discharge Requirements for Discharges of Storm Water Runoff Associated with Construction Activity

Dear Members of the Board:

AT&T Corporation and Pacific Bell Telephone Company (d/b/a AT&T California) ("AT&T") appreciates this opportunity to provide comments to the State Water Resources Control Board ("SWRCB" or "State Board") on the March 18, 2008, Draft SWRCB Order No. 2008-XX-DWQ National Pollutant Discharge Elimination System ("NPDES") General Permit No. CAR000002 – Waste Discharge Requirements for Discharges of Storm Water Runoff Associated with Construction Activity ("DCGP"). We thank you for this opportunity to participate in the process of developing the final Waste Discharge Requirements for Discharges of Storm Water Runoff Associated with Construction Activity ("Final CGP").

AT&T joins in the comments on the DCGP submitted by the California Council for Environmental and Economic Balance (CCEEB) on May 5, 2008. As an industry that provides essential utility services to the citizens of California, we are committed to working with the SWRCB to develop a Final CGP that raises the bar for water quality control, under an appropriate regulatory regime that provides the necessary flexibility to tailor control approaches for different construction types, phases, and associated technologies. An appropriate regulatory regime must also take into account the highly variable site and climatic conditions and widely divergent receiving water conditions across the State as recommended by the Blue Ribbon Panel,[1] and recognizes the finite technological and fiscal resources available to implement the program. By providing this letter, AT&T seeks to assist the SWRCB in the development of an effective and

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[1] Storm Water Panel Recommendations to the State Water Resources Control Board, The Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial and Construction Activities, June 19, 2006 ("Blue Ribbon Panel Report").

enforceable Final CGP that will benefit the State Board, the citizens of California, and the regulated industries. Toward that end, and in the interest of full participation in this process, we specifically reserve the right to comment on any and all future modifications, whether in writing or oral, made to the March 18, 2008 version of the DCGP that currently is under review.

It is our understanding that the State Board intends not to consider the comments submitted in response to the Board's March 2, 2007, preliminary CGP ("PCGP") as part of the administrative record for the Final CGP. We object to this short-sighted decision and urge the SWRCB to include all of the information submitted in response to the PCGP in the administrative record for the Final CGP. In the event that our current understanding is correct and the State Board does not change its mind on comments submitted in 2007, we hereby specifically incorporate by reference the comments submitted by AT&T in 2007 related to the PCGP. These comments are critical to preparation of the Final CGP and must be granted due consideration, especially in light of the fact that many of the issues raised in the prior comments are still relevant to the DCGP being considered now.

AT&T recognizes and applauds Board Member Gary Wolff's suggestion at the June 4th public hearing on the DCGP that SWRCB staff should consider modifying the existing General Permit for Small Linear Underground/Overhead Construction Projects ("SLUP Permit")[2] to regulate all linear underground and overhead projects ("LUPs"). Chief Deputy Director, Jonathan Bishop, responded to Board Member Wolff's comment, stating that staff is open to the idea of regulating all LUPs under a modified SLUP Permit or by separate treatment of LUPs in the Final CGP. We are in complete support of Board Member Wolff's suggestion to modify the SLUP Permit to include regulation of all LUPs, and urge the State Board to consider extending the Current CGP (Order No. 99-08-DWQ) for purposes of regulating large LUPs until such time as the SLUP Permit is appropriately modified. *See* section I.B below. We understand, however, that the SWRCB has not yet finalized its thinking on the regulation of LUPs; therefore, at the suggestion of Board Member Wolff, we are submitting comments on the DCGP. Our detailed comments are presented below, divided into two primary sections: 1) explaining why the DCGP is unsuitable for regulating LUPs, and 2) describing why certain components of the DCGP are inappropriate generally for all projects.

I. LINEAR CONSTRUCTION PROJECTS ARE FUNDAMENTALLY DIFFERENT THAN CONVENTIONAL FOOTPRINT PROJECTS

A. The DCGP is an Ineffective Tool for Managing the Unique Conditions Associated with Linear Construction Projects.

As a provider of telecommunications services, the vast majority of AT&T's construction projects are *linear trenching projects* to install underground telecommunications lines and related infrastructure. Linear underground and overhead projects ("LUPs") are often located away from and outside of conventional perimeter-bounded projects and are considered unique projects in their

2 Waste Discharge Requirements ("WDRs") for Discharges of Storm Water Runoff Associated with Small Linear Underground/Overhead Construction Projects, SWRCB Order No. 2003-0007-DWQ, NPDES General Permit No. CAS000005.

own right. Underground LUPs are typically of narrow width[3] and varying length (up to 20 miles or more), similar in nature to other utility installation projects (such as pipelines, conduits and cables) that provide essential public services. Linear trenching incrementally advances, closes, and is restored to near preexisting conditions, rarely resulting in permanent changes to the site terrain. Overhead LUP installations, too, are typically of similar narrow footprint and minimal, short-term soil disruption in any particular locale. LUPs can cross multiple regulatory jurisdictions, watershed boundaries, soil types, and climatic conditions. These linear project characteristics are in sharp contrast to conditions commonly associated with perimeter-bounded commercial and residential construction projects.

Our principal concern with the DCGP is that it regulates storm water discharges from both conventional footprint development projects and large LUPs (those LUPs that disturb five or more acres of soil). However, the differences between conventional footprint projects and linear construction projects are sufficiently great that forcing regulation of both types of construction under the same permit regime is untenable. The DCGP clearly is drafted with conventional footprint projects in mind and, consequently, is ill-suited to address the unique conditions associated with LUPs.

The focus on typical perimeter-bounded construction projects results in permit requirements that are unreasonably burdensome for LUPs. The DCGP as currently drafted will result in significant costs, technical challenges, and compliance difficulties for owners of LUPs. Below in section I.C, we provide discussions regarding several areas where the DCGP improperly regulates LUPs, and in section II below, we discuss DCGP requirements that are inappropriate for LUPs and perimeter-bounded projects. While AT&T joins in the goals of the SWRCB in continuing to improve water quality, we urge the State Board to consider an alternate approach to regulating storm water discharges from LUPs that is fashioned in a manner that achieves an appropriate level of environmental protection without imposing burdensome requirements that could negatively impact our ability to provide high quality telecommunications services to Californians.

B. Construction Storm Water Discharges from LUPs Should be Regulated Under a Separate Permit Designed for LUPs.

The SWRCB has already recognized the fundamental differences between LUPs and conventional footprint projects when it adopted the SLUP Permit in 2003. The SLUP Permit applies to linear projects that disturb greater than one acre, but less than five acres of soil. The SLUP Permit has proved to be an efficient and effective tool for mitigating potential storm water impacts that may result from the kinds of projects AT&T typically pursues.

The SWRCB described the reasoning behind adopting the SLUP Permit as follows:

> Construction activities associated with small linear underground/overhead projects that result in land disturbances greater than one acre, but less than five acres (hereafter referred

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3 Typical trench width for underground installation of AT&T's telecommunication lines is 1 to 2 feet with up to 6 additional feet of ancillary disturbance from excavated soil spread.

to as small LUPs), are not like traditional construction projects. Small LUPs have a lower potential to impact receiving waters because these projects are typically short duration and constructed within or around hard paved surfaces that result in minimal disturbed land areas being exposed at the close of the construction day.

SLUP Permit Fact Sheet, at 1. In AT&T's view, the State Board's reasons for adopting the SLUP Permit hold true when applied to large LUPs as well, which are currently regulated under the Current CGP (SWRCB Order No. 99-08-DWQ). A linear construction project, no matter the size, proceeds in a predictable way, with some sections of the project in active construction, while the majority of the project length is inactive. Since only a small portion of even a major utility line project is under active construction at any given time, the risk of sediment discharge and potential impact to receiving waters is greatly reduced, no matter the ultimate length of the construction route.

With these characteristics in mind, and in light of the inappropriateness of the DCGP for regulating LUPs generally, **AT&T urges the SWRCB to consider extending the Current CGP (Order No. 99-08-DWQ) for purposes of regulating large LUPs until such time as a the existing SLUP Permit is modified to regulate all LUPs.** In the alternative, AT&T suggests that the SWRCB either update the SLUP Permit concurrently with the CGP to include regulation of all LUPs, or completely rewrite the DCGP such that large LUPs are reasonably, appropriately, and distinctly regulated by the Final CGP.

C. Specific Provisions of the DCGP Do Not Make Sense for Regulating Storm Water Discharges from LUPs.

1. Overstated Risk Assessment

The risk assessment methodology proposed in the DCGP would likely result in a significant overstatement of risk for a linear project. As currently drafted, the DCGP assumes that a project would be assigned a single risk factor. However, at the discretion of the Regional Water Quality Control Board ("RWQCB"), multiple risk factors could be assigned to a project if it extends beyond a single "planning watershed." DCGP § VII.A. While this may be a workable approach for conventional footprint developments, this methodology would likely result in overstated risk for long LUPs. For example: the majority of a long LUP may be located in low-risk developed areas, but if any small portion of the project crosses a high risk area, such as a flood zone, or discharges to a 303(d)-listed waterbody impaired by sediment,[4] the *entire project* would be assigned a much higher risk level than necessary to protect water quality along the length of the project route.

[4] Attachment A to the DCGP is the Receiving Water Risk Factor Worksheet. The first question posed on this worksheet is "Does the disturbed area discharge (either directly or indirectly) to a 303(d)-listed waterbody impaired by sediment?" *See*, DCGP Attach. A, § A.1. If the answer to that question is yes, "the project is automatically a high receiving water risk project," with all of the attendant issues built into that designation. *Id.* Despite the potentially harsh consequences of the answer to this question, the terms "direct discharge" and "indirect discharge" are not defined anywhere in the DCGP. This omission must be addressed prior to adoption of the Final CGP, because as currently written Attachment A is vague and ambiguous. It should be noted that since paragraph 23 of the DCGP limits CGP coverage to discharges to

2. *Duplicative Rain Event Action Plans (REAP)*

Linear projects maintain essentially the same type or phase of construction over the life of the project, as opposed to traditional footprint construction for which the site characteristics change over time as construction phases are completed. Thus, for linear projects, it would be duplicative to prepare a new REAP for each and every new storm event as required by DCGP section X. Instead, LUPs should be required to prepare only a single standardized REAP to be used for the entire project, reviewed periodically and updated as needed to reflect new information or changed conditions that may arise over time. A documented review of the relevant parts of the project's Storm Water Pollution Prevention Plan ("SWPPP") or standardized REAP would provide environmental protection without creating a redundant plan.

3. *Unworkable Runon and Runoff Control Requirements*

Runon and runoff control requirements of the DCGP (§ VIII.C) are impractical tools for linear construction projects because of the physical length and location of many linear project sites. LUPs are typically placed in easements, franchise positions, or other right-of-ways where the project owner may have little to no control over access to the project site or the constituents and volume of runon entering the site from commingled external sources. Traditional barrier-type runon and runoff controls may not be feasible or safe for linear projects such as, for example, when work is conducted in city streets that must be periodically reopened for public use. The open and publicly-accessible nature of many linear project sites makes effluent monitoring highly problematic because the LUP owner has little control over the discharge parameters that enter or leave the site.

4. *Unreasonable Sediment Controls*

The perimeter sediment control requirements of the DCGP (§ VIII.D.1) are similarly unreasonable for long LUPs, considering the short duration of construction in any one location along the project route, and are undesirable, as they may result in hydrological barriers spanning long distances. Furthermore, perimeter controls would be impracticable on active city streets where it would be better to protect storm drains with BMPs.

Stabilized construction access points (required by DCGP § D.1) are not feasible for many LUPs. The "entrances" to the active construction areas move along the linear project route over time as construction commences. Traditional stabilization measures may not be prudent or safe in some locations due to the preexisting land use, public access to the site, or challenging terrain. Alternative BMPs should be allowed in such cases, such as sweeping, provided that water quality protection is achieved.

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waters of the U.S., if a construction site discharges directly or indirectly to a non-U.S. jurisdictional waterbody (*e.g.*, water of the State) prior to any flow reaching an impaired U.S. jurisdictional waterbody, the construction site would not be covered by the CGP. Without any additional clarification in Attachment A to the DCGP, the vague and ambiguous terms "direct" and "indirect" discharge conflict with the jurisdictional limitation of the DCGP to discharges to waters of the U.S.

5. *Unnecessary Soil Testing*

LUPs subject to the requirements of the DCGP will likely be several miles in length, potentially crossing numerous soil types and a variety of particle sizes. It is not practicable to consider, much less sample and evaluate, the particle size of every soil complex encountered over a several-mile-long linear construction route. *See* DCGP § VII.B. BMPs used effectively for linear construction in undeveloped areas are typically installed at drainage consolidation points and are not likely to vary significantly based on soil conditions. Also, many LUPs trench across existing paved areas, such as city streets and parking lots. Excavated soil is usually replaced into the trench or trucked offsite. Temporary stockpiling of excavated soil can be adequately secured with BMPs. It is unreasonable to require testing of excavated or import soil that will quickly be used as backfill for a trench that will be stabilized or paved over.

6. *Overbroad "Complete Utilities Phase" Risk Assessment for pH*

The DCGP states that the "complete utility phase" of a project is automatically designated as high risk for high pH discharges.[5] LUPs are unique projects in their own right and should not be defined entirely as a "utility phase," however, it is plausible that the entire duration of a linear utility installation could be interpreted as a "utility phase," classifying the LUP as a "high risk" project subject to sampling and testing for compliance with a pH NEL. *See* DCGP §.IV.B.1.a. The "high risk of pH discharge" classification is overbroad and is not reasonable for LUPs. For example, in many cases underground utility projects do use concrete slurry for backfill and, thus, present negligible likelihood of introducing pH-altering substances to storm water. For those linear projects that do use concrete, potential exposure of fresh concrete to rain is extremely limited, as trenches are paved over fairly quickly or covered with trench plates until backfilled. A linear project's risk of altering background pH levels is, in actuality, quite low. A blanket "high risk of pH discharge" classification for LUPs is inappropriate and erroneous.

7. *Improper Limitation on LRPs*

The DCGP specifies that only certain defined Legally Responsible Parties ("LRPs") can file Project Review Documents ("PRDs") and PRD updates online. The DCGP limits LRPs to the owners of the project or the project site. DCGP, Attach. I, § I.1. The DCGP is inconsistent with U.S. EPA regulations which allows signatories to be responsible corporate officers, general partners, principal executive officers or elected officials, **or** a duly authorized representative. 40 C.F.R. 122.22.a–b. The Current CGP includes the appropriate correct language allowing signatures by authorized representatives, but the DCGP modifies this language, removing the option of having an authorized representative as the signatory party. The DCGP also is inconsistent with U.S. EPA's NPDES General Permit for Storm Water Discharges From Construction Activities, which requires

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[5] The DCGP states, "A period f high risk of pH discharge is defined as a project's complete utilities phase, complete vertical build phase, and any portion of any phase where significant amounts of materials are placed directly on the land at the site in a manner that could result in significant alterations of the background pH of the discharges." DCGP § IV.B.1.a., fn. 5.

compliance by the project operator,[6] defined as the legal entity that either has (1) operational control over construction plans and specifications, or (2) day-to-day operational control of those activities at the project necessary to ensure compliance with SWPPP requirements or other permit conditions. *See*, U.S. EPA's 2003 NPDES General Permit for Storm Water Discharges From Construction Activities, as modified effective January 21, 2005, Appx. A, at A-2.

Flexibility to allow operators or authorized representatives to file and update PRDs is extremely important for LUPs. LUPs are often built in right-of ways, franchise positions, or easements over property owned by other parties. Moreover, LUP construction is frequently controlled by an operator who is not the owner of the land or the project, such as in design-build scenarios. In fact, typical linear project practice is to require operators to be LRPs. It is therefore inappropriate for the CGP to restrict designation of LRPs by excluding operators and authorized representatives from categories of persons capable of signing permit documents.

II. MANY COMPONENTS OF THE DCGP ARE INAPPROPRIATE FOR ANY PROJECT

Beyond the permit requirements that are ill-suited for LUPs, the following discussions highlight some of the components of the DCGP that are inappropriate generally for all projects.

A. Numeric Action Levels (NALs)/Numeric Effluent Limits (NELs) are Inappropriate for Inclusion in the Final CGP.

1. The DCGP's Proposed Numeric Actions Levels (NALs) Are Both Improperly Derived and Overly Simplistic.

The proposed NALs are not appropriate at this time when considered in the context of all the relevant factors governing promulgation of industry-wide pollutant control standards. From a technological perspective, it is too early to propose NALs until additional data is collected and analyzed to ascertain water quality benefit and regulatory feasibility. The federal Clean Water Act ("CWA") requires that an agency determine whether a regulation is economically achievable on the basis of the total cost to the industrial subcategory and the overall effect of the rule on the industry's financial health in implementing NALs,[7] but the SWRCB has failed to do so. Despite these deficiencies, if the SWRCB chooses to include NALs in the Final CGP, such numeric levels must be derived based on the available scientific evidence.

In response to the question posed by Board Member Wolff at the workshop on the DCGP conducted in Los Angeles by SWRCB staff on May 7, 2008, the NAL provisions are an area of the DCGP requiring more complexity. As drafted, the NALs do not consider elements required by federal and state law.[8] Further, the NALs are not supported by substantial evidence in the record,[9]

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[6] *See*, 73 C.F.R. 96, at 28456; *see, also*, U.S. EPA NPDES webpage, Applying for Coverage under the Construction General Permit (CGP), "Who Needs Coverage?" <http://cfpub.epa.gov/npdes/stormwater/application_coverage.cfm#coverage>.

[7] *See*, 33 U.S.C. § 1314(b)(3).

[8] *See, e.g.*, 33 U.S.C. §§ 1314(b)(4)(A) (consider the chemical and physical characteristics of pollutants in determining the appropriate level of reduction to be attained) and 1314(b)(4)(B) (consider the engineering

and are not established in accordance with the recommendations of the Blue Ribbon Panel, including the following:

- NALs should take into consideration the site's climatic region, typical soil conditions, slopes, and natural background conditions, including receiving water quality conditions. Blue Ribbon Panel Report, at 16–18.

- NALs need to be set at upset values that would be reliable indicators of construction BMP "failures." Blue Ribbon Panel Report, at 17–18.

- NALs must reflect an appropriate range of flow conditions (*i.e.*, a "design storm"). Blue Ribbon Panel Report, at 18.

Due to the deficiencies described above, the proposed NALs are technically flawed and must not be included in the Final CGP. However, if the NALs are to remain in any form in the Final CGP, we request that there be a phase-in period for the NAL requirements. This suggested phase-in period was recommended for NALs by the Blue Ribbon Panel, commensurate with the capacity of the dischargers and support industry to respond to these requirements. Blue Ribbon Panel Report, at 17. We encourage the SWRCB to follow the Blue Ribbon Panel's recommendations and work with AT&T and the regulated industry to identify any technical and/or practical limitations on implementation of these requirements and to tailor appropriate phase-in to account for such limitations.

We understand one of the primary goals of the NALs is to force the generation of monitoring data in order to fill acknowledged statewide data gaps. Enforcement of NALs is *not* the most effective or efficient way to generate useful monitoring data. Adherence to improperly derived NALs presents significant technical and enforcement issues, which are arguably unnecessary and inappropriate if what is truly needed is a more robust data set across the State. If the SWRCB determines that it requires data beyond that which is collected as part of existing SWRCB and RWQCB water quality programs, the industry is willing to work with the SWRCB to collect and share such data. As suggested by Board Member Wolff, AT&T would support a

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aspects of the treatment control technique and the benefits of effluent reductions attained); Cal. Water Code § 13241(c) (consider water quality conditions that could reasonably be achieved through coordinated control of all factors affecting water quality). Because the DCGP serves as both a NPDES permit under the federal CWA and as WDRs under California law, elements of the California Water Code, such as § 13241, apply to the DCGP. *See, e.g.*, DCGP, title page and § V.1 (applying the DCGP receiving water limitations to groundwater —a water not within federal jurisdiction); *see, also, City of Burbank v. SWRCB*, 35 Cal. 4th 613, 624–628 (2005) (confirming application of California law to water quality permits that go beyond federal minimum standards, which we believe is occurring with regard to the NELs, among other provisions of the DCGP).

[9] The SWRCB's decision on the Final CGP must be supported by substantial evidence in the record. *See, Riverkeeper, Inc. v. U.S. EPA*, 475 F.3d 83, 95–96 (2d Cir. 2007). The information discussed on pages 48–49 of the DCGP's Fact Sheet does not rise to the level of scientific evidence supporting the NALs, nor does it provide the breadth of information required to truly support NALs. Thus, the SWRCB has, to date, failed to produce sufficient evidence to the public to appropriately justify the proposed NALs.

permittee-funded data collection program as an alternative to NALs. A third-party collected dataset would provide uniformity in collection methods and quality of data, result in better study design, and allow for integration of results into a report or format that could be used to advance the State's water quality protection programs. A scientifically valid data set would better serve the intended purpose of the NALs.

2. *Numeric Effluent Limits (NELs) Are Inappropriate for Inclusion in the DCGP.*

The DCGP proposes prematurely to mandate construction site compliance with several NELs. *See* DCGP § IV.B. The NELs included in the DCGP comprise industry-wide control measures and, as such, are overly broad, do not take into account important technical constraints with respect to implementation, and require additional analysis to determine appropriate numeric values. Furthermore, the CWA does not require NELs for storm water discharges. *See* 40 C.F.R. § 122.44(k)(2)-(4). In fact, the U.S. EPA consistently has rejected the application of NELs to storm water discharges for the vast majority of industrial sources and has continued to refuse to impose NELs upon the construction industry. Likewise, SWRCB has previously "conclude[d] that numeric effluent limitations are *not* legally required."[10] Additionally, construction storm water is fundamentally different from other discharges and is not appropriate for regulation through NELs. NELs generally are feasible and appropriately applied to process wastewater from traditional industrial processes (*e.g.*, factories) or wastewater treatment facilities, which exhibit relatively constant flows and predictable pollutant loads. Manageable flow volumes and predictable pollutant loads lend themselves to capture and treatment via various technologies which, in turn, produce a consistent treated wastewater effluent. Under such circumstances, one can have a high degree of confidence that effluent concentrations will not exceed a prescribed limit, as long as the treatment unit is designed and operated properly. Accordingly, for traditional industrial processes and wastewater treatment facilities, it is feasible to calculate appropriate numeric limits, and compliance with such limits is possible. In contrast, storm water volumes and qualities are highly unpredictable and are largely dependent on weather, especially for linear projects because of the difficulty in controlling runon to the project site. *See* § I.A.3 above. Extreme and highly variable storm water flow volumes, together with uncertainty regarding storm water quality during any given time period or event, make storm water treatment an inexact science, and not one generally capable of consistent, reproducible results. Absent the ability to capture vastly divergent storm water volumes and to treat highly variable storm water quality to a consistent and reproducible result, strict compliance with NELs is neither feasible nor prudent. To support a claim of feasibility, such results must be capable of being repeated at all regulated sites (*i.e.*, approximately 20,000 sites statewide),[11] under dramatically divergent conditions influenced by a myriad of site-specific and

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[10] SWRCB Order No. WQ 91-03, at 30 (*emphasis added*). *See, also*, statements made by the SWRCB in litigation related to the Current CGP. *San Francisco Baykeeper, et al. v. SWRCB* (Sup. Ct. Cal., Sac. Cnty., Case No. 99CS01929) ("numeric limitations were not feasible [in the Current CGP] due to the variability of storm water events and pollutant constituents and concentrations in storm water runoff"), Respondent's Memorandum of Points and Authorities in Support of Motion to Discharge Writ, Dec. 9, 2004, at 3.

[11] Estimate of total construction sites governed by the Current CGP by Greg Gearheart, SWRCB staff, SWRCB Workshop on the DCGP, May 7, 2008.

climatic factors. Attempting to avoid this complexity by setting simplistic NELs is a recipe for failure given the extreme-value nature of storm water.

Storm water treatment technologies have not yet advanced to a point where NELs would be appropriate. The only treatment devices that SWRCB believes may be able to consistently meet a NEL, advanced treatment systems ("ATS"), have numerous technical problems associated with their implementation (see further discussion regarding ATS in § II.D, below). Because NELs are not required by the CWA, and the SWRCB has not yet presented sufficient evidence to go back on its prior statements about NEL infeasibility, and because compliance is not achievable under all conditions with the currently available treatment technologies, the proposed NELs are infeasible and not appropriate for inclusion in the Final CGP. In lieu of NELs, the SWRCB should include requirements in the Final CGP that refocus permit emphasis on requirements mandating that SWPPPs contain, and projects plan for, implement, and maintain, a comprehensive system of BMPs to control construction site pollutants and protect water quality. If the SWRCB desires a numeric approach, then AT&T points to the recommendations of the Blue Ribbon Panel Report to set appropriate NALs to guide and enhance BMP implementation and control.

B. The DCGP's Monitoring and Sampling Requirements are Unreasonable and Unjustifiably Expensive.

1. The monitoring program proposed in the DCGP is not required by law, is not cost-effective, and is unlikely to result in usable data or measurable water quality benefit.

The SWRCB has stated that dramatically expanding storm water sampling and analysis over requirements in the Current CGP is not required by law, and that no useful information would be generated. In the *Baykeeper* case, the SWRCB defended the sampling and analysis provisions of the Current CGP, stating that "[t]he Permit's sampling and analysis requirements... are the most rigorous in the nation, and go far beyond the requirements of the Clean Water Act and implementing regulations." *San Francisco Baykeeper, supra*, Opposition Motion For Order Enforcing Writ of Mandate, December 17, 2004, at 1. The SWRCB has provided no basis for reversing its position now through its dramatic proposed expansion of the monitoring program in the DCGP.

The monitoring program proposed in the DCGP will result in significant expenditures and compliance costs without providing usable data. This is particularly true for lengthy LUPs that can potentially have hundreds of discharge points. Additionally, for linear construction in existing developed areas (*e.g.*, paved city streets), the DCGP's effluent monitoring provisions could be interpreted to require sampling at each and every storm drain inlet. It is infeasible on a long LUP, or even a very large conventional project, to effect sampling at these numerous locations all within the first hour of discharge, much less during the first and last hour of each working day during the storm event, as is required under the DCGP. *See* DCGP Attach. B, Monitoring Program and Reporting Requirements, at 5 (related to Risk Category 2 and 3 sites). Furthermore, such burdensome monitoring would violate the terms of California Water Code section 13267, which

requires that the burdens of a monitoring program bear a reasonable relationship to the benefits to be obtained from the monitoring.

The data gathered through this expansive program will have little practical value, because data will be collected without a uniform study design, yielding data unusable for the purpose of evaluation of numerical measures or advancing the goals of the program. The DCGP fails to identify any other purposes of, or questions to be answered by, the monitoring program other than to use the data in enforcement actions. Statement by G. Gearheart, SWRCB Staff, at SWRCB Workshops on DCGP, May 7 and 21, 2008. For the requirement to be valid, there must be a reasonable relationship between the value of the information requested and the cost to provide it. Moreover, any monitoring requirements with a purpose of determining compliance with the improperly established NALs and NELs proposed in the DCGP, would also be improperly established. *See* section II.A above.

2. *SWRCB is contradicting its own positions on effluent monitoring, which were previously validated by the Baykeeper court, and is disregarding the recommendations of Blue Ribbon Panel.*

The DCGP proposes an aggressive effluent monitoring regime that requires collection of "storm water grab samples from one sampling location in each drainage area beginning in the first hour of any new discharge and during the first and last hour of every day of normal operations for the duration of the discharge event." DCGP, Attach. B, at 5 (related to Risk Category 2 and 3 sites). Whereas effluent sampling required by the Current CGP was triggered by specific situations and/or criteria (*e.g.*, direct discharges to sediment-impaired waters, exposure of non-visible pollutant sources to storm water, or failure of a BMP), the DCGP increases the sampling requirements to include all storm events and all drainage areas associated with construction activity, even in those areas that utilize BMPs that fully prevent exposure of pollutants to storm water, areas that are stabilized, or areas that are inactive. For large linear projects in particular, this could result in the onerous and expensive task of repeatedly collecting effluent samples from multiple, potentially remote discharge locations during each and every storm event. This dramatic increase in sampling places an unreasonable burden on the discharger in terms of logistics and costs required to conduct the sampling and analysis. Discharge from the majority of construction sites can be well-controlled with good SWPPP design, and diligent and proper application and maintenance of BMPs; this approach has a proven record of controlling water quality in storm water discharges from construction sites, and is currently considered cost-effective for construction sites by U.S. EPA[12] and pursuant to the Current CGP.

The more prudent approach appears to be to apply resources toward ensuring the efficacy of BMPs, rather than the costly effort to monitor for exceedances of numeric limits where the resulting water quality benefit is uncertain. Visual observations should continue to be relied upon primarily

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[12] 40 C.F.R. § 122.44(k)(2) provides that BMPs may be used in NPDES permits "to control or abate the discharge of pollutants... under § 402(p) of the CWA for the control of storm water discharges"; *see, also, Citizens Coal Council v. United States EPA*, 447 F.3d 879, 896 (6th Cir. 2006).

as the tool to assess whether BMPs are effective with limited instances of storm water monitoring, as is already required by the Current CGP.

3. *The proposed receiving water monitoring program presents onerous technical challenges and is unlikely to provide information that is useful for addressing water quality impacts.*

Implementation of components of the receiving water monitoring program may be particularly burdensome to dischargers. Access and safety issues are significant factors in receiving water sampling, because receiving waters are usually located off the site controlled by the discharger. Where receiving waters are on private property, access could be denied or revoked at the discretion of the owners, while permits may be required to access sampling points on controlled public lands. Safe access for sampling may not be available. This is particularly true for long LUPs that commonly traverse remote locations and challenging terrain. Also, a construction site's connection to a receiving water body is often remote and tenuous, making it difficult to identify the appropriate receiving water body to sample. In many cases the discharge does not occur directly to the water body, but rather to a seasonal channel, through percolation to groundwater, or to a lake where sampling upstream and downstream is not an option. Clarification of how a receiving water is defined and the discharger's ability to effectively monitor the receiving water needs to be addressed before any type of receiving water monitoring requirement should be imposed.

As is the case with effluent sampling, receiving water monitoring is not likely to yield useful data for adjusting construction site BMPs. In addition to the difficulty in complying with the logistical requirements of the monitoring program, the value of the data garnered from such sampling is questionable. For example, discharges from a particular construction site often flow into public or private storm sewer systems and are commingled with discharges from many other sources so that there is no technically valid way to associate the receiving water quality with the discharges from a particular construction site. Also, receiving water pH and turbidity can vary widely based on different natural soils and precipitation characteristics, within a single storm event, and even between storms events, making the meaningful interpretation of analytical results from individual grab samples exceedingly difficult. These issues are compounded for sites located in large watersheds or for linear projects where multiple sources contribute to a single receiving water. Thus, AT&T is concerned that receiving water data would be used improperly as an indicator of whether a certain construction discharge has caused or contributed to a receiving water quality exceedance. Given the forensic challenges inherent in connecting receiving water quality monitoring data with discharge from a particular site, it would be exceedingly difficult to truly ascertain if a particular construction site were a cause or a contributing factor to exceedance of a water quality objective in the receiving water.

AT&T's recommendation is to remove the receiving water monitoring elements from the DCGP. However, if monitoring of receiving waters is to continue to be an element of the Final CGP, the issues discussed above must be resolved prior to imposing such a program. Any revisions must ensure that the monitoring program is reasonable and provides meaningful data that more clearly supports the long-term goals and objectives of the program. As discussed in section II.A.1

above, AT&T would support a scientifically designed, third-party, regional monitoring approach in lieu of an uncontrolled data set collected by individual dischargers.

C. The DCGP's Qualified SWPPP Developer and Practitioner Requirements Are Impractical and Lack Appropriate Justification in the Record.

While AT&T supports the SWRCB's efforts to a create baseline program curricula for SWPPP developers and practitioners (inspectors, samplers, etc.) there is no justification in the record for limiting the preparation of SWPPPs and inspection of construction sites in the manner proposed by the DCGP. Section IX.A of the DCGP limits the pool of Qualified SWPPP Developers to those holding one of 7 credentials (most of which also require a college degree) and limits the pool of Qualified SWPPP Practitioners to those holding one of 9 credentials (most of which require a college degree). In fact, the impact of these requirements will be a significant increase in the cost of preparation and implementation of SWPPPs, and will potentially leave projects stranded awaiting preparation of documents by a certified developer, or potentially in non-compliance while site personnel await receipt of certification credentials. This is especially true considering that approximately 20,000 active permittees will need to be re-approved for coverage within one hundred days of the adoption of the DCGP.

A conservative estimate of the current number of "Qualified SWPPP Practitioners" that will need to be certified is approximately 60,000 (20,000 sites x [1 Developer and 2 Practitioners per site (a principal and a back-up)]).[13] It is unlikely that the very limited staff of two certifying companies offering the credentials per the DCGP —Certified Professional in Erosion and Sediment Control, Inc., and Certified Inspector of Sediment and Erosion Control, Inc.— could supply the necessary training to allow the construction industry to comply with this provision in two years as required for the "Qualified SWPPP Practitioner" let alone the very limited one hundred day compliance deadline that will have to be met for the "Qualified SWPPP Developer", where the DCGP does not allow a two-year grace period of obtaining this qualification.

EPA's Construction General Permit requires that qualified personnel conduct inspections but declines to specify "any inspector license or certification requirements at this time." U.S. EPA, NPDES General Permit for Storm Water Discharges from Construction Activities, Fact Sheet, at 29. Additionally, of the states cited by the DCGP Fact Sheet (page 62) as supporting the requirements for certification, only the state of Georgia requires the preparer of a SWPPP be a design professional; all the other states cited by the DCGP Fact Sheet only require that "qualified personnel" conduct site inspections. Thus, it is clear that the DCGP is proposing qualification requirements far in excess of what federal or other state authorities have deemed necessary or reasonable. Nothing presented in the Fact Sheet beyond a desire to have persons knowledgeable in erosion and sediment control with the skills to assess site conditions appears to justify the DCGP's limitation on appropriate qualifications to a limited set of individuals in the State. Certainly, considering the burden on the regulated community, to have all relevant personnel possess one of

[13] On especially long linear projects, several more qualified practitioners per site may be required if for no other reason than to collect the required storm water samples.

the listed qualifications in an extremely limited time period appears to be an unrealistic expectation of the SWRCB.

AT&T recommends that the Certification requirements for the "Qualified SWPPP Developer" in DCGP section IX.A.1 be deleted from the Final CGP to reflect the general consensus of the EPA and the various states cited in the Fact Sheet that there be no specific criteria for SWPPP preparation. Instead, AT&T would recommend more general language that SWPPP preparers be knowledgeable in the permit requirements with the skills necessary to prepare SWPPPs and related documents meeting the permit's requirements. At a very minimum, AT&T recommends the Final CGP clarify that SWPPPs may be prepared by persons working under the direction of a Qualified SWPPP Developer. Additionally, DCGP section IX.A.4 should be amended to reflect the original language from the PCGP that a Qualified SWPPP Practitioner have either a CPESC/SWSI certification (or be a Qualified SWPPP Developer) **or** have attended a State Water Board-sponsored or approved Qualified SWPPP Practitioner training course. Replacing the DCGP's requirement that Certified Practitioners have the listed credentials and attend a SWRCB-sponsored course, with the more inclusive option of possessing the credentials or attending the course, will allow the SWRCB to ensure Practitioners are properly trained while providing the regulated community with additional options (potentially at a lower cost) to obtain the required training.

D. The DCGP Gives Undue Preference to Advanced Treatment Systems ("ATS") and Fails to Remedy Concerns about Implementation of Such Systems.

The DCGP's Risk Calculator (Appx. A) unduly preferences the use of ATS by allowing credit for its use while failing to grant credit for other BMPs proven to be effective in reducing the risk of excessive sedimentation. The DCGP's Fact Sheet correctly identifies other effective erosion and sediment control BMPs, and further identifies ATS as a possible BMP for sediment control where other erosion and sediment controls may not be effective. However, the DCGP's Risk Calculator short-circuits this determination by using ATS as the single largest factor for reducing sediment risk, without allowing other possible BMP choices to reduce risk where other BMPs may also be effective.

In effect, the DCGP Risk Calculator forces projects into the ATS alternative by allowing only ATS as a BMP that could reduce a project's risk level from four (triggering the need to obtain an individual permit) to three (allowing CGP coverage). The terms of California Water Code section 13360 explicitly provide that the SWRCB "shall not specify the design, location, type of construction, or particular manner in which compliance may be had with" a requirement or order issued by the SWRCB. The ATS bias in the DCGP violates this provision because it effectively mandates the method, mechanism, and specifications for compliance, and as such violates California Water Code section 13360. Furthermore, as was pointed out in numerous comments on the PCGP, the SWRCB has yet to follow the cautionary advice of the Blue Ribbon Panel and establish limitations on the use of ATS to ensure any such use does not create more problems (*e.g.*, potentially toxic runoff) than it attempts to solve.

E. A Grandfather Clause is Needed to Avoid Creating Conditions of Project Infeasibility.

The DCGP requires all projects not completed within one hundred days of the adoption of the Final CGP to comply with the terms of the Final CGP. DCGP § VI. Significant changes in the requirements for coverage in the DCGP could render currently active projects infeasible or, in some instance, without coverage should a project fall into a risk category four and be obligated by the DCGP to obtain an individual permit. AT&T suggests adding language to the Final CGP establishing a firm date for grandfathering that will significantly reduce the risk of project infeasibility and the level of regulatory uncertainty engendered by wholesale compliance with the Final CGP.

F. The DCGP's Provision to Comply with "All Local Regulations" is Overly Broad.

Section VI.7 of the DCGP requires compliance with "all local regulations." This provision creates an opportunity for enforcement of elements not in the CGP through a CGP-related enforcement action and potentially exposes projects to state and federal enforcement of local rules in an improper forum. Municipalities, counties, drainage districts and other local districts each have their own enforcement powers for their local water quality regulations, ordinances, rules, etc. The DCGP's requirement to comply with "all local regulations" is not only unnecessary, but also subjects CGP permittees to a potential CGP violation (and ensuing enforcement) for violating a local rule, as compliance with the local rule is a requirement of the CGP. To add CGP enforcement venue extends the reach of the CGP well beyond its purview and unnecessarily exposes permittees to enforcement of local rules by SWRCB and RWQCB staff or citizens under section 505 of the CWA. AT&T urges the SWRCB to remove section VI.7 entirely from the Final CGP.

G. The Public Review Process is Vague and Undefined, and Provides RWQCB Staff with Unprecedented Discretion.

AT&T believes that the DCGP vests an unprecedented amount of discretion in the RWQCB staff, without any guidance on how such discretion is to be exercised. *See* DCGP § XII (vesting power within the RWQCBs or RWQCB staff alone to accept or reject CGP applications, hold hearings on permit coverage, terminate coverage already granted, force SWPPP revisions, etc.). Such a delegation of responsibility without establishing the necessary safeguards is improper. *See, Wilkinson v. Madera Community Hospital* (1983) 144 Cal.App.3d 436, 442. In effect, the SWRCB has granted the RWQCBs unrestricted authority to make fundamental policy decisions. *See, People v. Wright* (1982) 30 Cal.3d 705, 712. The potential for marked variability across the State as different RWQCBs review PRDs is phenomenal, and will result in uneven and unfair protocols.

The proposals included within the DCGP will have unintended and unavoidable consequences that will inject an undefined (potentially never-ending) round of public review at the last stage of the building process. *See* DCGP § XII.2. The new proposed public review process is especially troubling given that DCGP requirements are aimed, for the first time, at post-development project design features established during the land use, California Environmental Quality Act ("CEQA"), and environmental permitting processes, *i.e.*, hydromodification and low impact development ("LID") requirements. If the SWRCB determines that a public review process

must be provided in the Final CGP, though such a review is legally not mandated,[14] the public review process needs to be substantially revised. Any public review process incorporated into the Final CGP must establish a defined process whereby project proponents can satisfy public participation requirements without allowing new legal challenges to the previously issued land use, CEQA, and other environmental approvals, which were resolved and approved long beforehand. AT&T urges the State Board to adopt a Final CGP that exempts from any public review process the project elements previously approved in conjunction with the land use, CEQA, and environmental permitting processes where public participation was available, and limit any review of PRDs to a very short timeframe (*e.g.*, 15–30 days), only review comments on construction-phase elements, and only entertain the idea of public hearings based upon significant public comments.

III. CONCLUSION/RECOMMENDATION

Thank you for the opportunity to comment on the DCGP. AT&T urges the SWRCB to modify the existing SLUP Permit to include coverage of large LUPs, and apply the Current CGP (Order No. 99-08-DWQ) for purposes of regulating large LUPs in the interim. We appreciate your attention and consideration of our concerns and look forward to working with the State Board to develop an appropriate regulatory approach for linear projects. Please feel free to contact me should you have questions or require further information.

Respectfully,

Kent Kunce

Director, Environment Health and Safety

AT&T

Attachment: Letter from Mr. Jay P. Maille, AT&T, to Ms. Song Her, Clerk to the Board–SWRCB, re: "NPDES General Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities, Preliminary Draft Dated March 2, 2007," May 4, 2007.

[14] The DCGP Fact Sheet (p. 7) acknowledges that current case law does not mandate public review, yet the SWRCB goes on to require a very broad public review program in the DCGP.

AT&T Services, Inc. **Environment, Health & Safety**

May 4, 2007

Ms. Song Her
Clerk to the Board - SWRCB
1001 I Street, 24th Floor
Sacramento, CA 95814

Response from AT&T Corp. and Pacific Bell Telephone Company (dba AT&T California)
to: California State Water Resources Control Board (SWRCB)
NPDES General Permit for Storm Water Discharges Associated Construction
and Land Disturbance Activities
Preliminary Draft Dated March 2, 2007

Thank you for the opportunity to comment on this Preliminary General Permit. The following comments are in two categories: a general response to the document from the perspective of its overall applicability to the types of construction projects in which AT&T engages; and some specific point-by-point comments on language in the Draft Permit itself.

As a provider of telecommunication services throughout California, our principal concern with the proposed General Permit is that it is clearly most appropriate for addressing storm water discharges from conventional perimeter-bounded projects such as residential and commercial developments. As a telecom company, the vast majority of our projects are *linear trenching projects* typically of narrow width (usually 1-2 feet)[1] and of varying length (up to twenty or more miles) for the installation of telecom lines and related infrastructure. Many of these projects are located outside other common plans of development and are considered unique projects in their own right. Key provisions of the proposed permit, if applied to our longer linear projects, would present impractical, unreasonable, and in many cases unnecessary challenges to our compliance.

Operators of long linear projects (usually located in pre-existing easements and rights-of-way) typically have much less control over access to the "project site" than would a developer of a residential or commercial development project with a conventional perimeter and footprint. While a long linear project

[1] Typical trench width is 1-2 feet with up to 6 feet of ancillary disturbance from excavated soil spread, for a total disturbed width of up to 8 feet.

has many theoretically possible discharge points along the project route, in our experience *the actual portion of the discharge associated with the linear construction itself is typically small.* It will be impractical and cost-prohibitive to monitor for permit compliance along the full length of many linear utility projects - and with minimal or no increased environmental benefit for the expended effort. We believe this general reason alone is sufficient justification for the State to consider a different approach to managing these unique projects.

In 2003, linear projects were correctly recognized by the SWRCB as inherently and sufficiently different from other kinds of construction projects such that a special permit was created for small linear projects (less than 5 acres or approx 5 miles long)[2]. The *General Permit for Storm Water Discharges Associated with Construction Activity from SLUP -Small Linear Underground /Overhead Projects- (General Permit #2003-0007 DWQ)* has been an efficient and effective tool for mitigating the storm water impacts resulting from the kinds of projects we typically pursue.

It is our belief that the nature of most linear telecom projects is sufficiently different, both in kind and in likely environmental impact from other construction projects, such that the best approach to managing them would be to modify the existing SLUP Permit to include larger linear projects. Other possible approaches are offered at the end of this letter in "Recommendations". Reasons for this position are found in our specific comments on the Draft Permit itself which follow, but also in the language and reasoning in the *Fact Sheet* accompanying the Draft Permit.

For example - Section C of the *Fact Sheet* addresses the efforts of the State's 2005/2006 Blue Ribbon Panel to consider the feasibility of establishing "Numeric Effluent Limitations" (NEL) in California's storm water permits. In establishing the Panel, the State Board directed that "Consideration should be given to whether numeric limits would apply to all construction sites or only those with significant disturbed soil areas (e.g. active grading, un-vegetated, or un-stabilized soils)." The Board also directed that any evaluation of the establishment of objective criteria should address "the ability of dischargers and inspectors to monitor for compliance" and "the technical and financial ability of dischargers to comply with the limitations or criteria."

The following comments are specific to the cited language in the proposed Draft Permit and are generally based on the scenario of a typical linear construction project along a developed utility right-of-way, disturbing more than 5-acres of land (i.e. is greater than 5 linear miles).

I. Findings

25. Project Risk – Attachment F. The language of the "five distinct stages of construction activities" identified in this section clearly implies that the type of project being addressed is a conventional perimeter construction project. To apply these new criteria to linear projects based on the proposed risk metrics for likely sediment discharge, will cause many linear construction projects to be considered "high risk" which really should not be. This is due to the inevitable variability in soils (e.g. types and particle sizes) along a long linear route, variability in discharge points, variability in natural slope and variability in construction schedules.

IV. Effluent Limitations

Most linear projects contribute little to and enable even less control of off-site discharges, and therefore it is impracticable to impose objective numerical effluent limits on these projects. Linear projects consist of a narrow area of construction over a long distance, with discharge points typically consolidated at drainage culverts, swales, and other points along the route. Accordingly, identification and segregation of the discharge *solely associated with linear soil disturbance* is very difficult if not impossible to achieve. Potential contributors to the discharge at any given point along the route are the result of co-mingled runoff from the site, while that portion of the discharge associated with the linear construction itself is typically small. This is as true for short linear runs as for long ones.

3a. NEL for pH – Linear construction projects disturb native soils *without changing their inherent chemistry.* If pH discharge limits were exceeded, the linear excavation project itself would likely have had minimal impact and presents little realistic ability to control this discharge parameter. In long linear runs where only native soil is typically disturbed and replaced, the introduction of "fresh cement or wash water from cement mixers" typical to other construction sites (and noted in the Fact Sheet as a major contributor to pH changes in runoff) would not be expected.

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[2] A rule-of-thumb for estimating the disturbance of linear projects is "1 mile = 1 acre" based on 8 feet x 5280 feet equals 42,240 which is less than 1 acre.

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VI. Receiving Water Limitations

General - See above comments regarding effluent limits

VIII. Project Planning Requirements

B. Soil Analysis - Linear construction subject to this permit will likely be several miles in length. Over the course of several miles, numerous soil types may be encountered. It is not practicable to sample and evaluate the particle size of every soil type encountered over a several mile construction route. Once again, long linear projects are not a good fit for the practical expectations of this Draft Permit. Sediment control for linear projects is achieved through constructed Best Management Practices (BMPs) installed at logically chosen drainage consolidation points which rely heavily on naturally vegetated buffers along the project route. These are not likely to vary significantly based on changes in soil conditions (e.g. particle size) along the project route.

IX. Project Implementation Requirements

A. Numeric Limitations - See above comments regarding numeric limitations.

D. Runon and Runoff – Linear construction projects have little to no control over site runon and typically do not change the naturally existing slope of the terrain. The importance of this fact as a practical matter cannot be overstated. Calculations for runon and runoff therefore are impractical for most linear construction. Even if they were calculated, most of the discharge would be associated with surface runoff and drainage *from areas other than the actual disturbed area of construction.* Runoff velocity will be mainly a function of the natural slope of the existing site and *will be little affected by the actual linear construction activities themselves.* These calculations will serve little meaningful purpose for this type of construction.

E. Sediment Controls 2. Sediment basins – Not feasible for linear construction projects.

H 1f. Source Control - Unlike in a fixed perimeter construction site, linear projects have no typical project "entrance and exit points." A linear project advances incrementally, opening up and closing active segments as the project advances and therefore "stabilized construction entrances" are not feasible for linear projects.

X. Storm Water Pollution Prevention Plan (SWPPP)

A. SWPPP Preparation, Implementation and Oversight.

1. Qualifications – Required qualifications will serve to significantly increase the cost of SWPPPs. Most linear SWPPPs contain routine conditions which do not merit excessive credentials and associated cost. Costs will substantially increase if implementation (i.e., routine inspections) requires extensively credentialed erosion control professionals for all projects.

Attachment C – NOI and Instructions

Who must submit NOI (Notice of Intent)? - The second paragraph indicates that linear construction projects in one or more Regional Water Board jurisdictions should contact the State Water Resources Control Board prior to submitting an NOI. This language suggests that the SWCRB recognizes the unique nature of linear construction and its potential to cross jurisdictions. This language also suggests that in addition to the NOI, the SWRCB should be contacted *prior to every linear project.* This additional contact seems onerous and unnecessary within the context of a general permit authorization.

Attachment E - Monitoring Program and Reporting Requirements

General – *Effluent monitoring is simply not feasible for linear construction sites as there are multiple discharge locations and extensively co-mingled discharge.* The linear construction effort will have little or no control over the combined discharge parameters.

Receiving Water Monitoring - As linear construction subject to this permit crosses several miles of ground, there will be numerous discharge locations and very unlikely a single-point receiving water body. It is not feasible to conduct receiving water monitoring as discussed in Attachment E

Attachment F – Sediment Transport Risk Worksheet

Projects under the scope of the permit will likely be 5-miles or longer in length. Over the course of the project, many soil types and hydraulic conveyances will likely be encountered. Under the current worksheet parameters, it is likely that many linear projects will be considered a "medium or high risk" because of the following:

1. Proximity to Receiving Water - If *any single point* along the entire linear project was proximate to a water body, the *entire project* would be classified with a higher risk rating.

2. Area of site to be cleared - Linear projects usually include minimal grading or clearing and only a small portion of each project is ever exposed a one time.
3. Rainy Seasons and Erosivity Index: Projects are likely to be conducted year round with variable soil conditions.
4. Runoff potential: Variable soils likely to be encountered, potentially including hydrologic Group D.

Using this rating scheme, all projects exceeding 100 points would be classified as a "medium risk" and all projects exceeding 200 points would be considered to be a "high risk". At the April 20, 2007 workshop in Sacramento, Board Staff expressed their expectation that planned projects would fall in a "normal distribution curve" under this risk rating scheme, but it is clear that many of our projects would be rated either medium or high risk and that a low risk rating would be difficult to achieve. We believe this system mis-represents the actual risks and potential impacts and more importantly - *the controllable potential impacts* – of these projects, which in most cases really are of low risk to the watershed.

Attachment G - New and Re-development Standard Worksheet

General - This worksheet is not practical for linear utility construction as there is seldom any permanent modification to drainage characteristics of the site. Completion of this worksheet would add no value for most linear projects.

Other General Concerns

A. It is impractical to impose NELs on linear construction as there is so little ability to control the variables affecting the "project site."
B. It is impractical to consider soil particle-size or slope variability along lengthy project routes, especially when this would not change the location of BMPs which are always located at consolidated drainage points. The proposed permit requires BMPs *every 300 feet for zero slope* and more frequently with increasing slope. This seems excessive and of little added value on a long run with little change in slope. Instead, logical placement of BMP at consolidated drainage points would seem more than sufficient.
C. When assigning risk points by considering a project's "Proximity to Receiving Water", no account is made for time of year (wet season or dry), existing impairment of the nearby water body, or the amount of the linear project that is actually near the receiving water body.

D. When assigning risk points by considering the project area to be cleared, no account is made for the re-vegetation that occurs during a project's lifespan or along its length as active trench segments are closed, both of which serve to reduce the area actually subject to erosion at any one time.

In summary, the theme of our concerns about the proposed permit is one of *applicability, practicability, feasibility and efficacy*. Utility projects for the installation or maintenance of telecom lines are a common activity in California and with growing demand for broadband services is likely to increase. In previous General Permits, the State Board has already correctly recognized that small linear construction projects are inherently different than conventional footprint construction projects and therefore warrant a special approach to managing their storm water impacts. In fact our essential position can be found in the Fact Sheet accompanying the 2003 SLUP in which the State Board notes that small LUPs "are not like traditional construction projects" and are "typically of short duration and constructed within or around hard paved surfaces that result in minimal disturbed land areas being exposed at the close of the construction day". We agree and believe this approach remains valid regardless of individual project length. We further believe that these projects are not well considered under the current proposal. Issues of practicability, cost of compliance, and even the likely effectiveness of proposed mitigation measures are all a serious concern for us under the current proposal. In short they are not a good fit for being managed under the proposed language. Carefully considered relief from the most problematic provisions of this proposed permit for the linear projects we typically engage in is greatly needed and we believe warranted.

RECOMMENDATIONS: Because linear telecom projects are different from the kinds of projects best managed by the proposed General Permit, we ask that the State Board carefully re-consider how linear projects are to be regulated. The following possible solutions are submitted for your consideration:

1. Categorical Exclusion - Consider categorically excluding most linear telecom projects from coverage under this Permit as was done with the construction of "water lines, electrical utility lines, etc. as part of oil and gas exploration". The potential adverse environmental impacts of most telecom linear projects are far smaller than those of other industries with hazardous chemical-bearing infrastructure.

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2. SLUP Expansion - Seriously consider expanding the current Small Linear Underground/Overhead Permit (SLUP) to larger linear projects. Its mitigation methods work well for this type of project. Many of the proposed Draft Permit requirements are not applicable to linear construction or will be very difficult to implement and would achieve little or no additional watershed protection.
3. Assumed Level of Risk - Consider changes within the proposed Permit such that linear construction be considered *low risk by rule* and therefore would not require NELs in most circumstances based on: the incremental nature of construction, seasonality, the type and true proximity of water bodies affected, amount of re-vegetation over time, and the amount of the project area soil exposed at any one time.
4. Consistency - Because long linear projects may cross many jurisdictional lines (including multiple Regional Boards), we believe a consistent approach across the State is warranted to address these concerns.

We appreciate and thank you for the opportunity to participate in this dialogue and we look forward to working with the State Board to craft an approach that meets all of our objectives. Should you have any questions or require any clarification, please feel free to contact the undersigned.

Sincerely,

Jay P. Maille

EH&S Manager – U. S. Water Compliance
AT&T Services, Inc.
2600 Camino Ramon - 3E000A
San Ramon, CA 94583

Tel: 925.823.7430

cc: Michele Blazek, AT&T Director EH&S