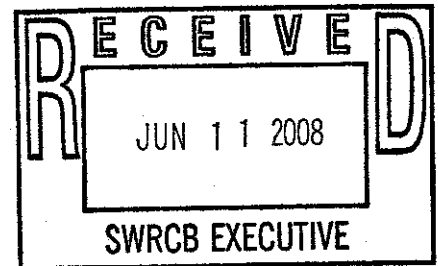




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June 11, 2008

Tam Doduc, Chair and Members
State Water Resources Control Board
1001 I Street
Sacramento, California 95814



VIA EMAIL: commentletters@waterboards.ca.gov

Re: Comments on the March 18, 2008 Draft of NPDES General Permit for Discharges of Storm Water Associated with Construction and Land Disturbing Activities

Dear Chair Doduc and State Board Members:

The California Coastkeeper Alliance (CCKA), which represents 12 Waterkeepers spanning the coast of California, is pleased to submit these comments in response to the State Water Resources Control Board's ("State Board") request for documents, comments, and other information regarding the draft of NPDES General Permit for Discharges of Storm Water Associated with Construction and Land Disturbing Activities (Draft Permit) circulated by the State Board and dated March 18, 2008. We thank the State Board for taking on the important and necessary task of reissuing an NPDES permit for construction activities in the State. We look forward to working with the State Board to develop a final permit that will ensure that the State Board will meet its mandate to protect water quality in the State of California.

While the Draft Permit is an improvement over the current General Permit for Discharges Associated with Construction Activities (1999 Permit), the State Board can and must do better in order to comply with the Clean Water Act and achieve clean water goals. Among other things, the Draft Permit illegally exempts numerous classes of dischargers from the purview of the Permit, sets a turbidity level that is so high as to be essentially meaningless in most circumstances, and fails to comply with public participation requirements set in *Environmental Defense Center v. EPA*, 344 F.3d 832 (9th Cir. 2003).

The Draft Permit also continues to fail at the essential task of providing a simple and transparent regulatory scheme that dischargers can comply with in confidence and that regulators can easily and effectively enforce when necessary. This is particularly important for a transient

industry such as the construction industry, where impacts tend to be acute rather than chronic, and where quick enforcement is thus essential to protect affected waterways. The findings from the draft Enforcement Report prepared pursuant to California Water Code section 13385(o) state that "the current level of program staffing resources is not sufficient to fully implement the storm water program." The Enforcement Report further states that "stormwater permits currently contain no numeric effluent limitations and instead rely on a suite of general narrative effluent limitations... (c)ompliance determinations for these effluent limitations at stormwater facilities therefore depends heavily upon site visits that include specific observations, analysis, and documentation...." According to the report, approximately two-thirds of all storm water permittees are construction storm water dischargers. Indeed, the enforcement provisions are so staff-intensive that at the recent Los Angeles construction permit workshop, regional board staff said they wouldn't be reading the storm water pollution prevention plans (SWPPPs) and State Board staff stated that they would be relying on environmental groups to enforce the Permit! Considering these findings and representations from staff, a permit that contains numeric effluent limitations based on the best available technology (BAT) and the best conventional pollutant control technology (BCT) is the only one that will ensure compliance with water quality standards. Since compliance could then be judged by a simple comparison of monitoring data to the effluent limitations, such a permit would be easily enforced without reliance on the costly and time-consuming site inspections and analyses that currently overwhelm the system. Inexplicably, the Draft Permit proposes for the most part a continuation of the current, failed system..

In the event the State Board does not change course and develop a permit that replaces the complicated regime currently proposed with a simple-to-enforce permit with numeric effluent limitations that includes all regulated discharges (rather than the illegal and ill-advised exemptions that pervade the current permit), we provide our comments below regarding:

- those elements of the permit as drafted that must be changed to comply with the law;
- those elements of the Draft Permit that are steps in the right direction, both as improvements over the 1999 Permit and/or the March 2007 draft of the permit, which we addressed in our May 4, 2007 comments (attached for reference); and
- the Clean Water Act's prohibition against the economic analysis called for by industry during the June 4, 2008 hearing in Sacramento on the Draft Permit.

I. Deficiencies in the Draft Permit That Must Be Addressed to Comply with the Clean Water Act

In the event the Board does not reconsider its approach and continues with the Draft Permit's BMP-based permitting scheme, we have identified the following deficiencies with the Draft Permit that must be corrected in order to meet Clean Water Act requirements:

- the Draft Permit is not simple and transparent and therefore does not lend itself to efficient compliance determinations and enforcement necessary to achieve water quality standards;

- the time-consuming and labor-intensive Numeric Action Level (NAL) system implemented by the Draft Permit to protect water quality is an impractical method for achieving its goal in light of the short-lived and transient nature of construction activities and acute nature of their impacts;
- The Draft Permit's proposed numeric effluent limitations will not protect water quality;
- the monitoring requirements should be expanded to ensure the goals of the Draft Permit and water quality standards are being met;
- the Draft Permit cannot authorize discharges to water bodies listed as impaired by any pollutant found in, or likely to be found in, storm water discharges from construction activities;
- the Draft Permit illegally exempts both discharges from oil and gas facilities and "discharges to non-jurisdictional waters (as determined by the U.S. Army Corps of Engineers)" (USACE), including those waters for which USACE has not yet made a jurisdictional determination;
- the agency review and public participation requirements fail to meet the requirements of the Clean Water Act.

Below are our specific comments on each of these points.

A. **Compliance Determinations Should Be Simple and Transparent**

Any NPDES permit must lend itself to a simple and transparent compliance determination in order to be effective.¹ Indeed, as staff articulated in the Los Angeles workshop, in the absence of adequate funding to enforce any permit that is adopted, the State and regional boards will have to rely on citizens to enforce this permit, and for citizens to effectively do so the permit must be simple. The 1999 Permit did not achieve this standard. By relying exclusively on an inherently subjective best management practice (BMP)-based system of compliance and not requiring monitoring to evaluate BMP effectiveness, the 1999 Permit failed to provide an objective means to determine if the pollution control measures implemented were achieving the requirements of the permit to protect water quality. Unfortunately, the Draft Permit proposes to continue this regime. In place of a subjective BMP-based system of compliance, and for the reasons below, we recommend the State Board adopt numeric effluent limitations (NELs) for all pollutants of concern.²

¹ In our comments on the March 2007 draft of the permit (attached) we explained in detail the directives from the Governor's office that address the importance of making permits simple and transparent to improve enforceability and to provide ease of compliance for dischargers. Key memoranda from the Governor's office and CalEPA on the issue include the Governor Arnold Schwarzenegger's "Action Plan for California's Environment" (Oct. 2003), the Enforcement Initiative Memorandum from Secretary Terry Tamminen, Cal EPA to Board Chairs, Department Directors; and Executive Officers (November 30, 2004) and the Memorandum from Secretary Alan Lloyd, Cal EPA to Art Baggett, Chair, SWRCB, (March 23, 2005) ("Lloyd Memo").

² Our attached comments to the March 2007 draft permit provide additional detail on the feasibility and usefulness of NELs.

1. **Numeric Action Levels Do Not Make Permit Simple or Transparent**

Rather than implement NELs for discharges, this Draft Permit largely reinstates the same regime for determining compliance as the 1999 Permit. The Draft Permit relies too heavily on a lengthy Numeric Action Level (NAL) feedback loop process, rather than imposing numeric effluent limitations on dischargers. In fact, the Draft Permit even states, "the NALs in this General Permit are not directly enforceable."³ Though an NAL system may be useful as an internal-auditing program to evaluate BMP effectiveness in some circumstances, it does nothing to improve the regulator's ability to evaluate permit compliance and improve enforceability.⁴

As a practical matter, given the short-lived and transitory nature of many construction projects, the NAL feedback loop will fail entirely to provide a useful program for protecting water quality. In these situations, for the regional board staff to have any ability to effectively monitor these sites, there must be numeric effluent limitations in place that can be enforced immediately. Further, there must be enforcement tools available to the Regional Board, such as stop-work orders, that can be used to require immediate correction of the problem identified. The Draft Permit currently lacks a useful and effective mechanism for regional board staff to take the immediate action necessary to protect water quality from pollutant discharges from short-lived, fast-paced, and dynamic construction operations.

Without an easily enforceable permit, water quality will suffer, as overburdened regulatory staff will not have time to perform the labor-intensive compliance determinations needed to demonstrate a violation. Paradoxically, this is no assurance for a discharger since they are also unable to tell whether they are in compliance and thus could be subject to seemingly arbitrary enforcement by regional board staff. The NAL feedback loop in the Draft Permit should be rejected in favor of a system that provides both a simple method for determining performance and a streamlined mechanism that gives the Regional Boards the ability to step in and require immediate compliance before any other actions with the potential to degrade water quality are taken. However, our recommendation is not to scrap the NAL system entirely. We believe that an NAL-based feedback loop can be helpful in bringing a *clearly* non-compliant facility into compliance. However, it is of limited usefulness in ferreting out complying versus non-complying dischargers on a regular and timely basis.

2. **Numeric Effluent Limits Can and Should Be Incorporated into the Draft Permit**

To avoid the problems with transparency and enforceability as they existed in the 1999 Permit, the State Board should revise the Draft Permit to incorporate NELs rather than NALs for pollutants likely to be discharged.⁵ With NELs, determining compliance will be simple, and

³ Draft Permit, Section 1, ¶ 14.

⁴ Our comments here address Dr. Gary Wolff's question distributed on May 20, 2008 regarding the value of the "tiered" compliance structure.

⁵ We recognize the inclusion of an NEL for turbidity, which has been set at 1000 NTUs. This is a start but it does not adequately address the issue as explained below.

dischargers will still have the quantitative information to help determine what additional steps are necessary to achieve compliance. Further, there is sufficient information available to support the inclusion of NELs in this permit. In fact, the inclusion of a NEL for turbidity, pH, and for discharges from sites employing active treatment systems (ATS) is a positive development in the Draft Permit. These NELs will provide some clarity to dischargers and regulators alike regarding what constitutes compliance.

However, the NELs included in the permit fall short in key ways. At 1000 NTUs the turbidity NEL is not BCT, is meaningless for identifying any but the most egregious violators and is useless for protecting water quality. Assuming turbidity is a surrogate for total suspended solids, the turbidity NEL is more lenient than what is achievable using BCT, the technology requirement applicable to conventional pollutants. The Clean Water Act requires the use of these technology-based effluent limitations in NPDES permits to control conventional pollutants, and the NEL for turbidity should be established at the appropriate level.⁶ Further, NPDES permits must implement water-quality based effluent limitations where appropriate when technology-based standards will not ensure implementation of water quality standards.⁷

The 1000 NTUs level inserted as the numeric effluent for turbidity is neither BCT nor an appropriate water-quality based effluent limitation. As several presenters noted during the June 4, 2008 hearing in Sacramento, there are many technologies available that can ensure turbidity levels in discharges at or below 20 NTUs (or 10 NTUs as a daily flow-weighted average).⁸ Even the Draft Permit recognizes that these levels are achievable with currently available technology to control sediment discharges in storm water associated construction activities.⁹ Since these are the turbidity values achievable using the best conventional pollutant control technology available, the State Board should adopt these values as the NEL in this permit. It would then be up to the discharger to decide which technologies to use to meet the NEL.

The 1000 NTUs level is even more problematic from an environmental perspective. The Draft Permit itself notes that "compliance with this value does not represent compliance with ...receiving water limitations."¹⁰ As we mentioned in comments presented to the June 4 hearing, many receiving water bodies have turbidity water quality objectives at around 20 NTUs. The chart on page 55 of the Fact Sheet provides further information indicating that turbidity water quality objectives throughout the State will often be well below the 1000 NTUs NEL for turbidity in the Draft Permit. Discharges with turbidity levels that are orders of magnitude above the receiving water's water quality objectives will by definition be harmful to the aquatic species and organisms that depend on these waters. The harm caused to aquatic organisms by elevated

⁶ 33 U.S.C. § 1311(b) and 1342(b).

⁷ *Id.*

⁸ The Fact Sheet recognizes that even the construction industry itself advocated for a turbidity NEL of 500 NTUs in its presentations and comments to the State Board regarding the March 2007 draft permit. Fact Sheet at 12. The obvious inference here is that if the industry itself believes that 500 NTUs is appropriate as an NEL, then there are currently available technologies available to meet this standard. At a minimum, the Draft Permit should set 500 NTUs as the uniformly applicable NEL for turbidity.

⁹ Section IV.B.2.

¹⁰ Fact Sheet at 53.

turbidity levels is well-documented, with studies showing that turbidity levels near 1000 NTUs causing serious harm and even death to many species.¹¹ It is irresponsible, as well as contrary to the State Board's obligation to implement water-quality based effluent limitations, to set a NEL for turbidity at 1000 NTUs – a level that is toxic to many aquatic organisms dependent on the very water bodies the State Board must protect.

It is arbitrary to limit the applicability of the NEL for pH to only those discharges occurring when there is a "high risk of pH discharge."¹² Whether there is a relative risk of discharge is irrelevant to the question of the appropriate effluent limitation for a pollutant. If the NEL for pH is appropriate when there is a high risk of pH discharge, then the same NEL should apply when there is a medium or low risk of discharge. The only explanation we can imagine for limiting the applicability of the pH NEL is to provide a loophole for dischargers during the "non-high risk" phases of a project. This is unacceptable, lacks common sense, and is arbitrary.

Finally, without NELs for all potential pollutants that are applicable during all times a discharge could occur, the Draft Permit will not ensure compliance with water quality standards, as it must.¹³ We recognize that the Draft Permit contains prohibitions on discharges of pollutants that cause or contribute to an exceedence of any applicable water quality standards. However the permit fails to address how a discharger or anyone else can easily know whether this requirement is met. The State Board should cure this deficiency with the establishment of NELs that address all potential pollutants and that are set at levels that will ensure compliance with water quality standards. These NELs will be based, at least in part, on numeric criteria set forth in a Statewide Water Quality Control Plan, the California Toxics Rule, the National Toxics Rule, or an applicable Regional Basin Plan.¹⁴ Since discharges to different water bodies may require different limitations, the State Board should develop a table for dischargers to use to identify which set of effluent limitations applies to their discharges.

¹¹ See <http://www.lakeaccess.org/russ/turbidity.htm>; C.P. Newcombe, and D.D. MacDonald. 1991. *Effects of Suspended Sediments on Aquatic Ecosystems*. North American Journal of Fisheries Management 11:72-82. 1991; <http://www.deq.state.or.us/wq/standards/turbidity.htm>.

¹² We are pleased that the unjustifiable compliance schedule for the pH NEL has not been continued from the March 2007 iteration of the permit.

¹³ See 33 U.S.C. §§ 1311 and 1342 (requiring all NPDES permits to contain provisions necessary to ensure compliance with water quality standards); see also Cal. Water Code § 13377.

¹⁴ For pollutants addressed by the California Toxics Rule (CTR) the required NEL is equal to the stated water quality criteria unless a mixing zone has been established by the permitting authority. 40 C.F.R. § 131.38(c)(2). The Draft Permit does not establish mixing zones for any discharger thus the water quality criteria in the CTR apply at the point of discharge.

B. Receiving Water Monitoring Must Be Mandatory for All Dischargers to Ensure Water Quality Standards Are Met

In addition to establishing appropriate NELs, the State Board should require monitoring of receiving waters to verify that the pollutant discharges authorized are not resulting in, or contributing to, exceedences of water quality standards. In *Defenders of Wildlife v. Browner*, the Ninth Circuit explained that the Clean Water Act requires strict compliance with water quality standards by dischargers of storm water associated with industrial activity (which includes construction activities).¹⁵ As the Draft Permit states:

We do not know and cannot know without better monitoring if compliance with technology based standards will be adequate to prevent exceedences of receiving water objectives.¹⁶

The only way to correct this problem, comply with the law, and give the regulated community assurances it needs, is to establish a monitoring program that provides useful data for determining if water quality standards are being met. The Draft Permit takes this necessary step for dischargers categorized as Risk Level 3 – this step must be taken for all dischargers no matter their risk level.¹⁷

We fail to understand why, at a minimum, the Draft Permit does not carry over the requirement from the 1999 Permit that all dischargers to water bodies impaired by sediment monitor receiving waters.^{18, 19} For reasons not articulated in the Fact Sheet or the Draft Permit, this requirement has been done away with, despite the fact that it would provide an effective mechanism for determining compliance with water quality standards. Further, we are surprised that this process was done away without explanation, especially since this requirement was in the 1999 Permit as a result of a court order.²⁰ The sediment monitoring requirements of the 1999 Permit must accordingly be carried over to the Draft Permit and expanded to address all pollutants that may be discharged from construction sites, including known or likely pollutants.

¹⁵ 191 F.3d 1159, 1165 (9th Cir. 1999).

¹⁶ Draft Permit, Fact Sheet at 29.

¹⁷ We are pleased that an explanation of protocol for upstream and downstream receiving water monitoring locations has been included in the Draft Permit. See Attachment B, Section F, ¶¶ 6-8. However, by not requiring receiving water monitoring for all dischargers the Draft Permit appears to treat monitoring as a penalty rather than what it is – an essential component in an effective regulatory system.

¹⁸ 1999 Permit, Section B(7). If the monitoring indicated an increase in sediment loading downstream of the discharge, a rebuttable presumption was established that the discharge was causing or contributing to an exceedence of water quality standards. *Id.* It was then up to the discharger to monitor its effluent to prove that it neither caused nor contributed to the exceedence. *Id.*

¹⁹ We note however that as explained below, the State Board may not authorize discharges to water bodies impaired by sediment (or any other pollutant in storm water associated with construction activity). Our comments regarding the value of this provision are thus limited to explaining that receiving water monitoring requirements similar to those in the 1999 Permit for sediment impaired waters is a useful system for evaluating a permittee's compliance with water quality standards.

²⁰ See 1999 Draft Permit, Fact Sheet at 2 (referencing *San Francisco Baykeeper, Santa Monica Baykeeper, San Diego Baykeeper, and Orange Coastkeeper v. State Water Resources Control Board*, Case No. 99CS01929).

C. The Permit Cannot Authorize Any New Discharges to Water Bodies Listed as Impaired By Any Pollutant Likely to Be Found In Storm Water Discharges Associated with Construction or Land Disturbing Activities

The Draft Permit impermissibly authorizes discharges from projects to water bodies listed on the State of California's Clean Water Act Section 303(d) List of Water Quality Limited Segments (303(d) List)). In *Friends of Pinto Creek v. EPA*, the Ninth Circuit ruled that 40 C.F.R. § 122.4, which establishes prohibitions on permit issuance applicable to all NPDES permitting authorities, prohibits the issuance of permits for new discharges of pollutants to water bodies identified as impaired on a 303(d) list.²¹ The Court affirmed the categorical prohibition on permitting new discharges in situations where a TMDL has not been prepared, and noted the limited exceptions provided for in situations where a TMDL has been prepared. Accordingly, the State Board may not permit any discharges of the impairment-causing pollutant to an impaired water body until the water body is no longer impaired.

Under the limited exceptions applicable only when a TMDL exists, a permit authorizing discharges to an impaired water body is only allowed when the discharger can demonstrate that there is a sufficient load allocation to accommodate the discharge, and that all dischargers to the water body are subject to compliance schedules designed to bring the impaired water into compliance with applicable water quality standards.²² The Draft Permit does not distinguish between its authorization of discharges to impaired water bodies with TMDLs and impaired waters without TMDLs. Even if it did, the materials it requires the discharger to present prior to permit coverage are inadequate to support the findings required by 40 C.F.R. § 122.4(i).

The Draft Permit must be rewritten to account for the permitting rules associated discharges to 303(d)-listed water bodies. The Draft Permit's risk characterization worksheets and associated permitting restrictions on Risk Level 4 dischargers do not address the requirements of 40 C.F.R. § 122.4(i). Instead, if the discharge will be to a water body on the 303(d) List, the Draft Permit should direct dischargers that they may not seek coverage under the permit and must instead obtain individual NPDES permit coverage (or in the case of a water body without a TMDL, that no permit will be granted and no discharge can be allowed).

D. The Draft Permit Improperly Exempts Discharges from Permit Coverage Requirements

There are two categories of discharges that the Draft Permit improperly exempts from coverage – discharges from oil and gas exploration and development facilities, and “discharges to non-jurisdictional waters (as determined by the Army Corps of Engineers).”

First, the exemption for discharges from oil and gas facilities found in Finding 32 is inconsistent with Federal law, specifically the Ninth Circuit decision in *Natural Resources Defense Council v. EPA*, No. 06-73217 (9th Cir, May 23, 2008). The Ninth Circuit reasoned

²¹ 504 F.3d 1007, 1012 (9th Cir. 2007).

²² 40 C.F.R. § 122.4(i)(1) and (2); *Friends of Pinto Creek*, 504 F.3d at 1012.

that: oil and gas exemption from storm water permitting in the CWA only applies to uncontaminated discharges; the Energy Policy Act amendments to CWA did not change need for permit for contaminated discharges, including discharges related to construction activities at oil and gas facilities; and therefore EPA's shift from long-standing policy requiring permits for discharges related to construction activities at oil and gas facilities was not justified. The Court referenced the many studies and vast documentation of the impacts of discharges from construction and land-disturbing activities (many of them cited by the EPA) to find that EPA failed to provide a reasoned explanation for not requiring permits from these activities at oil and gas facilities. As a delegated authority, the State Board is obligated to implement the NPDES program as required by Federal law and thus cannot exempt dischargers of storm water associated with construction and land disturbing activities at oil and gas facilities.

Second, the State Board cannot make the requirement to obtain permit coverage contingent on a jurisdictional determination of the receiving water body by the USACE. USACE jurisdictional determinations are applicable to permits issued under section 404 of the Clean Water Act, not section 402, which is applicable here.²³ Further, the obligation to apply for an NPDES permit (and therefore assess as an initial matter whether a permit is required) lies with the permittee,²⁴ and the Clean Water Act establishes a strict liability scheme for unpermitted discharges to waters of the United States.²⁵ Inclusion of a requirement that makes the necessity for permit coverage contingent on a jurisdictional determination by the USACE is confusing to dischargers and contradictory to the Clean Water Act.

Our comments presented during the June 4 hearing, and repeated here, explained both the illegality and practical consequences of including this jurisdictional determination proviso in the Draft Permit.²⁶ Our comments presented the case of Mandeville Canyon Creek, a small creek off Sunset Boulevard in Los Angeles County. It is listed in the Basin Plan for the region as a water of the State. In 2005, the Regional Board asked the USACE for a jurisdictional determination for this water body, and the USACE declined to exercise jurisdiction (citing many factors including the fact that the drainages largely existed underground in the man made storm drain system in the canyon and therefore average high water marks were not consistently present.) There is no question that the storm water discharges from these construction activities need permit coverage, and under the 1999 Permit, coverage for construction activities is required for discharges to waters of the State, regardless of any USACE jurisdictional determination. Protecting the waters of the State is the State Board's responsibility, yet the Draft Permit backslides from this requirement. We fail to understand the purpose of inserting a requirement applicable to the Clean Water Act section 404 permitting process into a permit issued pursuant to

²³ The Clean Water Act does not even place this regulatory prerequisite on dredge and fill activities requiring a permit, activities which are directly regulated by the USACE. It is the permittee's obligation to determine whether its discharges are to waters of the United States, and if they are to make sure they are properly permitted.

²⁴ See 40 C.F.R. §§ 122.2, 122.26, 122.28; see also Finding 1 of the Draft Permit.

²⁵ See 33 U.S.C. §§ 1311(a), 1319, and 1365.

²⁶ We have attached pictures that demonstrate the potential for destruction caused by discharges to waters of the State over which the USACE has not exercised jurisdiction. It took action by Santa Monica Baykeeper to force these dischargers to obtain NPDES permit coverage and bring their operations into compliance with the Clean Water Act – even though the 1999 Permit does not include a jurisdictional determination prior to requiring coverage.

section 402 of the Clean Water Act – a provision with different goals and subject to different permitting requirements. The addition this illegal and unwarranted requirement in the Draft Permit will undoubtedly undermine the State Board's ability to protect water quality.

E. Agency Review and Public Participation Processes Require Revision

As citizen environmental groups we are particularly interested in ensuring that the components of this permit implement fully the Clean Water Act's public participation and regulatory oversight provisions.²⁷ Unfortunately, the agency review and public participation provisions in the current Draft Permit still do not satisfy the requirements of the Clean Water Act and controlling legal precedent.²⁸ As explained in our previous letter, the agency review of a discharger's SWPPP must occur early in the permitting process, prior to receipt of permit coverage.²⁹ In addition, the avenues for public participation must occur prior to the discharger's receipt of permit coverage and must include opportunities for a public hearing.³⁰

To satisfy the agency review requirements the State Board must mandate agency review of the SWPPP, and other documents that establish substantive pollution control measures prior to the grant of permit coverage. An alternative would be to develop NELs that all dischargers must comply with and leave the method for complying with them up to the discharger. Under the latter alternative, the substantive terms of the permit would be the numeric effluent limitations, and there would be no issue of dischargers writing the terms of their permits. The Draft Permit still places the development of the terms of the SWPPP, which ultimately set forth the BMPs required instead of NELs, with the discharger. As a result, the permittee is still writing its own permit without agency or public review prior to permit coverage. This is contrary to law.

To address public participation requirements, we suggest the Draft Permit include a mandatory public review period prior to the grant of permit coverage. Likewise, we suggest that Draft Permit, Section XII.2. be rewritten to include the following language: "upon request, a public hearing on any permit application shall be provided by the Regional Board." These simple revisions to the Draft Permit will resolve some of the public participation shortcomings.

²⁷ For detailed discussion of these requirements see *Environmental Defense Center v. EPA*, 344 F.3d 832 (9th Cir. 2003) ("EDC") and *Waterkeeper Alliance, et al. v. EPA*, 399 F.3d 486 (2d Cir. 2005).

²⁸ We view the explanations for when permit coverage is effective, overall improved clarity regarding SWPPP requirements, and the inclusion of the template for the Rain Event Action Plan (REAP) as necessary and sensible improvements over the March 2007 draft permit. Some of our concerns with the March 2007 draft have been cured by these improvements.

²⁹ See *EDC*, 344 F.3d at 854-858.

³⁰ *Id.*

II. Elements of the Draft Permit that Are Initial Steps in the Right Direction

Provided the State Board continues its ill-advised BMP-based permitting strategy (rather than pursue effluent limitations based on BAT/BCT that will far better ensure protection of water quality standards as we recommend), we have the following comments in support of key elements of the Draft Permit. First, we endorse the use of standards to eliminate or minimize damage caused by modification of the hydrograph by construction and development. Second, while we support the risk characterization processes required to identify the specific concerns presented by individual sites, we do not believe that this risk categorization process should be used to exempt facilities from other key permit requirements. Third, we approve of the more robust monitoring requirements in the Draft Permit as compared to the 1999 Permit. Below is further detail of our support (and caveats to our support) for these elements of the Draft Permit.

A. New and Redevelopment Performance Standards Will Help Protect Long-term Water Quality and Aquatic Habitat from Negative Impacts of Construction and Development

The new and redevelopment performance standards³¹ in the Draft Permit will generate important improvements in water quality in the face of increasing landscape alteration in California.³² The fact sheet to the Draft Permit provides a detailed and well-conceived explanation of the importance of maintaining the pre-construction hydrograph to in order to prevent aquatic habitat degradation.³³ A general NPDES permit for discharges associated with construction activities is the appropriate place to implement these Hydrograph Maintenance Standards.

We generally approve of the provisions in the Hydrograph Maintenance Standards that acknowledge the possibility of duplicative regulation of discharges in areas covered by active Phase I and Phase II municipal separate storm sewer system (MS4) requirements.³⁴ However, we believe that the approach taken to address possible conflict – to exempt dischargers under the jurisdiction of a Phase I or II MS4 from the provisions of the Draft Permit³⁵ – is inconsistent with the State Board's obligations to ensure protection of water quality. There is no excuse or legal justification for requiring less than is required by the Clean Water Act. Instead, where a potential conflict arises, the State Board must require the discharger to comply with the more stringent (*i.e.*, more protective of water quality) provisions. We made this recommendation in our May 4 letter and see no justification for not taking this approach.

Further, there should be no concern about requiring Hydrograph Maintenance Standards in the construction permit, even though the construction permit may not have to be obtained until

³¹ The New Development and Redevelopment Performance Standards will be referred to here as "Hydrograph Maintenance Standards."

³² See Findings 10 and 28, Section VIII.H., and Attachment F.

³³ Fact Sheet at 38-45.

³⁴ Section VIII.H.1.

³⁵ *Id.*

after the project is designed. As is the case with any permit that will be required at some point during development, the project must be designed to meet the requirements of that permit. Since preventing long-term water quality degradation that often accompanies landscape alteration is most cost-efficient and easiest to implement during the initial development phase, we support the inclusion of Hydrograph Maintenance Standards in the Draft Permit as both a legally-required and practical business practice.

B. The Site Risk Analysis and Characterization Requirements Are Necessary for Determining Appropriate Pollution Control Measures but Should Not Be Used for Exemptions

Considering the decision to continue the BMP-based approach to permitting, the site risk analysis and characterization requirement is a necessary component of the Draft Permit.³⁶ In particular, it will provide both the regulated parties and the regulators with important information to effectively develop and implement BMPs to control pollutant discharges. Further, we are pleased to see the requirement that all facilities – regardless of their risk level – develop a SWPPP and conduct some monitoring. These are necessary improvements over the March 2007 draft.

However, we do not concur with using the results of the risk analysis and characterization to exempt facilities from regulatory requirements.³⁷ While using a risk analysis to help design effective pollution control measures for a particular site is appropriate, exempting dischargers from permit requirements, such as the monitoring requirements imposed to evaluate the effectiveness of the pollution controls implemented is inconsistent with the Clean Water Act's technology-forcing regulatory structure.³⁸ The relative risk of erosion or other pollution generating conditions at a site does not mean that there is no risk, and as such the Draft Permit should be modified to remove the exemptions to permit requirements currently allowed to lower-risk sites.

C. The Requirement to Monitor Effluent Regardless of Identified BMP Failure Is Essential

We support the requirements that dischargers monitor their effluent regardless of whether there has been an identified BMP failure.³⁹ This monitoring will help dischargers better evaluate the effectiveness of, and modify if necessary, their BMPs to prevent pollution problems. It will also provide useful data that the Draft Permit Fact Sheet acknowledges must be collected to understand the water quality impacts of construction activities.⁴⁰ As noted in a memo from

³⁶ See e.g., Finding 25; Sections VII, VIII.B.-G, and X, Attachments A, B, C, and G.

³⁷ See e.g., Sections VIII.B.-G, and X, Attachments A, B, C, and G (provisions that do not require certain BMPs or certain monitoring for Risk Level 1 and Risk Level 2 sites).

³⁸ See 33 U.S.C. §§ 1311 and 1342 (establishing a permitting scheme that does not include risk in the calculation of when a permit is required or how limits on pollutant discharges should be decided).

³⁹ We support the re-inclusion of the non-visible pollutant monitoring requirements – an essential requirement of the 1999 permit that was inexplicably absent in the March 2007 draft.

⁴⁰ Draft Permit, Fact Sheet at 29-38.

CalEPA to the State Board, "appropriate data [should be] gathered and analyzed to determine our progress in protecting water quality."⁴¹

On May 20, 2008 State Board member Dr. Gary Wolff posed three questions he sought specific comments upon. Dr. Wolff's second question read as follows:

Our scientific understanding of when and where a management practice is best is limited. Self monitoring for compliance will not necessarily increase our understanding due to variations between practitioners and for other reasons. Are you interested in creating a scientifically valid database on management practice performance via rigorous third party 'random' monitoring in lieu of self-monitoring and at least partially paid for by permittees?

Even though Dr. Wolff stated during the June 4 Sacramento hearing he did not intend to infer that self-monitoring is of limited value, that inference arises from the second sentence of the question and should be addressed. We fundamentally disagree with such an inference. Indeed, monitoring is the only truly objective method available for determining a specific site's compliance with the terms of the permit and the Clean Water Act. Further, unless a discharger is monitoring its discharge, it will lack critical information regarding the effectiveness of its pollution control measures. However, we do support the development of a rigorous, independent, and random monitoring to evaluate BMP performance on an industry-wide scale. Such a program would be useful (though we do not believe necessary) for developing the numeric effluent limitations applicable to all dischargers. If such a program is undertaken, in no way should it serve in lieu of monitoring by individual dischargers. Further, since the program will ultimately benefit the industry itself by serving its research and development needs to ensure permit compliance, it must be funded by dischargers.

III. The Clean Water Act Prohibits Consideration of Economic Impacts

Comments made by industry representatives during the June 4 hearing in Sacramento suggested that the State Board has not adequately considered the economic impact of the Draft Permit and its terms. The State Board should recognize that when, as here, the terms and conditions of the permit established do no more than meet the requirements of the Clean Water Act, the economic considerations called for in California Water Code sections 13263 and 13241 cannot be considered.⁴² In *City of Burbank*, the Supreme Court concluded that the economic considerations called for under state law cannot be included in the analysis of whether a certain water quality control requirement is necessary to meet the requirements of the Clean Water Act because the Clean Water Act's technology-forcing standards that must be implemented to control pollutants do not allow for the consideration of costs of compliance.⁴³

⁴¹ Lloyd Memo, *supra*.

⁴² *City of Burbank v. State Water Resources Control Board*, 35 Cal. 4th 613 (2005).

⁴³ *Id.* at 624-628.

As our comments here make clear, the Draft Permit does not meet minimum Clean Water Act requirements. Thus, at this stage the question of whether economic impacts of the permit's requirements should be considered is premature. Further, there are no elements of this permit that will exceed the requirements of the Clean Water Act in the event the currently-deficient elements are brought up to the necessary Clean Water Act standards. In any event, our recommendation for a permit that simply sets numeric effluent limitations based on BAT/BCT and the achievement of water quality standards would require no more than meeting the requirements of the Clean Water Act, and would thus preclude the need to engage in the economic analysis impacts called for by the building industry. Furthermore, even if a full economic analysis were done, the one-sided analysis that the industry recommends of only industry costs would be insufficient. Instead, a full analysis of all costs, including the costs of polluted water, would need to be done to ensure a robust analysis.

IV. Conclusion

The basic structure of the Draft Permit, including its illegally broad suite of exemptions, is flawed in that it is difficult to enforce, staff-intensive, and includes few numeric limits which themselves are too high to protect water quality. As such, it simply will not lead to attainment and maintenance of water quality standards. We instead would recommend proceeding with a simple and transparent permit that sets easily-enforceable and environmentally protective numeric effluent limitations (while leaving the method of achieving compliance up to the discharger). We hope that the State Board and staff take the time to consider each of these concerns and make the recommended or required changes to the Draft Permit to ensure that it directly improves and maintains the health of the state's waterways, consistent with the Clean Water Act.

Sincerely yours,



Linda Sheehan
Executive Director

lsheehan@cacoastkeeper.org

EXHIBIT 1



May 4, 2007

Tam Doduc, Chair and Members
State Water Resources Control Board
1001 I Street
Sacramento, California 95814

VIA EMAIL: commentletters@waterboards.ca.gov

Re: Comments on the Preliminary Draft of NPDES General Permit for Discharges of Storm Water Associated with Construction Activities

Dear Chair Doduc and State Board Members:

California Coastkeeper Alliance and Santa Monica Baykeeper are pleased to submit these comments in response to the State Water Resources Control Board's ("State Board") request for documents, comments, and other information regarding the preliminary draft of NPDES General Permit for Discharges of Storm Water Associated with Construction Activities ("Draft Permit") circulated by the State Board on March 2, 2007. We include and incorporate by reference the comments submitted by Dr. Richard Horner on behalf of the California Coastkeeper Alliance ("Dr. Horner's Comments"), which address the permit provisions in detail. We thank the State Board for taking on the important and necessary task of reissuing an NPDES permit for construction activities in the State. We note at the outset that the Draft Permit is a marked improvement over the current General Permit for Discharges Associated with Construction Activities ("1999 Permit") and support many of the changes to that permit. We look forward to working with the State Board to develop a final permit that will ensure that the State Board will meet its mandate to protect water quality in the State of California.

Introduction

California's need for housing, work spaces, and other infrastructure continues to grow. These development pressures create demand to build homes, office parks, and shopping centers not only in farmland, but also in ecologically sensitive and important areas not previously subject to landscape alteration, such as rolling grasslands, forested hillsides, wetlands, and ephemeral streams and creeks at the headwaters of many watersheds. We have all had the experience of driving through an undeveloped valley with a stream flowing from nearby ridgelines out to agricultural lands one year, and the very next year driving through this same valley to find the hillsides covered with houses, the valley floor covered with office

buildings and grocery stores, and the stream either gone or a shadow of its former self. The developers' financial incentive, when building whole towns in a matter of months, is to work as quickly as possible with little regard for the downstream water quality impacts of their operations, since every day spent building is a decrease in the profit margin. In the process, entire hillsides can be graded at once, with scores of dump trucks, cement mixers, and other heavy machinery criss-crossing the land, and the local ecosystem is immediately transformed. The incentive is the same with smaller scale projects: work quickly with an eye towards expeditious completion, regardless of the environmental cost of getting the job done. The questions the Water Board must ask are: what are the consequence for water quality of this pressure to work as quickly as possible, and how should a permit be constructed in light of this situation to best protect water quality?

One obvious consequence of these activities is the potential for massive amounts of sediment and other waste to discharge into nearby waterways. It is generally acknowledged that erosion rates from construction sites are much greater than from almost any other land use activity.¹ Once soil is disturbed by grading and the operation of trucks and other heavy construction equipment, the disturbed land becomes vulnerable to erosion, and any significant rainfall event has the potential to cause large amounts of sediments, oil and grease, trash, sewage, phosphorus and other chemicals used in construction activities to wash down hillsides and into creeks, rivers, and their downstream water bodies. The result is the deterioration of water quality and harm to aquatic species and their habitats. Another significant consequence of construction projects is long-term impacts on the local hydrology ("hydromodification"). In particular, construction projects can result in the complete and long-term transformation of the local hydrology by directly or indirectly rerouting streams and paving the land, to prevent preventing storm water infiltration.

A major issue that the State Board faces in developing a permit that will protect water quality from impacts of construction activity, and an issue that is unique to construction sites, is their high-pressure and transitory nature, and the resulting short timeframe that the Board has to make sure that proper measures are implemented to prevent both short- and long-term degradation. In light of the pressures of construction and its short-term nature, the State Board will only be effective and protect water quality if the permit sets forth clear requirements dischargers must meet that will protect water quality, simple and transparent methods to determine compliance with these requirements, effective means of enforcement to protect water quality during construction, and appropriate measures to prevent long-term physical and other impacts to the local hydrology and water quality.

The Draft Permit presents a major step towards achieving these goals. Our comments, which support many aspects of the Draft Permit and offer suggestions to improve others, are presented as follows: (1) we provide our support for many of the improvements the Draft Permit makes over the 1999 Permit such as the hydromodification standards and risk assessment procedures to guide BMP development and implementation; (2) we explain the

¹ Novotny, V. and H. Olem, 1994, *Water Quality: Prevention, Identification, and Management of Diffuse Pollution*, New York: Van Nostrand Reinhold.

concerns we have with the Draft Permit despite these improvements. In summary, our concerns are:

- (a) compliance determinations in NPDES permits must be simple and transparent but as currently written the Draft Permit will not achieve this requirement;
- (b) beyond failing to allow for simple, transparent compliance determinations, the Draft Permit does not provide enforcement mechanisms necessary to address the transitory nature of construction discharges;
- (c) the Clean Water Act requires the Construction Permit ensure compliance with water quality standards but the Draft Permit fails in this regard;
- (d) numeric effluent limitations ("NELs") are both feasible and appropriate but the Permit does not incorporate them for the most significant pollutants;
- (e) the Draft Permit's monitoring provisions must be designed to demonstrate compliance with the permit and should not be treated as a penalty; and
- (f) though the agency review and public participation provisions of the Draft Permit are superior to those in the 1999 Permit, these provisions require further modification to meet the requirements of the Clean Water Act and controlling legal precedent.

I. Support for Key Elements of the Draft Permit

The Blue Ribbon Panel of Experts convened by the State Board to assess stormwater controls in California issued a report in June 2006, "Report on the Feasibility of Numeric Effluent Limitations Applicable to Discharges of Storm Water Associated with Municipal, Industrial and Construction Activities" ("Blue Ribbon Panel Report"). The Blue Ribbon Panel Report concludes that the existing system for managing storm water pollution is not working, "specifically recognizing in the construction context that "...traditional erosion and sediment controls are highly variable in performance, resulting in highly variable turbidity levels in the site discharge." In the Draft Permit, the Fact Sheet incorporates the findings of the Blue Ribbon Panel Report, stating:

It is critical to recognize that the BMP solution to storm water problems has been inadequate, based on 15+ years of experience with construction, industrial, and Phase 1 MS4 storm water permits.²

The Draft Permit begins to address some of the issues raised by the Blue Ribbon Panel and State and Regional Water Board staff as systemic problems with the current permit. The changes to the current permit that we endorse include the following:

- Standards to eliminate or minimize damage caused by hydromodification;³
- Requirements to characterize the risks posed by each site;⁴

² Draft Permit, Fact Sheet at 19 of 40 (emphasis added).

³ Draft Permit, Section XI(A).

⁴ *Id.*, Section VIII(A).

- Requirements to monitor the effluent and track potential damage to the environment so it can be quickly reversed;⁵ and
- Guidelines for using the active treatment system ("ATS")/source control options.⁶

We reference the comments by Dr. Richard Horner submitted on behalf of the California Coastkeeper Alliance ("Dr. Horner's Comments") for details on our support for these changes, and include additional analysis below.

A. **Hydromodification Standards Will Help Protect Long-term Water Quality and Aquatic Habitat from Negative Impacts of Construction and Development**

The hydromodification standards in the Draft Permit will generate important improvements in water quality in the face of increasing landscape alteration in California. The Draft Permit would benefit from additional explanation of the importance of maintaining the pre-construction hydrograph to in order to prevent aquatic habitat degradation; there is significant available technical information on this issue that could be easily integrated into the Draft Permit. Emphasis should be given to the benefits that a stable, functioning stream channel has on water quality – thus providing support incorporated into the Draft Permit for the proposed hydromodification standards.

A general NPDES permit for discharges associated with construction activities is the appropriate place to implement such hydromodification standards. The concern raised by CASQA and BIA at the April 20 Workshop – that the hydromodification standards in the Draft Permit will create a confusing and potentially conflicting regulatory regime for builders who must also meet similar standards pursuant to MS4 permits – appears to be merely an attempt to delay the implementation of a meaningful program. CASQA and BIA are asking the State Board to maintain the status quo and defer to a program that has been only marginally effective in protecting stream-bed degradation and associated water quality problems. Further, as Dr. Gary Wolff and staff noted during the April 20 Workshop, in many of the less-developed areas of the state not covered by MS4 permits, the construction permit may be only avenue the State Board has to require measures to meet its mandate of protecting water quality. Indeed, some of these areas likely have particularly pristine habitat that demands protection offered by hydromodification requirements. Reliance on the CEQA process or other planning processes will also be ineffective protection since, as Dr. Wolff also correctly noted, the State Board does not have the power to require changes to projects during these planning processes. In order to avoid any concern about duplicative regulation, a simple clarification stating that the dischargers must meet the stricter of either the hydromodification standards of the applicable MS4 permit or of the construction permit is all that would be necessary.

⁵ *Id.*, Attachment E, Section E.

⁶ *Id.*, Section E(1).

The State Board should have no reservations about requiring hydromodification standards in the construction permit even though the construction permit may not have to be obtained until after the project is designed. As is the case with any permit that will be required at some point during development, the project must be designed to meet the requirements of that permit. Since preventing long-term water quality degradation that often accompanies landscape alteration is most cost-efficient and easiest to implement during the initial development phase, we support the inclusion of hydromodification standards in the Draft Permit.

B. The Site Risk Analysis and Characterization Requirements Are Necessary for Determining Appropriate Pollution Control Measures

The site risk analysis and characterization requirement is a well-conceived component of the Draft Permit. In particular, it will provide both the regulated parties and the regulators with important information to effectively develop and implement BMPs to control pollutant discharges. However, we caution that using the results of the risk analysis and characterization to exempt facilities from regulatory requirements must be avoided. Using risk analysis as a basis for regulation is inconsistent with the Clean Water Act's technology-forcing regulatory structure.⁷ Further, as a practical matter, exempting certain facilities from fundamental aspects of the Draft Permit, such as the requirement to prepare a SWPPP and the requirements to monitor effluent discharges, will have the unintended consequence of encouraging these facilities to forego implementing needed pollution control practices. The relative risk of erosion or other pollution generating conditions at a site does not mean that there is no risk, and as such the Draft Permit should be modified to remove the exemptions to permit requirements currently allowed to low-risk sites.

C. The Requirement to Monitor Effluent Regardless of Identified BMP Failure Is Essential

We also support the new requirement to monitor the effluent regardless of whether there has been an identified BMP failure.⁸ This monitoring will help dischargers better evaluate the effectiveness of, and modify if necessary, their BMPs to prevent pollution problems. It will also provide useful data that the Draft Permit Fact Sheet acknowledges must be collected to understand the water quality impacts of construction activities.⁹ As noted in a memo from Cal EPA to the State Board, "appropriate data [should be] gathered and analyzed to determine our progress in protecting water quality."¹⁰

⁷ See 33 U.S.C. §§ 1311 and 1342 (establishing a permitting scheme that does not include risk in the calculation of when a permit is required or how limits on pollutant discharges should be decided).

⁸ The Draft Permit has eliminated the requirement in the 1999 Permit to monitor for pollutants that are known or likely to be present in discharges. No explanation for removing this requirement from the permit was provided and we see none that would justify doing so. Pollutants known or likely to be present must be addressed with pollution control measures to ensure that water quality standards are met and monitoring for these pollutants must be required to evaluate compliance with this requirement.

⁹ Draft Permit, Fact Sheet at 21.

¹⁰ Memorandum from Dr. Alan Lloyd, Secretary, Cal EPA to Art Baggett, Chair, SWRCB (March 23, 2005).

D. The Requirements Imposed When Highly Erosive Soils Will Be Exposed Are Valuable Additions to the Draft Permit

We support the alternative ATS or source control options to control sediment when preconstruction soil surveys indicate that soils to be exposed are particularly prone to erosion.¹¹ We acknowledge the fears some commenters may raise about the potential toxicity of the polymers used in an ATS but do not believe that these fears are justified. Several other states, including Washington, have established a protocol and procedure for testing and approving these treatments and we encourage the State Board to consider establishing a similar system to approve these systems in California.¹² Further, the effluent limitations established to address toxicity¹³ should provide an effective backstop to ensure that these systems are properly developed and implemented.

II. Concerns That Still Need to Be Addressed

A. Compliance Determinations Should Be Simple and Transparent

Any NPDES permit must lend itself to a simple and transparent compliance determination in order to be effective. The first Secretary of Governor Schwarzenegger's California Environmental Protection Agency ("Cal EPA") articulated this principle in an enforcement initiative that directs agencies on the development of permits to protect environmental quality.¹⁴ The Enforcement Initiative Memo also states that "[c]urrently, one of the greatest difficulties faced by enforcement staff is complicated, ambiguous and/or poorly written permits or multiple, conflicting and confusing regulatory requirements that are unenforceable." The Secretary then provided specific recommendations in his Memo to address the problems associated with assessing compliance, stating that "[p]ermit requirements must be unambiguous. They should be written in such a way that they are clear, easy to understand, and determining compliance is simple." The Secretary added with respect to actual enforcement that "[s]imilarly, the enforcement consequences for violation should be clear."

These points were reiterated by the Governor's subsequent Secretary in a memo to the State Board,¹⁵ which requested the Board to work with Cal EPA to:

- "[m]easure compliance rates among all potential violators of water laws . . . and post information about violations and compliance rates on the Internet";
- "regularize and systematically assure that violations are promptly and consistently enforced and prosecuted"; and

¹¹ See Dr. Horner's Comments at 3-4.

¹² *Id.*

¹³ Draft Permit, Section IV(4)(a)-(b).

¹⁴ Enforcement Initiative Memorandum from Secretary Terry Tamminen, Cal EPA to Board Chairs, Department Directors, and Executive Officers (November 30, 2004) ("Enforcement Initiative Memo").

¹⁵ Memorandum from Secretary Alan Lloyd, Cal EPA to Art Baggett, Chair, SWRCB, (March 23, 2005) ("Lloyd Memo").

- “[s]tandardize permitting requirements and permit monitoring, and reporting.”

Both the Enforcement Initiative Memo and the Lloyd Memo were issued during the development of the Draft Permit and reiterate the critical importance of making permits simple and transparent so that compliance can be effectively measured, reported, and when necessary, efficiently enforced to protect water quality.

The 1999 Permit did not achieve these goals. By relying exclusively on an inherently subjective BMP-based system of compliance and not requiring monitoring to evaluate BMP effectiveness, the 1999 Permit failed to provide an objective means to determine if the pollution control measures implemented were achieving the requirements of the permit to protect water quality. We heard perennial complaints from Regional Board staff that they lacked the funding to engage in the largely subjective and resource intensive process of site visits and technical oversight necessary to evaluate developers’ attempts to comply with the 1999 Permit.

It is disheartening to see that this Draft Permit largely reinstates the same regime for determining compliance as the 1999 Permit. Rather than correct many of the problems with the 1999 Permit, the Action Level (AL) feedback loop proposed in the Draft Permit is not designed to effectively evaluate compliance with the Permit. Instead, as the Draft Permit states, “the ALs in this General Permit are not directly enforceable.”¹⁶ Rather, they are simply intended to provide feedback to see if the BMPs chosen by the discharger are in working as predicted. If they are not, there is no potential for a penalty, and all that the discharger must do is try some additional BMPs. The dischargers will never be assured that they have done what is required to meet the permit requirements and water quality standards, and the Regional Boards will have to spend just as much time making the subjective determination of whether a certain project is in compliance. This system failed under the 1999 Permit and it should not be repeated here.

To avoid perpetuating these problems as they exist in the 1999 Permit, the State Board should revise the Draft Permit. In particular, the permit should incorporate numeric effluent limits (NELs) rather than ALs for pollutants likely to be discharged. With NELs, determining compliance will be simple and dischargers will have quantitative information to help determine what additional steps are necessary to achieve compliance.

In addition, the Draft Permit’s monitoring program should be revised such that it can be used to evaluate compliance. As it is currently written, the monitoring requirements will generate useful data regarding BMP effectiveness relative to promised performance, but they will not indicate whether compliance with the required technology-based pollutant reductions or water quality standards has been achieved. Until compliance determinations are simple and transparent, neither the regulators nor the dischargers will know if the measures being taken are resulting in the protection of water quality that the Permit must ensure.

¹⁶ Draft Permit, Section 1, ¶ 14

B. The Construction Permit Must Provide Appropriate Enforcement Mechanisms to Address the Transitory Nature of Construction Project Discharges

The Governor's message in his Action Plan on the Environment could not have been any clearer regarding the importance of simplicity in permitting and the relationship this simplicity has to enforcement. Specifically, the Action Plan provides:

Strict law enforcement is vital to assure environmental protection, prevent polluters from achieving unfair competitive advantage against complying competitors, send a message of public values, and establish conditions conducive to creativity and participation in voluntary initiatives. My Administration will focus on keeping underlying statutes and regulations simple; simple rules are easiest to follow and comply with; unnecessarily complex rules are hard to comply with, hard to enforce, and encourage evasion.¹⁷

The Draft Permit does not provide this simplicity, nor does it provide adequate enforcement mechanisms needed to be certain the environment is protected. The substantial discharges of sediment and other pollutants from construction sites occur in a very short period of time, often over just one or maybe two rainy seasons. As such, in order to effectively enforce the terms of the permit and ensure that an entire project does not get built without needed controls to protect water quality and aquatic habitat, the Permit must provide the agency responsible for enforcement with effective tools to guarantee environmental protection. In the context of a permit governing construction activity, the agency responsible for enforcement must have the ability to stop the cause of the pollution problem immediately. Much as an enforcer of the fire code would have the ability to immediately stop a construction project and require the problem be corrected if an inspection revealed violations of the code, this permit must ensure that the Regional Boards have the authority to stop work if sample results or inspections reveal the pollution control measures are not working to protect water quality. This enforcement tool is critical if the state is to be effective in an environment like construction, as discussed in the Introduction to these comments.

The Draft Permit does not provide this essential authority. Instead, the Draft Permit provides that Regional Boards "may require revisions of SWPPPs and [other pollution prevention plans]." The statement that noncompliance with this order is grounds for enforcement under the Clean Water Act¹⁸ is not effective in the construction context. For one thing, as explained, determining compliance under the Draft Permit would be a long, resource intensive process and thus is not responsive enough to provide for quick enforcement. Further, enforcement actions under the Clean Water Act can take months to even reach a stage where a work stoppage can be obtained. In the case of a construction project, these months could mean many more rain storms and associated pollutant discharges, or even the completion of the project such that by the time a stoppage is ordered, controls are no longer a viable option. The window of opportunity to correct the problem before more harm is caused

¹⁷ Governor Arnold Schwarzenegger, "Action Plan for California's Environment" (Oct. 2003).

¹⁸ Draft Permit, Attachment C, Section I(1).

will have passed, making the threat of halting the project an empty one. The Draft Permit should be revised to provide both a simple method for determining performance and a streamlined mechanism that gives the Regional Boards the ability to step in and require immediate compliance before any other actions with the potential to degrade water quality are taken.

C. **The Construction Permit Must Ensure Compliance with Water Quality Standards**

A significant shortcoming of the Draft Permit is its authorization of polluted discharges without any method to ensure that water quality standards will be not be violated. We recognize that the Draft Permit contains prohibitions on discharges of pollutants that cause or contribute to an exceedance of any applicable water quality standards.¹⁹ However, as explained below, the assertion of this requirement must be accompanied by numeric effluent limitations on discharges, and appropriate monitoring requirements to guarantee that the discharges authorized by the Draft Permit are not causing or contributing to violations of applicable water quality standards. Unless changes are made, neither the dischargers nor the Regional Boards will be able to make efficient compliance determinations or take appropriate subsequent action to mitigate the environmental harm caused by noncompliance.

A quick background on the requirements of the Clean Water Act is necessary to inform this discussion. The Clean Water Act requires that all NPDES permits, including permits for construction storm water discharges, comply with sections 301 and 402, 33 U.S.C. §§ 1311 and 1342. Specifically, section 402 requires the State Board issue permits that “apply, insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343.”²⁰ Section 301(b)(1)(C) requires that discharges be controlled with effluent limitations necessary to meet water quality standards.²¹ In addition, section 13377 of the Porter-Cologne Act requires that NPDES permits “apply and ensure compliance with all applicable provisions of the [CWA] ... together with any more stringent effluent standards or limitations necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance.”²² Together these provisions mandate that when discharges of pollutants are authorized by an NPDES permit, the NPDES permit must contain provisions that will ensure that applicable water quality standards are met.

Rather than comply with this Clean Water Act mandate, the Draft Permit focuses almost exclusively on the requirement that all NPDES permits require technology-based pollutant reductions in discharges, ignoring the additional requirement to ensure that water quality standards are met. The Draft Permit must be revised to include provisions that the discharges authorized by the Permit shall not result in a violation of water quality standards.

¹⁹ Draft Permit, Section VI(2).

²⁰ 33 U.S.C. § 1342(b)(1)(A).

²¹ 33 U.S.C. § 1311(b)(1)(C).

²² Cal. Water Code § 13377.

The technology-based requirements in the Draft Permit represent an improvement over previous permit iterations but do not go as far as feasible or necessary to reduce pollutant loads in discharges.²³ The Draft Permit itself acknowledges the shortcomings of the technology-based ALs and other pollution control requirements when stating:

The Action Levels chosen should indicate whether systems are working as intended. Since these are technology based numbers, though, they are not necessarily good indicators of compliance with downstream water quality standards.²⁴

To meet its obligation and ensure that water quality standards are met, the State Board must replace the action level system currently proposed with a set of numeric effluent limitations and a monitoring program that allows dischargers to evaluate whether their discharges are causing or contributing to water quality standard exceedances.

1. **Numeric Effluent Limitations Are Necessary Component of Ensuring Water Quality Standards Are Met**

Numeric effluent limitations should be established for all pollutants present or likely to be present in the authorized discharges. These NELs will be based, at least in part, on numeric criteria set forth in a Statewide Water Quality Control Plan, the California Toxics Rule, the National Toxics Rule, or an applicable Regional Basin Plan. Since discharges to different water bodies may require different limitations, the State Board should develop a table for dischargers to use to identify which set of effluent limitations applies to their discharges.

Notwithstanding the fact that NELs will help substantially in ensuring compliance with water quality standards, the only generally applicable NEL established by the Permit is for pH.²⁵ The Draft Permit provides that pH is a good indicator of a failure of pollution control measures to prevent the discharge of pollutants associated with concrete and masonry activities. Including a NEL for pH is a good idea, but we see no reason why an NEL for sediment, the pollutant almost all commenters recognize as the most problematic at construction projects, as well as other pollutants likely to be present, were not developed. The mandate the State Board must meet is to ensure that discharges do not violate water quality standards. At the very least the State Board should implement NELs to address those pollutants most likely to lead to such violations.

²³ See also Dr. Horner's Comments at 2.

²⁴ Draft Permit, Fact Sheet at 34.

²⁵ We are entirely unclear why the Draft Permit includes a compliance schedule for the pH NEL. The Draft Permit Fact Sheet states that "while we believe these limits are feasible to comply with immediately, we have set them to a compliance schedule to become effective 18 months after adoption of this General Permit." Draft Permit, Fact Sheet at 37 (emphasis added). We are unaware of a legal basis for including a compliance schedule when the State Board finds that immediate compliance is feasible. The Draft Permit should be revised to remove the compliance schedule for pH.

2. **Receiving Water Monitoring Must Be Mandatory to Ensure Water Quality Standards Are Met**

In addition to establishing appropriate NELs, the State Board should require monitoring of receiving waters to verify that the pollutant discharges authorized are not resulting in, or contributing to, exceedances of water quality standards. In *Defenders of Wildlife v. Browner*, the Ninth Circuit explained that the Clean Water Act requires strict compliance with water quality standards by dischargers of storm water associated with industrial activity (which includes construction activities). 191 F.3d 1159, 1165 (9th Cir. 1999). Without effective monitoring requirements it will be difficult for a discharger to know whether he or she is meeting this requirement. It will be additionally difficult for a regulator charged with enforcing the permit to know whether a particular discharger is in compliance. Finally, it will be impossible for the regulator to know whether their permit scheme is effective in ensuring that authorized discharges do not cause or contribute to exceedances of water quality standards. In fact, the Draft Permit acknowledges this problem, stating:

We do not know and cannot know without better monitoring if compliance with technology based standards will be adequate to prevent exceedances of receiving water objectives.²⁶

The only way to correct this problem, comply with the law, and give the regulated community assurances that it is in compliance with the law is to establish a monitoring program that provides useful data for determining if water quality standards are being met.

A monitoring program to ensure that water quality standards are complied with would necessarily include mandatory monitoring of the surface water conveyances into which discharges from construction activities flow. The 1999 Permit established such a program, at least for water bodies impaired for sediment, by requiring dischargers to monitor the waters receiving their discharges both upstream and downstream of the discharge locations.²⁷ For reasons not articulated in the Fact Sheet or the Draft Permit, this requirement has been done away with, despite the fact that it would provide an effective mechanism for determining compliance with water quality standards.²⁸ We suggest that the sediment monitoring requirements of the 1999 Permit be carried over to the Draft Permit and expanded to address all pollutants that may be discharged from construction sites, including pollutants known or likely to be present.

²⁶ Draft Permit, Fact Sheet at 21.

²⁷ 1999 Permit, Section B(7). If the monitoring indicated an increase in sediment loading downstream of the discharge, a rebuttable presumption was established that the discharge was causing or contributing to an exceedance of water quality standards. *Id.* It was then up to the discharger to monitor its effluent to prove that it neither caused nor contributed to the exceedance. *Id.*

²⁸ We are surprised that this process was done away with without explanation, especially since this requirement was in the 1999 Permit in the first place as a result of a court order.

D. Numeric Limitations Are Feasible and Appropriate

The Lloyd Memo from Cal/EPA to the State Board directs the State Board that “[w]here appropriate to achieve water quality protection, numeric limits based on sound science should be incorporated into permits that define the allowable discharge of pollutants that the Boards determine are a high priority.” When asked by the State Board whether numeric limits were feasible in the construction context, the Blue Ribbon Panel Report concluded that “[n]umeric limits . . . are technically feasible” and provided a series of guidelines that the State Board should follow when developing numeric effluent limitations for construction storm water discharges.²⁹ The BRP recommended that the State Board consider numeric limits for pH “in particular,” and added that “[t]he Board should consider Numeric Limits . . . for other pollutants of relevance to construction sites” in addition to pH.

The State Board should revise the Draft Permit to include numeric effluent limitations for high priority pollutants, which from construction sites must at a minimum include sediment and turbidity. Numeric effluent limitations are the most effective method available to the State Board to ensure that the permits will meet the dual requirements of the Clean Water Act to force technology-based solutions to reduce pollutants and to ensure that water quality standards are met. As with any other industry, the NELs can, and should, be established based on an evaluation of technology that is available, with the concentration limits set at the levels achieved by the appropriate technologies.³⁰ Further, NELs necessary to ensure that water quality standards are met can be established by referring to the numeric criteria for pollutants established in the Statewide Water Quality Control Plan, the California Toxics Rule, the National Toxics Rule, or an applicable Regional Basin Plan.

The benefits of using NELs are threefold. First, rather than having to spend countless hours reviewing SWPPPs and conducting site visits to assess whether the BMPs chosen will in fact achieve the pollutant reductions required, NELs set a pollutant concentration level that dischargers must comply with and leave it up to the discharger to determine how it will meet these limits. Second, utilizing NELs rather than ALs eliminates the need for a back-and-forth between the permittee and the Regional Board to determine the best method to reduce problematic discharges. Third, NELs provide a clear and simple method for evaluating compliance with the permit. This is a benefit to both the regulatory agency and the discharger since questions, about what constitutes compliance will be eliminated and, when enforcement is necessary, demonstration of non-compliance will involve a quick comparison of sample results to NELs.

E. Monitoring Programs Should Be Designed to Demonstrate Compliance with the Permit and Not Treated as a Penalty

We applaud inclusion in the Draft Permit of the requirement for dischargers to monitor and sample their discharges on a regular basis. However, even with this addition, the monitoring requirements in the Draft Permit will be insufficient to encourage and effectively

²⁹ Blue Ribbon Panel Report at 16-17.

³⁰ 33 U.S.C. § 1311(b)(1)(A) and 1311(b)(2)(A). See Dr. Horner's Comments at 4-5.

evaluate compliance with the permit. Our recommended improvements to the monitoring requirements in order to achieve the goals of the Lloyd Memo are set forth in the sections above addressing the requirement to ensure compliance with water quality standards and necessity of making compliance determinations simple and transparent.

Our remaining concern with the monitoring requirements as currently structured is that the incentives established are backward. As the Lloyd Memo states, any monitoring program in an NPDES permit must "[a]ssure that . . . appropriate data are gathered and analyzed to determine our progress in protecting water quality."³¹ Notwithstanding the directive from Cal/EPA, which still stands, the Draft Permit appears to treat monitoring as a penalty rather than what it is – an essential component in an effective regulatory system. For example, receiving water monitoring is only required when ALs are exceeded and low-risk sites are not required to monitor their discharges.³² Monitoring is the only way for dischargers, the regulators, and the public to judge the effectiveness of the pollution control measures implemented; it is the simplest and most-effective way to judge compliance with the terms of the permit; it is the best way to test the accuracy of assumptions built in to the permit (for example whether the low-risk sites in fact have fewer pollution problems); and it is the only way to evaluate impacts to water quality.³³ As such, it should not be treated as a penalty but understood and utilized as the only effective means to ensure pollution in storm water discharges are controlled.

As a practical matter, when monitoring is not required, permits fail to achieve their goals. For example, the 1999 Permit does not require monitoring until after a problem has been visually detected. One result of the 1999 program is that there is no way to determine if BMPs that appear to be working are in fact doing their job. The perils of not requiring monitoring can also be found in the group monitoring programs authorized by the General Industrial Storm Water Permit, such as the Metals Recyclers Group ("MRG") operating in Region 4. Members of the MRG are only required to monitor two times every five years. Results from this limited monitoring reveals repeated and regular exceedances of benchmarks and water quality standards for almost all pollutants they discharge. Without regular feedback on the effectiveness of their pollution controls, the MRG dischargers have no idea of whether they are complying with their permit or not. Both of these examples demonstrate the importance of establishing a regular monitoring program that is not treated as a penalty but instead is understood as an integral part in protecting water quality.

F. Agency Review and Public Participation Processes Require Revision

The agency review and public participation provisions in the Draft Permit are a good start towards incorporating the review and participation requirements of the Clean Water Act into the permitting process. We support the inclusion of provisions allowing the Regional Boards to review the NOI, SWPPP, and SWPPP Checklist and to require revisions to the

³¹ Lloyd Memo at 2.

³² Draft Permit, Attachment E, Section E(3).

³³ See Lloyd Memo at 2.

SWPPP or rescind permit coverage if these documents are found to be inadequate.³⁴ We also support the provisions that require the SWPPP to be submitted to a publicly accessible database, allow the public to comment on the SWPPP and other aspects of the permit application, and give the Regional Board the flexibility to require revision of the SWPPP or rescind permit coverage based on public comments. However, the agency review and public participation provisions do not completely satisfy the requirements of the Clean Water Act and controlling legal precedent. As explained more thoroughly below, the agency review of a discharger's SWPPP should occur early in the permitting process, prior to receipt of permit coverage.³⁵ In addition, the avenues for public participation must occur prior to the discharger's receipt of permit coverage and must include opportunities for a public hearing.³⁶

The Clean Water Act requires agency review of permit applications and the substantive terms of the permit designed to control pollutant discharges, prior to granting permit coverage.³⁷ In cases where the substantive terms of the permit include the development and implementation of BMPs to prevent pollutant discharges, it is incumbent that the agency issuing permit coverage have the opportunity to review the BMPs selected prior to permit coverage to ensure that they will have the required effect of achieving the applicable pollutant reduction standards.³⁸ Agency review is appropriate even where the terms of the general permit identify detailed management practices, since absent review "nothing requires that the combination of [BMPs] that the operator [of the construction project] selects from this 'menu' will have the combined effect of reducing discharges to [the applicable pollution reduction standards]."³⁹ In sum, the Ninth Circuit requires that:

Stormwater management plans that are designed by the regulated parties must, in every instance, be subject to meaningful review by an appropriate regulating entity to ensure that each such program [meets applicable pollutant reduction standards].⁴⁰

As a final note, *EDC* provides that "technical issues relating to issuance of NPDES permit issuance should be decided ... at a stage where the [permitting agency] has the greatest flexibility to make appropriate changes."⁴¹

The Draft Permit fails to meet these requirements. In pertinent part, the Draft Permit provides that "Regional Boards *may* review permit registration documents [NOI, SWPPP, SWPPP Checklist] and reject or accept permit coverage."⁴² On its face the Draft Permit does not require review of the SWPPP and other documents that establish the substantive pollution

³⁴ Draft Permit, Section XIII(1)-(2).

³⁵ See *Environmental Defense Center v. EPA*, 344 F.3d 832, 854-858 (9th Cir. 2003) ("*EDC*").

³⁶ *Id.*

³⁷ See 33 U.S.C. §§ 1342(a) and 1342(b); *EDC*, 344 F.3d at 841, 854-856, and 855 n.32.

³⁸ *Id.* at 854-856.

³⁹ *Id.* at 855 n.32.

⁴⁰ *Id.* at 856.

⁴¹ *Id.* at 857 (citing EPA interpretation of permitting process requirements found in 44 Fed. Reg. 32,854, 32,885 (June 7, 1979)).

⁴² Draft Permit, Section XIII(2).

control measures chosen by the permit applicant to meet the applicable pollutant reduction standards. Further, the Draft Permit fails to indicate when this discretionary review will take place. The Draft Permit seems to indicate that permit coverage is effective on the date the permit registration documents are "administratively accepted."⁴³ The Draft Permit does not suggest that agency review will take place, if it takes place at all, prior to the grant of permit coverage. This scheme is inconsistent with the requirements of the Clean Water Act and controlling Ninth Circuit precedent, and the State Board should correct it to comply with the law.

The solution we propose to satisfy the agency review requirements is to mandate agency review of the SWPPP, and other documents that establish the substantive pollution control measures, prior to the grant of permit coverage. An alternative would be to develop NELs that all dischargers must comply with and leave the method for complying with them up to the discharger. Under the latter alternative, the substantive terms of the permit would be the numeric effluent limitations, and there would be no issue of dischargers writing the terms of their permits.

The public participation provisions of the Draft Permit also need modification to meet the requirements of the Clean Water Act and controlling legal precedent. Section 402 of the Clean Water Act provides that the permitting process must provide for "opportunity for public hearing" and make a copy of each permit application available to the public.⁴⁴ Further, the timing for the public review process is the same as for agency review – that is public participation in the permitting process must occur prior to the issuance of permit coverage and in "the most open, accessible forum possible."⁴⁵

As currently written, the Draft Permit does not achieve these requirements. The Draft Permit states "the Regional Water Boards shall review comments provided from the public ... within the 90-day public review period" and "the Regional Water Boards *may* take actions ... requiring public hearings."⁴⁶ The Draft Permit does not indicate when this public review period will occur relative to permit coverage, but, as noted above, permit coverage is effective the date the SWPPP and other documents are "administratively accepted," which appears to coincide with the date they become available to the public.⁴⁷ That is, if our understanding is correct, the Draft Permit does not allow for public participation prior to permit coverage as required. Further, if a public hearing is requested (for which the decision to grant is discretionary, not mandatory as required by law), the hearing will not take place until after the permit has been issued, the project has begun, and the project momentum is already well underway. Asking the Regional Boards to mandate BMP reconfigurations at that point in the

⁴³ *Id.*, Section VII(4).

⁴⁴ 33 U.S.C. §§ 1342(a)(1) and 1342(j); *EDC*, 344 F.3d at 856-857 (regulatory agency must make permit application materials publicly available and allow for a public hearing on NPDES permits).

⁴⁵ *EDC*, 344 F.3d at 856-857 (citing EPA interpretation of permitting process requirements found in 44 Fed. Reg. 32,854, 32,885 (June 7, 1979)).

⁴⁶ Draft Permit, Section XIII(2) (emphasis added).

⁴⁷ Draft Permit, Section VII(4)

process does not meet the requirement that agency review and public participation occur at the stage when the agency has "the greatest flexibility to make appropriate changes."⁴⁸

The Draft Permit should be reworked to ensure that public participation requirements of the Clean Water Act are met. To do so, we suggest a mandatory public review period prior to the grant of permit coverage. Likewise, we suggest that Draft Permit, Section XIII(2) be rewritten to include the following language: "upon request, a public hearing on any permit application shall be provided by the Regional Board." These simple revisions to the Draft Permit will resolve the bulk of the public participation shortcomings and help ensure that the State Board acts as required by the Clean Water Act.

Conclusion

We would again like to thank the State Board and staff for preparing a Draft Permit that takes many of the needed steps to control the water quality impacts of construction activity in California. However, there is still room for improvement. The State Board should take the necessary steps to complete its task and issue a General NPDES Permit for discharges associated with construction activities that ensures compliance with water quality standards and guarantees that California meets its mandate to protect water quality and aquatic habitat. Growth pressures in California will continue to demand larger and more elaborate construction projects and projects that increasingly reach into undeveloped areas. The State Board must take all steps necessary to protect the health of California's waters and habitat impacted by these pressures, for the benefit of us all.

Thank you.

Sincerely yours,



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⁴⁸ EDC, 344 F.3d at 856-857 (citing EPA interpretation of permitting process requirements found in 44 Fed. Reg. 32,854, 32,885 (June 7, 1979)).

EXHIBIT 2

