California Council for Environmental and Economic Balance

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Public Comment
Draft Construction Permit
Deadline: 6/11/08 by 12 p.m.

June 10, 2008

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

RE: Comment Letter – Draft Construction Permit

Dear Ms. Townsend:

The California Council for Environmental and Economic Balance (CCEEB) is a non-partisan, non-profit organization of business, labor and community leaders that seeks to achieve the State's environmental goals in a manner consistent with a sound economy. As such CCEEB has taken an active role in working with the State Water Resources Control Board (SWRCB) to address proposed policies and permits that affect the construction, operation and maintenance of facilities, such as those used by CCEEB's members' companies providing essential public services like natural gas, electricity, and communications.

With this letter CCEEB is submitting its final comments on the March 19, 2008 version of the Proposed Construction Storm Water General Permit ("Proposed Permit"). While this letter includes comments and recommendations on the general merits and applicability of this permit to conventional footprint development projects, its primary focus is on the potential application of this permit to linear construction activities. CCEEB's comments consist of this letter, the attached Comment Table and other documents referenced in this letter.

Permitting of Linear Projects

CCEEB respectfully requests that Order 99-08, the existing Construction Stormwater General Permit ("Existing Permit"), be continued in force after the adoption of the Proposed Permit for the purpose of providing construction stormwater permit coverage for those linear projects that are not covered under the Small Linear Underground/ Overhead Projects Permit (SLUP) until such time as the SLUP can be revised to cover all linear projects. Our reasoning for this request follows.

The Proposed Permit, as drafted, would regulate stormwater discharges from both conventional footprint land development projects and from large linear projects. The differences however between land development projects and linear construction projects are sufficiently great that any attempt to force both types of construction to be covered under the same permit will result in an overstatement of the risk of linear projects, unreasonably high costs to the owner of the linear project, and significant compliance challenges which would make compliance at most linear sites nearly, if not completely, impossible. **Simply stated, the Proposed Permit seems clearly to be written for conventional footprint land development projects and is consequently not well-suited to regulate long linear projects.**

In 2003, the SWRCB adopted the Small Linear Underground/ Overhead Projects Permit or "SLUP" (Order 2003-0007) in recognition that linear construction projects are fundamentally different from conventional footprint land development projects. This permit applies to linear projects that have one or more, but less than five, acres of total soil disturbance[1]. In CCEEB's view this reasoning also applies to linear projects that are required to be regulated under a construction stormwater permit for projects that have five or more acres of soil disturbance (i.e., linear projects that cannot be covered under the SLUP).

A linear project, no matter the total soil disturbance area, proceeds in a predictable way, with sections of the project active, but most of its length inactive. That is, along a major linear line, only a small portion is active at any time, which greatly reduces the risk of sediment discharge and receiving water risk.

The SLUP states:

> *"Construction activities associated with small linear underground/overhead projects that result in land disturbances greater than one acre, but less than five acres (hereafter referred to as small LUPs), are not like traditional construction projects. Small LUPs have a lower potential to impact receiving waters because these projects are typically short duration and constructed within or around hard paved surfaces that result in minimal disturbed land areas being exposed at the close of the construction day." Page 1 SLUP fact sheet. (Copy attached)*

Following are three options available to achieve the goal of appropriately permitting linear construction projects:

1. Extend Order No. 99-08-DWQ for the purpose of regulating linear projects not covered by the SLUP until such time as the SLUP can be rewritten to include all linear construction projects;
2. Update the SLUP concurrently with the Proposed Permit to include all linear construction projects; or
3. Completely rewrite the Proposed Permit so linear construction is appropriately regulated.

We believe **Option One** is the most effective considering the current stage of the Proposed Permit process and that the SWRCB hopes to finalize the Proposed Permit in the summer/fall of 2008, considering that the SLUP is due to be renewed this year, and understanding that regulation will be needed for large linear projects while an appropriate regulatory program is developed.

CCEEB submitted an initial comment letter[2] dated May 5, 2008 which included summaries of ten specific examples of requirements in the Proposed Permit that are not appropriate for linear

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[1] Note the SLUP "...regulates storm water discharges associated with Small LUPs. Small LUPs include, but are not limited to, any conveyance, pipe, or pipeline for the transportation of any gaseous, liquid (including water and wastewater for domestic municipal services), liquescent, or slurry substance; any cable line or wire for the transmission of electrical energy; any cable line or wire for communications (e.g., telephone, telegraph, radio, or television messages); and associated ancillary facilities. Construction activities associated with Small LUPs include, but are not limited to, (a) hose activities necessary for the installation of underground and overhead linear facilities (e.g., conduits, substructures, pipelines, towers, poles, cables, wires, connectors, switching, regulating and transforming equipment, and associated ancillary facilities); and include, but are not limited to, (b) underground mark-out, potholing, concrete and asphalt cutting and removal, trenching, excavation, boring and drilling, access road and pole/tower pad and cable/wire pull station, substation construction, substructure installation, construction of tower footings and/or foundations, pole and tower installations, pipeline installations, welding, concrete and/ or pavement repair or replacement, and stockpile/borrow locations.", See SWRCB Order 2003-0007, Section D.1, Page 6.

[2] Letter from Robert W. Lucas, Waste & Water Quality Project Manager - CCEEB to Michael Lauffer, Chief Counsel – SWRCB entitled "Recommendations for the Permitting of Stormwater Discharges from Large Linear Construction Projects Considering the Focus of the Proposed Construction Stormwater General Permit on Conventional Footprint Land Development Projects", May 5, 2008

projects. These ten issues are addressed below and other issues that are specifically applicable to linear projects are identified as such in the attached Comment Table.

1. **Risk Assessment**

   The Proposed Permit assumes that a project would be assigned a single risk factor, or at the RWQCB's discretion, multiple risk factors could be assigned if the project extended beyond a single "planning watershed". Although this may be a workable approach for a conventional footprint land development project, for a linear project that spans five plus miles, often across multiple watersheds, receiving waters, soil types, terrains, rainfall zones, etc, it is not an appropriate methodology. The proposed methodology would likely significantly overstate the risk for a linear project.

   For example, where 99% of a linear project is outside the floodprone width of a waterbody, the remaining 1% located within a floodprone width would result in the entire project having a much higher risk level than needed to sufficiently protect water quality. This would be even more true when all or a portion of the project is in existing developed areas, which many linear projects are.

   The use of a risk-based approach is a good idea; however, the approach proposed in the Proposed Permit is too complex for linear projects. Even if the Proposed Permit included the option to have multiple site-specific risk factors (that incorporated all of the site-specific risk criteria) along the length of a linear project and could therefore allow for lower risk factors on certain segments of the project, this would likely become too complex of an approach to implement on long linear projects. Linear projects need an alternate method of risk assessment that focuses on those portions of the project that could potentially have higher risks, such as work in undeveloped vs. developed areas (e.g., existing paved streets), or specific risk factors such as where a project occurs within a certain distance of a waterbody. A qualitative risk approach method was incorporated into the SLUP (i.e., Tier I and Tier II projects), wherein Tier II projects have more stringent requirements than Tier I projects. Modifying the SLUP to include large linear projects, rather than including them in the Proposed Permit, would allow linear projects to take advantage of a qualitative risk approach that is more manageable to implement.

2. **Run-on/ Run-off Controls**
   Distinct from conventional footprint land development projects that regrade existing topography, linear projects typically work within relatively narrow rights of way (e.g., 50 ft.) and within existing slopes and terrain, which precludes the ability to control run-on.

   Installation of perimeter controls along miles of linear construction is unreasonable. It would result in a hydrologic barrier across miles of landscape in natural areas, and would be impracticable on active city streets, where it would be better to protect storm drains with BMPs. Also, construction access points are constantly moving along large linear projects; thus, stabilization of each "entrance" is unreasonable and may not be safe at some locations. Alternative BMPs, such as sweeping, should be allowed in such cases as long as the protection of water quality is accomplished.

3. **Numeric Action Level (NAL) Determination**
   Calculating a site specific NAL for a linear project will be exceedingly difficult since these projects traverse many different areas that would affect the factors used to calculate the NAL. Having multiple NALs for a project will be difficult to develop and implement.

4. **Stabilization of Disturbed Areas on Linear Projects**
   The entire length of most linear projects is not disturbed at any one time; a portion is exposed, underground lines are placed, the trench is closed, and the project moves ahead. Very often portions of the project are re-vegetated and/or otherwise stabilized before the

remainder of the project is completed. As portions of linear projects achieve final stabilization during the project they should be able to be removed from permit coverage.

5. **Inspections/ Monitoring**

Rain Event Inspections/ Monitoring - Access roads along a linear project can be in very isolated and topographically challenged areas. Any mandated inspections/ monitoring during and immediately after a rain storm would put the inspector at very high risk of becoming stuck on an isolated access road or possibly sliding off a steep slope. Inspections and monitoring need to be required only during periods in which it is safe to access the sites. Also, not driving on the dirt access roads until they have dried out prevents additional erosion that is caused by creating new ruts in the roads.

Effluent Monitoring - Effluent monitoring, as required by the Proposed Permit, will be extremely expensive and time consuming for linear projects. Since, in the Proposed Permit workshops, staff has characterized a project's discharge as anywhere that stormwater leaves the project boundary, lengthy linear projects can potentially have hundreds of discharge points. Additionally, for linear construction in existing developed areas (e.g., paved streets), this requirement could be interpreted to require sampling at each storm drain inlet. It is infeasible to require sampling for all of these numerous locations, much less to require sampling within the first hour of discharge and then the first and last hour of each working day during the entire storm event for linear projects.

Receiving Water Monitoring - A linear project could cross multiple watersheds or sub-watersheds, and thus could discharge to multiple receiving waters and/ or to multiple points on individual receiving water. The requirement to monitor the receiving waters for a linear project is infeasible due to the potentially large number of locations where receiving water monitoring could be required and the issues of accessing the receiving waters. Additionally, the requirement to perform a benthic macro-invertebrate assessment will multiply costs for linear projects due to their discharges to multiple receiving waters. Clearly, the permit estimate that compliance will cost approximately $1,000 per construction site is significantly underestimated for linear projects where multiple personnel (and necessary sampling and analytical equipment) would be required.

6. **"Complete Utility Phase" vs. Linear Construction**

The Proposed Permit states that the "complete utility phase" of project construction is automatically high risk for high pH discharges. Linear projects should not be considered to be comprised solely of a "utility phase" but this finding could be interpreted to classify the entire duration of linear projects as high risk for pH discharges and subject to a pH numeric effluent limit. This is not appropriate or reasonable. The Proposed Permit's utility phase is different from linear construction. In many cases, underground utility projects do not use concrete slurry for backfill and those that do would only pose limited exposure of fresh concrete to rain as trenches are paved over fairly quickly or covered with trench-plates when backfill doesn't occur immediately. This practice limits the exposure of any newly poured concrete and obviates the need to consider linear utility sites at high risk for pH discharges.

7. **Rain Event Action Plans (REAPs)**

Because linear projects have essentially one phase of construction (contrary to conventional footprint land development projects with multiple phases of construction), linear projects should be required to prepare a single standardized REAP for the entire project that would be referenced during pre-storm inspections to ensure appropriate BMPs are in place, rather than preparing a new REAP for every new storm event.

8. **Soil Testing**

Linear construction subject to the Proposed Permit will likely be at least several miles in length and numerous soil types and particle sizes will be encountered. It is not practicable to consider, much less sample and evaluate the particle size of every soil type encountered

over a several mile construction route. BMPs used for linear construction in undeveloped areas are installed at drainage consolidation points and are not likely to vary significantly based on soil conditions. Also, many linear projects trench across existing paved areas, such as city streets. Excavated soil is usually replaced into the trench or trucked offsite. Temporary stockpiling of excavated soil can be adequately secured with BMPs. It is unreasonable to require testing of excavated or imported soil that will quickly be used as backfill for a trench that will be paved over.

9. **Location of SWPPP to be On-site**
   Linear projects do not typically have a construction trailer located on-site and if they do it may be located at one end of a long project. Appropriate regulation for linear projects needs to allow the SWPPP to be retained in a project vehicle with the requirement that it must be made available within a reasonable period of time upon request of an inspector. (Such language appears in the SLUP and represents one of many instances where the SLUP, modified to address longer linear projects, represents the best opportunity for appropriate regulation of all linear projects.)

10. **Permit Registration Documents/ Security**
    Utility companies are concerned about protecting infrastructure that is critical to providing the essential public services they provide from terrorist attacks. Therefore it is important to limit public access to information regarding the location of their facilities. Public submittal of certain documents, such as the SWPPP map and NOI, would undermine utilities efforts to keep this information from the public purview and utility companies should be exempt from having their documents posted on the internet for public viewing.

EPA's Exemption Rule re: Oil & Gas Construction Activities

The SWRCB has affirmed the US Environmental Protection Agency's (EPA) exemption for oil and gas exploration, production, processing, or treatment operations or transmission facilities from having to obtain coverage under a federal or state construction stormwater permit for their construction activities that have one or more acres of soil disturbance. In fact, the SWRCB's web-site has several pages dedicated to this exemption and how and when it applies to projects in California.

On May 23, 2008, the US Appeals Court vacated EPA's rule implementing the oil and gas exemption and sent it back to EPA. However, it is uncertain going forward what will occur as EPA has the opportunity to request a rehearing and there may be other legal motions before this issue is finally settled. The decision is not immediately effective and it could be mid-July or longer before its effective date is known depending on whether EPA requests a rehearing, whether the court approves their request, and the final outcome or any rehearing.

The important point is that, although the Court vacated EPA's rule, the Clean Water Act statutory exemption language still exists and was not affected by the Court's ruling.

This is an important issue to CCEEB's membership and therefore CCEEB urges the SWRCB, through its web-site and permits, to:

- Continue to recognize the existing EPA rule implementing the exemption until the court action becomes effective;

- Ensure that any change to the exemption language contained in the SWRCB's web site and stormwater permits is consistent with the Clean Water Act exemption language (to the extent there is no EPA exemption rule) or with any future EPA rule that results from the court's action.

Permit Registration Documents

The Fact Sheet (page 5-6) references two court decisions (*Environmental Defense Center v. USEPA* (344 F.3d 832) and *WaterKeeper Alliance v USEPA* (2nd Cir. 2005)) to explain why the Proposed Permit requires, in addition to the submittal of the Notice of Intent (NOI), the submittal of the permittee's Storm Water Pollution Prevention Plan (SWPPP) and other compliance related documents. Additionally, these decisions are also used to explain the inclusion of an open-ended Regional Water Quality Control Board and public review[3], with the potential for holding public hearings on a project that has submitted a complete application. Although the SWRCB acknowledges[4] that neither of these court cases is directly applicable to states implementing the USEPA regulations, which includes California, the permit has been revised to include these new requirements.

The SWRCB, however, did not consider a third, more directly applicable court decision (*Texas Independent Producers and Royalty Owners Association v. EPA*, 410 F.3d 964 (7th Cir. 2005) – copy attached) that found that the Clean Water Act does not require USEPA's General Construction Stormwater Permit to mandate public availability of NOIs and SWPPPs or require USEPA to provide the public with the opportunity for a public hearing on a NOI or SWPPP (see page 13). The court found that Clean Water Act Sections 33 USC 1342(j) and 1342(1)(a) apply to "permits" and "permit applications" and NOIs and SWPPPs are neither permits nor permit applications. Further they concurred with USEPA's following rationale:

- The General Permit does not make use of a permit application. Those wishing to operate under the General Permit must comply with the previously established permit terms, which would include the filing of an NOI;
- The opportunity for public input on the General Permit was through response to the Federal Register notice of the proposed General Permit; and
- Once the General Permit is issued and a discharger files a NOI, there is no need for additional notice period or public comment. Further, requiring a public hearing is completely inconsistent with the general permit scheme and would be no different from the process for obtaining an individual permit, which is also inconsistent with Congress' intent to allow use of general permits;

Permittees need the assurance that, once they have submitted their NOI and they receive acknowledgement of their submittal from the SWRCB, they have a valid permit and can proceed with their construction activities without the potential for being shut down. Many construction activities have to be conducted during specific times of the year (e.g., outside of bird breeding season) so the delay of several months could postpone a project 9-12 months. Also, it is very disruptive and extremely expensive to mobilize and then demobilize a project. We urge the SWRCB to remove the Proposed Permit's requirements for submittal of SWPPPs, public review and public hearings, making the Proposed Permit consistent with the Seventh District Court's decision.

Comment Table

Attached is a table (i.e., Comment Table) that contains CCEEB's comments on the requirements of the Proposed Permit. The comments are arranged sequentially (i.e., by Permit Document type, such as Fact Sheet, Permit, Attachment A, etc. and by section number within each Permit Document). Those issues that specifically affect linear projects have a "YES" in the table column labeled "Will This Impact Linear Projects?" The other comments in the table are more generally applicable to all projects that could be regulated by the permit, but could also be applicable to linear projects.

[3] See SWRCB's Proposed Permit Sections XII.1 & 2 on Page 26
[4] See SWRCB's Proposed Permit Fact Sheet, page 6

We appreciate the opportunity to provide these comments on the Proposed Permit and we look forward to working with the State Board and staff to reach a consensus on the best approach to permit linear construction projects. If you have any questions, please contact Bob Lucas at 916-444-7337.

Sincerely,

Robert W. Lucas
Waste & Water Quality Project Manager

Gerald D. Secundy
President

Attachments:

- Comment Table
- SWRCB's Small Linear Underground/Overhead Projects Permit – Page 1 of the Fact Sheet
- *Texas Independent Producers and Royalty Owners Association v. EPA*, 410 F.3d 964 (7th Cir. 2005)

cc: Members of the State Water Resources Control Board
Dorothy Rice, Executive Director, SWRCB
Jonathan Bishop, Chief Deputy Director, SWRCB
Jackson Gualco, The Gualco Group, Inc.

CCEEB's Comments on the SWRCB's Proposed Construction Storm Water General Permit (March 18, 2008)

The Following Table contains CCEEB's comments on the requirements of the SWRCB's Proposed Construction Storm Water General Permit. The comments are arranged sequentially (i.e., by Permit Document type, such as Fact Sheet, Permit, Attachment A, etc. and by section number within each Permit Document). Those issues that specifically affect linear projects have a "YES" in the table column labeled "Will This Impact Linear Projects?". The other comments in the table are more generally applicable to all projects that could be regulated by the permit, but could also be applicable to linear projects. The comments in the table are primarily focused on the Permit and Attachments; however to the extent that the same issue arises in the Fact Sheet, the comment is applicable to the Fact Sheet as well.

Ref #	Will this Impact Linear Projects (YES) ?	Citation – Permit Section (e.g., Fact Sheet, Permit, Appdx A) – Page #	Citation - Reference Number (e.g., Finding 5; Section II.B.4)	What is the Concern?	Comment
1	YES	Overall		Use of the draft General Construction Permit to regulate linear construction is not appropriate or feasible.	The General Construction Permit is written for traditional conventional footprint development construction projects. The differences between linear and traditional construction are sufficiently great that any attempt to force both types of construction to be covered under the same permit will result in an overstatement of the risk of linear projects, unreasonably high costs to the owner of the linear project, and significant compliance challenges which would make compliance at most linear sites nearly, if not completely, impossible. We recommend that linear construction projects over five acres be excluded from the new General Construction Permit and the SWRCB continue to permit linear construction projects that do not qualify for coverage under the Small Linear Underground/ Overhead Project Permit (SLUP) under the current General Construction Permit (Order No. 99-08) until the SLUP can be updated to include all linear construction projects. This would require the Proposed Permit to be a new permit, leaving Order 99-08 in effect after the Proposed Permit is adopted.
2		Fact Sheet-11	Section D - ATS	When is it appropriate to use an ATS system?	The permit should clarify when it is appropriate to use an ATS system other than to obtain a reduced project risk level.
3		Fact Sheet-35-36	Section III.B.1.a.iii &	Effluent Monitoring.	The permit requirements for effluent monitoring are confusing and contradictory. Specifically, the

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			Table 3		requirements included in the Fact Sheet on page 35 state that all projects must collect samples after 0.5 inch of measured rain, and collect samples after every inch thereafter, whereas Table 3 specifies different requirements for each risk level. In order to prevent project sites from inadvertent non-compliance with the permits' monitoring requirements, the Permit should be revised to more clearly and consistently state the effluent monitoring requirements. Additionally, the stormwater monitoring requirements should be separated from the non-stormwater monitoring requirements.
4		Fact Sheet-38	Section III.B.1.a.vii	Annual Reporting is due in February of each year.	We recommend that annual reporting be due by August 1st or 31st of each year instead of February. This would allow adequate time after rainy season has ended (June 30) to prepare information to submit and would eliminate overlap with the submittal of the industrial stormwater permit annual reports, which are due June 30.
5	YES	Fact Sheet-38-40	Section III.B.2	New development and re-development stormwater performance standards.	**The new development and redevelopment stormwater construction standards should be removed from the permit.** The state's permit authority under the Clean Water Act is limited to regulating the quality of the discharges from the regulated construction activity. Since these post-construction discharge standards are for discharges after the construction activity is complete they are outside the purview of this permit. **Linear construction projects should be exempt from any new development and redevelopment stormwater performance**

Ref #	Will this Impact Linear Projects (YES) ?	Citation – Permit Section (e.g., Fact Sheet, Permit, Appdx A) – Page #	Citation - Reference Number (e.g., Finding 5; Section II.B.4)	What is the Concern?	Comment
					standards, if they remain in the permit. These concepts are more applicable to areas where concentrated amounts of new impervious surfaces will be installed, such as in conventional footprint development projects. Linear construction projects, located in developed or undeveloped areas, do not result in significant new areas of impervious surfaces or changes to stormwater runoff characteristics. Linear underground systems are located below grade, with the exception of periodic above grade equipment installations (e.g., pads and vault covers) which are very limited in size. The above-grade facilities for aboveground systems (e.g., an overhead electric transmission line or communications cable) include poles direct buried in the ground, or towers or lattice structures with concrete foundations. These structures are spaced out over the length of the line and do not represent significant new impervious surfaces at any location. The level pads on which the structures are set typically remain permeable surfaces as are the access roads that are associated with these projects, which continue to allow infiltration of stormwater.
6	YES	Fact Sheet-46	Section III.B.3	Public availability of documents is a security concern for utilities.	Utility companies are concerned about protecting infrastructure that is critical to providing the essential public services they provide from terrorist attacks. Therefore it is important to limit public access to information regarding the location of their facilities. Public submittal of certain documents, such as the SWPPP map and NOI, would undermine utilities efforts to keep this information from the public purview and utility companies must be exempt from having their documents posted on the internet for public

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					viewing.
7	YES	Fact Sheet-48	Section III.B.4.b	Risk Factor Assessments.	The Proposed Permit assumes that a project would be assigned a single risk factor, or at the RWQCB's discretion, multiple risk factors could be assigned if the project extended beyond a single "planning watershed". Although this may be a workable approach for a conventional footprint land development project, for a linear project that spans five plus miles, often across multiple watersheds, receiving waters, soil types, terrains, rainfall zones, etc, it is not an appropriate methodology. The proposed methodology would likely significantly overstate the risk for a linear project. For example, where 99% of a linear project is outside the floodprone width of a waterbody, the remaining 1% located within a floodprone width would result in the entire project having a much higher risk level than needed to sufficiently protect water quality. This would be even more true when all or a portion of the project is in existing developed areas, which most many linear projects are. The use of a risk-based approach is a good idea; however, the approach proposed in the Proposed Permit is too complex for linear projects. Even if the Proposed Permit included the option to have multiple site-specific risk factors (that incorporated all of the site-specific risk criteria) along the length of a linear project and could therefore allow for lower risk factors on certain segments of the project, this would likely become too complex of an approach to implement on long linear projects. Linear projects need an alternate method of risk

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					assessment that focuses on those portions of the project that could potentially have higher risks, such as work in undeveloped vs. developed areas (e.g., existing paved streets), or specific risk factors such as where a project occurs within a certain distance of a waterbody. A qualitative risk approach method was incorporated into the SLUP (i.e., Tier I and Tier II projects), wherein Tier II projects have more stringent requirements than Tier I projects. Modifying the SLUP to include large linear projects, rather than including them in the Proposed Permit, would allow linear projects to take advantage of a qualitative risk approach that is more manageable to implement. The larger a project, the more potential it may have for impacts to its receiving water body. Consistent with this concept, the Fact Sheet states that a project's size will be considered when determining the risk level. However, the risk evaluation method found in Attachment A does not consider the project's area and this factor should be incorporated into Attachment A.
				The method of determining risk does not account for the project's size.	
8	YES	Fact Sheet-48	Section III.B.4.b	Where is soil particle testing required?	The Fact Sheet is not clear on how a project would determine how many locations are required for soil particle testing. The Permit should provide some guidance as to what is appropriate. For linear projects that could cross many different soil conditions, this requirement would be burdensome as there could be hundreds/ thousands of potential sample locations. This testing requirement should be limited to those areas that have a greater potential to pose significant risks for water quality, such as work immediately adjacent to (e.g., within a defined distance of) sensitive waterbodies.

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9		Fact Sheet-49	Section III.B.4.c.i	Statistics used to determine NAL and NEL for pH from Caltrans data.	The statistics used to determine the pH NAL and NEL should be explained. The Fact Sheet references the Caltrans Construction Sites Runoff Characterization Study, which provides an average pH value of 7.66 in construction site runoff. The Fact Sheet seems to round this to 7.5 for use as an average, or starting point. The Fact Sheet then states that the NAL was determined by moving one standard deviation from the average, resulting in a range from 6.5 to 8.5. Therefore, the standard deviation can be assumed to be 1. The Caltrans study does not identify the standard deviation of the data set. The source of the calculations should be provided, or better explained. When determining the range for the NEL, the Fact Sheet states that three standard deviations from the average were used. If the standard deviation is approximately 1 pH unit, then the calculated NELs would appear to have a larger range than the proposed NELs. To substantiate the proposed NELs the calculations for determining the upper and lower NEL should be provided in the Fact Sheet.
10		Fact Sheet-50	Section III.B.4.d	Use of Numeric Effluent Limits.	We believe it is premature to include NELs in this permit, which is still a BMP based permit. Staff has not conducted a rigorous limit development process, as required by EPA regulations, to develop and substantiate the proposed NELs in the permit. The Blue Ribbon Panel encouraged a gradual and careful application of effluent limits for construction sites, along with careful regard for the cost of implementing monitoring. The Board needs to take this recommendation into account since the Proposed Permit requires that linear

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					construction projects comply with the same requirements as conventional footprint construction projects. The Blue Ribbon Panel also suggested that effluent limits not be applied during unusual or extreme weather conditions. We concur with this position and recommend that, to the extent that numerical limits can be derived that are valid from a technical and regulatory standpoint, the Proposed Permit restrict application of the NELs to only normal sized storm events. Implementation of NELs into this permit needs to be deferred until, at least, appropriate NELs can be developed in accordance with EPA requirements.
11		Fact Sheet-52	Section III.B.4.d	Cost Estimate for Monitoring.	The permit estimates that permit compliance will cost approximately $1,000 per construction site. The permit estimate accounts for rental or purchase of a pH meter and a turbidity meter. The permit neglected to take into account labor for effluent monitoring, receiving water monitoring, soil particle size analysis, cost for benthic macro-invertebrate analysis and resources to manage the sampling data and reporting. The Fact Sheet needs to be revised with a more realistic and accurate cost estimate for the monitoring activity level imposed by the permit.
12		Fact Sheet-53	Section III. B.4.d.ii	Assumed Relationship Between Turbidity and Suspended Sediment Concentration.	The Fact Sheet states that a 1:3 relationship between turbidity and suspended sediment concentration is assumed. The staff need to provide the data upon which the above assumption was derived and the derivation methodology. It is our understanding that the literature does not support this assumption, and

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					we believe the "assumed" ratio should not be used in the Permit if it has no scientific basis. We also propose that staff do a more thorough evaluation, using more gauges to gain a better understanding of the actual relationship if, in fact, one can be established that includes a high level of support by the data.
13	YES	Permit-0	Cover Page	The permit states that it supersedes Order 99-08.	This permit is focused on regulating stormwater and non-stormwater discharges from typical large conventional footprint development projects. Linear projects are significantly different from typical large conventional footprint development projects and this permit is not well-suited to regulate large linear projects. Order 99-08 should be continued in force specifically to regulate linear projects that cannot be regulated under the SWRCB's SLUP. When the SWRCB renews and reissues the SLUP, the SLUP should be revised to incorporate all linear projects into a single permit.
14		Permit-0	Cover Page	The Order will be effective too soon after adoption (i.e., 100 days after adoption if EPA has no objection).	Implementation of all of the new requirements within the permit will be extremely difficult, given the many new requirements, including the use of "certified" professionals which were not previously required. Given the numerous outstanding projects (~20,000) that will be required to modify SWPPPs, train personnel and refile for permit coverage, this will place a tremendous resource burden on the RWQCB staff. The phase-in of the permit's requirements needs to be extended over a longer period of time, such as until 9/1/09.
15		Permit-01	Table of Contents	Missing Attachments Section.	It would be helpful to add all the Attachment Titles to the Table of Contents, as at first glance it may seem like some things are missing from the permit when in fact there is a lot of information located in the Attachments.

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16	YES	Permit-02	Section I.10	The permit requires all dischargers to maintain pre-development hydrologic characteristics in order to minimize post-development impacts to offsite water bodies.	This requirement should be removed from the permit as it is more appropriate to be addressed at the local planning level, not in the construction stormwater permit. See also Comment No. 5.
17		Permit-02	Section I.5	The permit becomes effective 100 days after adoption as long as no objection is raised by EPA.	See comment on the Permit's "Cover Page"
18	YES	Permit-03	Section I.11	"The panel concluded that numeric limits or action levels are technically feasible for construction storm water discharges provided certain conditions are considered."	The Storm Water Panel Recommendations to the California State Water Resources Control Board report "The Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial and Construction Activities" (June 19, 2006) (or "Panel Report") contained a number of observations and recommendations concerning use of ATSs to meet NELs and NALs, including: • ATS technologies have only generally been applied to construction sites of five acres or larger and incorporate large storage systems. • Technical practicalities and cost-effectiveness may make ATS less feasible for smaller sites, including small drainages within a larger site. • The cost-effectiveness of active treatment systems is greatly enhanced for large drainage areas where construction occurs over an extended period of time; Linear projects will typically fit into the category of construction projects in smaller drainages making it infeasible to employ ATS. The Proposed Permit needs to incorporate these

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					observations/ recommendations.
19	YES	Permit-03	Section I.12	Defines "high risk of high pH discharge" to include the "complete utility phase" and the "complete vertical build phase".	Linear utility projects should not be considered high risk for high pH for the following reasons: • A wood pole transmission line would not use concrete foundations and would therefore have limited use of concrete on the project. • Even a steel pole or tower transmission line with foundations would only pose a very short term and limited risk of high pH from concrete pours of foundations. These foundations are limited in size and spaced far apart, thereby limiting the potential for high pH in runoff. • Some underground utility projects do use concrete slurry for trench backfill, but those that do would only pose limited exposure of fresh concrete to rain. Most trenches are paved over fairly quickly or covered with trench-plates when backfill doesn't occur immediately, which limits the exposure of any newly poured concrete. • Since linear projects are solely made up of a "utility phase", this finding would inappropriately and unreasonably classify the entire duration of linear projects as high risk.
20	YES	Permit-03	Section I.14	The permit established NALs for turbidity based on site specific characteristics, not to exceed 1,000 NTU.	The Permit and/ or Fact Sheet should explain the applicable EPA procedure used to establish the NALs and the analysis conducted by the SWRCB specifically for the turbidity NAL. It would be very difficult to establish and comply with multiple NALs over a linear project. Therefore we recommend that NALs only apply at high water quality risk areas (e.g., within a defined distance from a waterbody) and, where NALs are applicable, they be a fixed number for the entire

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					project.
21	YES	Permit-04	Section I.16	The permit establishes an NEL for turbidity of 1,000 NTU.	The Permit and/ or Fact Sheet needs to explain the applicable EPA procedure for establishing NELs and the analysis conducted by the SWRCB specifically for the turbidity NEL. The Storm Water Panel Recommendations to the California State Water Resources Control Board report "The Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial and Construction Activities" (June 19, 2006) (or "Panel Report") contained a number of observations and recommendations concerning numeric effluent limits for construction projects, including: • Traditional erosion and sediment controls are highly variable in performance, resulting in highly variable turbidity levels; • ATS technologies have only generally been applied to construction sites of five acres or larger and incorporate large storage systems. • Technical practicalities and cost-effectiveness may make ATS less feasible for smaller sites, including small drainages within a larger site. • Where chemical addition is not permitted, then numeric limits are not likely feasible. • Non-active erosion and sediment control BMPs, while effective when applied and adequately maintained, produce more highly variable effluent quality, making setting numeric limits difficult, if not impossible. • A site could meet certain conditions to be considered stabilized for the runoff season, thus eliminating numeric limits. • The Board should consider phased

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					implementation of numeric limits and action levels, commensurate with the ability of the dischargers and support industry to respond. • A numeric limit or action level should be compared to the average discharge concentration. • Numeric limits and action levels should not apply to storms of unusual size and/or pattern. • The Board should consider that the monitoring of discharges to meet either numeric limits or action levels may be costly. • The cost-effectiveness of active treatment systems is greatly enhanced for large drainage areas where construction occurs over an extended period of time (Recommendation 1); Based on the Panel Report, we believe it is inappropriate to establish NELs in this permit, especially for sites implementing BMPs rather than ATS. Linear projects will typically fit into the category of construction projects in smaller drainages making it infeasible to employ ATS. **According to the Panel Report, without the use of ATS it is not possible to implement a numeric effluent limit.** Therefore, linear projects should not be subject to numeric effluent limits, but rather utilize traditional BMPs. Periodic monitoring could be conducted (when safe to do so) to assess their effectiveness.
22	**YES**	Permit-04	Section I.17 & I.18	Risk level 1 projects will require visual monitoring and discharge sampling and analysis.	Discharge sampling will be difficult to do for all the discharge points on a linear project (e.g., in developed areas – street curb inlets; in

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					undeveloped areas, each drainage).
23	YES	Permit-04	Section I.19 and Section VII.B	Soil Particle Size Analysis requirements may be quite complicated and impractical for linear projects.	The draft permit requires a soil particle size analysis for each project site (for percentages of sand, fines, silt, clay etc.). The analysis also needs to include a percentage of particles less than 0.02 mm. Section I.19 also implies that if the site includes soils with a high percentage of 0.02 mm particles, the Board may recommend an Advanced Treatment System (ATS) to alleviate the turbidity and long settling times of fine particles. This requirement is not realistic for linear projects with potentially multiple drainage areas and soil types. Also the requirement for the use of an ATS would not appear to be feasible for linear projects.
24	YES	Permit-04	Section I.21	Risk levels determine specific actions.	See Comment No. 7. Also, the risk level assessment approach needs to be site specific enough so that linear projects do not have substantial portions of the project deemed high risk due to a limited area of high risk triggered by a localized parameter.
25	YES	Permit-05	Section I.22	Set-backs from streams and wetlands provide for lower risk levels.	See Comment No. 7. Also, the risk assessment approach needs to be site specific enough so that linear projects do not have substantial portions of the project deemed high risk due to a limited area of high risk.
26		Permit-05	Section I.23	This finding specifies that the permit is applicable only to construction activity discharged to "...US jurisdictional surface waters".	Restricting the scope of the Proposed Permit to only US jurisdictional waters is unreasonable as it would require a construction project to apply for stormwater discharge WDRs in those cases where the activity "...could affect the quality of the

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					waters of the state...".CWC 13260. This puts a project into the position of having to apply for two construction stormwater permits, one from the SWRCB and WDRs from the RWQCB. There is no facilitated process to obtain WDRs for these projects which will result in tieing up RWQCB resources and slowing down the processing of project permits. The Proposed Permit needs to be revised to also include coverage of state-only waters.
27	YES	Permit-05	Section I.24	The permit recognizes five distinct phases of building, which include the "streets and utilities stage" and the "vertical construction stage".	Linear utility projects are not a good fit for these phases because their construction is not represented by the typical development project. Linear projects should be covered by a separate permit.
28		Permit-05	Section I.26	Compliance with water quality standards for receiving waters. This finding states: "Where receiving water has a more stringent standard, an NEL stated in this permit may not be the most restrictive applicable requirement."	This statement infers that a receiving water standard may be the de facto discharge limit when it is the most restrictive of the two limits. Receiving water limits are not necessarily effluent limits and the permit should make this clear.
29		Permit-05	Section I.27	New requirements for waters subject to TMDLs.	The permit needs to describe the process for obtaining this information so that the RWQCB does not have to be consulted on every project, which will also tie up scarce RWQCB staff resources.
30		Permit-06	Section I.29; Section II.A.1	Electronic filing.	Since electronic filing is proposed to be an integral component of this permit, the SWRCB needs to demonstrate the efficacy of the system prior to adoption of the permit. Otherwise it will create a permitting nightmare for staff and permit applicants.
31	YES	Permit-06	Section I.30	Permit records are required to be available on-site until construction is complete.	Linear projects do not typically have construction trailers located on-site and if they do it may be

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					located at one end of a long project. If this permit will cover linear projects, it needs to incorporate the language in the SLUP that allows the SWPPP to be retained in a project vehicle with the requirement that it must be made available within a reasonable period of time upon request of an inspector.

32		Permit-06-07	Section I.32	This finding lists discharges "...not required to obtain coverage under this General Permit".	This finding needs to be reworded such that it clarifies that certain projects are not considered "construction" (e.g., maintenance, emergency construction) and therefore are not subject to construction stormwater permitting. As written, the existing wording is not clear whether these projects may have to get coverage under another construction stormwater permit.
					
					This finding should be split into two separate findings as follows:
					• Projects exempt from construction stormwater permitting:
					  • Projects with less than 1 acre of soil disturbance
					  • Maintenance activities
					  • Emergency construction activities
					  • Oil and gas projects subject to Clean Water Act and EPA exemptions
					• Projects subject to other construction stormwater permits
					  • Risk Level 4 projects
					  • Discharges on tribal lands
					  • Discharges in the Lake Tahoe Hydrologic Unit
					  • Projects that have obtained coverage under another construction stormwater permit

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33		Permit-07	Section I.32	This finding lists "Discharges to non-jurisdictional waters (as determined by the US Army Corps of Engineers)" as discharge "...not required to obtain coverage under this General Permit".	This permit needs to be revised to cover projects that could affect "state-only" waters. Previous SWRCB construction stormwater permits have provided this coverage and there is no rationale provided by the fact sheet as to why this coverage has been removed. Removing this coverage will: • Eliminate one of the goals of a general permit which is to reduce the regulatory burden on staff and the discharger community; and • Result in additional permit regulatory proceedings for dischargers at their RWQCBs to obtain WDRS for discharges to state-only waters. See also Comment No. 26.
34		Permit-08	Section II.B.2.c	When the project size increases or decreases specific information must be submitted including, where appropriate, SWPPP revisions.	The permit does not clarify the process that will occur once a revised SWPPP is submitted. It should clarify that changes to the originally submitted SWPPP to not reopen the SWPPP to additional public review and comment or another waiting period.
35	**YES**	Permit-09	Section II.B.3	Specifies that coverage under the general permit shall continue for any "parcel" that has not achieved final stabilization.	Use of the term "Parcel" is not appropriate in the context of linear projects. If this permit will cover linear projects, this condition should include "or other identified area", to allow permit termination for portions of linear projects that achieve final stabilization during the life of the project.
36		Permit-09	Section II.B.4	Mailing of revised fee within 7 days.	There needs to be a longer period, such as 30 days as it can take longer than 1-2 weeks to get checks in a corporation.
37		Permit-09	Section III.1	Waste discharges to Areas of Special Biological Significance require Ocean Plan	The permit needs to specify that this provision only applies to "direct discharges" to ASBSs, not

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				exception.	to discharges that go through a municipal stormwater conveyance or via a hydrologically connected waterway.
38		Permit-10	Section IV.B. Table 1	The table identifies sampling and analysis information.	40 CFR 136 contains EPA's approved analytical methodologies for NPDES permits. Specifically for pH, turbidity, and SSC, the methods must be, at a minimum, methods that are "certified" by the State of California DHS. Without use of methods having one of these certifications, the precision and accuracy of the test results are suspect. The only potential use for non-certified methods would be for testing for achievement of action levels where permit compliance is not also being determined with the analytical results. Data collected from tests using non-certified methods also should not be used for the future development of effluent limits.
39	YES	Permit-10	Section IV.B.1	Footnote Table 1 includes the "complete utilities stage" as part of the "high risk of pH" period. This drives certain monitoring requirements.	Please see Comment No. 19 which describes why linear projects should not be considered high risk for pH. Consequently, the permit should clarify that these testing requirements do not apply to linear projects.
40		Permit-10	Section IV.B	NELs should not be included as part of this Permit.	The concept of NELs is still very experimental. A BMP-based approach should be used until the protocols for determining NELs and the benefits have been determined. There are several significant requirements that have been added to the Permit to ensure compliance and improve the overall stormwater program. We recommend that the effectiveness of the Permit be evaluated over the next permit term and that the concept of NELs be reevaluated at the next permit renewal.
41		Permit-11	Section IV.B.2.a	Specifies discharge limits for ATS discharges.	The Permit and/ or Fact Sheet should explain the applicable EPA procedure for establishing NELs and the analysis conducted by the SWRCB specifically for the turbidity and residual chemical

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					NELs If a turbidity result is equal to or greater than 9.5 or 19.5, will it be non-compliant when rounded to determine compliance with the limit, since the limits are <10 and <20. If these limits are retained in the permit they should be revised to be "less than or equal to" limits. Also these limits are inconsistent with those listed in Table 1. The Proposed Permit should reflect the Panel Report recommendation to compare the average of samples to the effluent limit.
42		Permit-11	Section IV.B.2.b	Specifies residual chemical level to be less than 10% of the MATC.	As defined, if the LOEC was 50mg/l and NOEC was 30mg/l, the geometric mean would be 39mg/l and the residual chemical limit would be <4mg/l. Since 30mg/l represents the highest concentration of residual chemical that does not exhibit statistically significant toxicity, setting the effluent limit to 10% of this value is overly conservative. It is unclear whether it is possible to regulate the feed to the ATS to stay below this level (i.e., <10% of MATC) and still be effective in meeting the turbidity limits. If a limit is retained in the permit it needs to be set at a level at which it is feasible to conduct the treatment efficiently and effectively while maintaining compliance with the limit. The permit needs to clarify what specifically is measured when analyzing for the "residual chemical", what analytical methods are used and, if the acceptable test result is non-detected, how an operator can effectively run the treatment process when detection means non-compliance.

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43		Permit-11	Section IV.B.3	When an effluent limit is exceeded, it must be electronically reported within 48 hours of obtaining the results.	This requirement should be at least 5 business days to allow bridging over a weekend for analyses received late in the week and to allow the discharger the opportunity to review if there are any errors in the analytical process or what may have caused the exceedance. Reporting within 48 hours has no material benefit.
44		Permit-11	Section V.1	The permit states that "Storm water discharges and authorized non-storm water discharges shall not contain pollutants in quantities that cause a public nuisance in groundwater or surface water."	See Comment Nos. 26 & 33. However, if, as is stated in the findings, this permit is adopted as a NPDES only permit, this requirement should not refer to "groundwater" since NPDES regulations only regulate surface waters.
45		Permit-11	Section V.2	The permit states that "Storm water discharges and authorized non-storm water discharges shall not contain pollutants that cause or contribute to an exceedance of any applicable water quality objectives or water quality standards (collectively, WQS) contained in a Statewide Water Quality Control Plan, the California Toxics Rule, the National Toxics Rule, or the applicable Regional Water Board's Water Quality Control Plan (Basin Plan)".	See Comment Nos. 26 & 33. However, if, as is stated in the findings, this permit is adopted as a NPDES only permit, this provision should clarify that "applicable" does not include water quality objectives and standards for groundwater since NPDES regulations only regulate surface waters.
46		Permit-11	Section V.4	Prohibits disrupting the pre-project equilibrium flow and sediment supply regime and, where there is not an equilibrium, project related activities shall not impede the natural channel evolution process.	Each stream/drainage will have to be assessed for its "equilibrium flow and sediment supply regime" and whether or not it is in equilibrium prior to a project. The permit needs to clarify how one would determine how to not disrupt the "non-equilibrium" process, especially when the non-equilibrium may not be affected by the project but by other upstream factors outside the control of

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					the project. This provision appears to be unenforceable due to its lack of clarity for the discharger. Also, see Comment No. 5.
47		Permit-12	Section V.5	Storm water discharges and authorized non-storm water discharges to any surface or ground water shall not adversely affect human health or the environment.	See Comment Nos. 26 & 33. However, if, as is stated in the findings, this permit is adopted as a NPDES only permit, this provision should remove the reference to groundwater since NPDES regulations only regulate surface waters.
48		Permit-12	Section VI.2.a & b	New projects after the permit is adopted have 14 days to submit SWPPP and comply with permit. Existing projects have 100 days from permit adoption to comply with permit.	Implementation of all of the new requirements within the permit will be extremely difficult, given the many new requirements, including the use of "certified" professionals which were not previously required. Given the numerous outstanding permittees (~20,000) that will be required to modify SWPPPs, train personnel and refile for permit coverage, this will place a tremendous resource burden on the RWQCB staff. The phase-in of the Proposed Permit's requirements needs to be extended over a longer period of time, such as until 9/1/09.
49		Permit-12	Section VI.2.b	The permit states: "If the project acreage subject to the annual fee has changed, dischargers shall mail a revised annual fee no less than seven days after receiving the revised annual fee notification or lose permit coverage."	There needs to be a longer period, such as 30 days to mail the annual fee check. It can take longer than 1-2 weeks to get checks in a corporation. Loss of permit coverage is an extremely severe automatic penalty since discharging without a permit carries federal and state fines and penalties. Alternatively, the permit should define a process under which a SWRCB could terminate

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					coverage for lack of payment of fees. However, the permit needs to clarify how, if for some reason the check is not received in time, the permit can be reinstated.
50		Permit-12	Section VI.3	The permit states: "Existing dischargers under the prior permit will continue to have coverage until this General Permit takes effect. Dischargers who complete their projects and electronically file a Notice of termination during this 100-day review period are not required to obtain coverage under this General Permit."	Dischargers who have completed construction and are waiting for final stabilization to be achieved should be grandfathered under the same conditions required by Order 99-08 or given an alternate process that precludes having to reapply for coverage under the new permit or to develop a completely new SWPPP.
51	YES	Permit-13	Section VI.4	A paper SWPPP is to be retained on-site at all times.	Linear projects do not typically have construction trailers located on-site and if they do it may be at one end of a long project. If linear projects are covered under this permit, the permit would need to incorporate the language in the SLUP that allows the SWPPP to be retained in a project vehicle with the requirement that it must be made available within a reasonable period of time upon request of an inspector.
52		Permit-13	Section VI.5	The permit states: "Pursuant to Water Code Sections 13383 and 13267, all dischargers shall develop and implement a Construction Site Monitoring Program (CSMP) in accordance with Attachment B: Monitoring Program and Reporting Requirements."	CWC 13383 states that the board may require monitoring. CWC 13267.b.1 requires that "The burden, including costs, of these reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports. In requiring those reports, the regional board shall provide the person with a written explanation with regard to the need for the reports, and shall identify the evidence that supports requiring that person to provide the reports." The Proposed Permit has substantially increased the amount of sampling and analysis that permittees are required to conduct. For example,

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					under the existing permit, sampling for sediment/silt or turbidity was only required to be conducted in the receiving waters during the first two hours of the rain event and only when the stormwater discharge was directly to a turbidity or sedimentation/ siltation limited CWA 303(d) water body. The sampling requirement was limited to no more than 4 rain events per month. However, the Proposed Permit requires turbidity sampling from every discharge point from the construction site, during the duration of the discharge of every rain event and must be conducted during the first hour of discharge, and the first and last hour of every day of normal operations. Furthermore, the Proposed Permit does not set a limitation on the number of sampling events. This represents an enormous increase in sampling requirements and associated costs. The Fact Sheet does not provide an adequate justification for this increase in sampling or cost. To better comply with the CWC 13267.b.1, the following monitoring elements should be incorporated: • Place a limit on the actual number of sampling events; • Allow sampling representative discharge locations and/ or BMP types; and • Do not require sampling in locations where active construction activity is not occurring.
53		Permit-13	Section VI.6	The permit states: "Existing dischargers shall make and implement necessary revisions to their SWPPP and Monitoring Program to reflect the changes in this General Permit in accordance with Section IX., Storm Water Pollution Prevention Plan, and Attachment B, Monitoring Program and Reporting Requirements, in a timely manner but no later	See Comment No. 50.

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				than 100 days after [insert adoption date of permit]."	
54		Permit-13	Section VI.8	"Authorized non-storm water discharges may include those from non-chlorinated potable water sources..."	Most potable water is chlorinated. We recommend that this requirement be revised to state that dischargers of water from potable sources need to employ BMPs to reduce or eliminate residual chlorine.
				a. The discharge does not cause or contribute to a violation of any water quality standard.	See Comment Nos. 26 and 33. However, if this permit does not cover state-only waters, Section 8.a should refer to "surface water quality standard" not "water quality standard".
				e. The discharge does not contain toxic constituents in toxic amounts or (other) significant quantities of pollutants.	Section 8.e should refer to "Storm water discharges and authorized non-storm water discharges regulated by this General Permit shall not contain a hazardous substance equal to or in excess of a reportable quantity listed in 40 CFR Part 117 and/or 40 CFR Part 302" (See Section IV.1.A) rather than "The discharge does not contain toxic constituents in toxic amounts or (other) significant quantities of pollutants". These are potentially conflicting requirements.
				f. The discharge is monitored and meets the applicable NALs and NELs.	Section 8.f authorizes non-stormwater discharges only if they are "monitored" for and comply with "applicable NALs and NELs". The monitoring requirements in Attachment B require: • Once per rain event (for Risk Level 1); • At the beginning of discharge and in the first hour and last hour of every day of normal operations for the duration of the discharge event (Risk Category 2); or • Either at the beginning of discharge and in the first hour and last hour of every day of normal

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					operations for the duration of the discharge event or continuous at any sampling point where results exceed the turbidity NEL (Risk Level 3). This amount of sampling and analysis is more than necessary and should be revised to require only "visual monitoring once daily during discharge of the non-stormwater to ensure BMPs are appropriate and working". If required, any specific sampling of non-stormwater discharges should be separately designated from the sampling of stormwater.
55	YES	Permit-14	Section VII.A and Receiving Water Risk Factor Worksheet	Large linear projects traverse a wide range of physical conditions along the entire length of the project, risk levels are based on "planning watersheds" and true risk levels may vary widely within a single planning watershed. The permit reserves the decision to assign more than one risk level to the RWQCB. Calculation for risk level No. 1 is too restrictive.	According to the permit, risk levels may be assigned by planning watersheds, which range from 5 to 15 sq miles in area. Determining a single risk level for an entire section of large linear project that traverses a particular planning watershed would bias the project's risk level to a higher level than the true risk level for many of the spans of the project. See also Comment No. 7. It would be more efficient for the discharger to make the assessment whether more than one risk area is applicable. This would minimize the additional burden this permit places on RWQCB staff, when resource minimization is a significant benefit of a general permit. The score sheet gives an automatic 10 points for just being a project. If all other scores in the worksheet are zeros (0), the project is still scored as a medium or high risk level (levels 2 or 3). The score for a level 1 risk should be raised to a value

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					above 10.
56	YES	Permit-14	Section VII.B.1	Particle Size Analysis "Dischargers shall complete a soil particle size analysis, using test method ASTM D-422 … to determine the percentages of sand, fine sand, silt, and clay on the site…."	Linear construction subject to this permit will likely be five or more miles in length and since soils do not occur in a linear manner, numerous soils will be encountered. For linear projects in undeveloped areas, it is not practicable to consider, much less sample and evaluate the particle size of every soil type encountered over a long construction route. BMPs used for linear construction are installed at drainage consolidation points and are not likely to vary significantly based on soil conditions. In developed areas, many linear projects trench across existing paved areas, such as city streets. Excavated soil is usually replaced into the trench or trucked offsite. Temporary stockpiling of excavated soil can be adequately secured with BMPs. It is unreasonable to require testing of excavated or import soil that will quickly be used as backfill for a trench that will be paved over. Standard engineering soil analysis is done down to sieve size 200 (0.075 mm). Any testing for smaller sizes requires a hydrometer to identify/ quantify the smaller particle sizes in the soil sample. A hydrometer test will have additional cost over $100 per test and require an additional 24 hours to simply conduct the test, let alone prepare and submit a report. The Permit does not address the number of tests required to determine the average particle size below the 0.02 mm size for a project. Nor does it discuss when the sample should be taken – before construction in the design phase, during construction of the
				Frequency of testing for soil particle size is not identified.	

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					slopes, after construction or at all three times or, if this permit is applicable to linear projects, what values would be used when work is conducted in existing paved areas (e.g., trenching in paved streets). This requirement should be eliminated for linear projects because their potential impacts are not concentrated in one location like a typical conventional footprint development project.
57		Permit-15	Section VIII.A.1	NAL for pH.	The Fact Sheet needs to describe the methodology that was used to establish the NAL value, confirm the methodology used conforms to that required by EPA's NPDES regulations and provide the actual data and calculations used to derive the NAL.
58	YES	Permit-15	Section VIII.A.2	NAL for turbidity.	The Fact Sheet needs to describe the methodology that was used to establish the NAL value, confirm the methodology used conforms to that required by EPA's NPDES regulations and provide the actual data and calculations used to derive the NAL. Calculating the NAL for a linear project will be difficult since these projects traverse many different areas, requiring multiple calculations of the NAL. Having multiple NALs for a project will be difficult to implement. Therefore we recommend that NALs only apply at high water quality risk areas (e.g., within a defined distance from a waterbody) and, when applicable, they be a fixed number for the entire project. Where applicable, this commentalso applies to NALs for construction activities in a developed area (e.g., paved streets).

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59	YES	Permit-15	Section VIII.A.3	Run-on evaluation for linear projects (to address NAL exceedances) may not be realistic.	The draft permit requires the discharger to conduct a construction site evaluation and a run-on evaluation to determine whether pollutant source(s) associated with the site's construction activity may have caused or contributed to the NAL exceedance and immediately implement corrective actions if needed. This run-on evaluation requirement may work for a confined site (e.g. conventional footprint development construction project) but it is not realistic for large linear projects with multiple drainage sites or for those projects located in existing developed areas (e.g., paved streets).
60	YES	Permit-15	Section VIII.A.4.b	Run-on corrective actions.	Run-on corrective actions are problematic for linear projects, especially in developed areas (e.g., streets) where the project has no control over the sources of run-on and physical barriers may not be possible (e.g., in streets) due to traffic or other safety issues.
61	YES	Permit-16	Section VIII.B.2	Effective soil cover for "inactive areas…"	This is unreasonable and unnecessary in the dry season in arid and semi-arid areas of the state. Cover should only be required in anticipation of a predicted rain event. Dust control can be achieved through other methods, such as watering, soil stabilizers, etc., as necessary. Also, this requirement needs to exclude linear project access roads, equipment pads and other similar areas which, by design and due to their function, will not be revegetated.
62		Permit-16	Section VIII.B.3	Cover for disturbed inactive areas "equivalent to RUSLE "C" Factor of 0.003".	Attachment C (Turbidity) includes a table that provides C Factors for different types of construction site BMPs. Notably, this table includes only one type of BMP (RECPs) that

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					potentially meet the 0.003 criterion. RECPs may also not be practical to install when the inactivity period is going to be short and/or will occur during the non-rainy season. This criterion is much too stringent and needs to be set at a level that provides more selection of alternative BMPs that are practical while providing a reasonable amount of protection. Also, the fact sheet should provide the original data source of the C Factors listed in Attachment C as we have been unable to locate documentation for C Factors at or below 0.003.
63	**YES**	Permit-16	Sections VIII.C.1 & C.2	Run-on and runoff observation, sampling and controls.	Run-on control for large linear projects in streets is not generally possible due to potential street runoff volumes, active traffic and safety considerations. Run-on in a non-urban area is also difficult to assess and control. Simply due to the nature of linear construction, there will be site run-on and control of such run-on is quite different than control on a conventional footprint type of development such as a commercial or residential development project. Linear projects should be required to implement appropriate BMPs such as required in the SLUP.
64	**YES**	Permit-16	Section VIII.D.1	Sediment Controls - Perimeter controls. Stabilized construction entrances/ exits.	It is not reasonable to require a large linear project to implement perimeter controls along miles of linear construction. This would result in a hydrologic barrier across miles of landscape in natural areas, and would be impracticable on active city streets. Alternatively, appropriate sediment control BMPs should be placed where necessary to protect storm drains and/ or receiving waters. Construction access points are constantly moving

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					along large linear projects; thus, stabilization of each "entrance" is unreasonable and may not be safe at some locations. Alternative BMPs should be allowed, for example, sweeping.
65		Permit-16	Section VIII.D.3	Shall implement appropriate erosion control BMPs ...for areas under active construction.	Erosion controls should not be required in active areas as they will be constantly disturbed. Sediment controls would be more appropriate to require.
66	**YES**	Permit-17	Section VIII.D.5	Shall limit traffic to and from the project to entrances and exits that employ effective controls to prevent offsite tracking of sediment.	Because on linear projects there can be numerous locations where vehicles need to get on and off existing paved roads this requirement should be "Linear projects shall implement effective off-site tracking controls at construction project entrances and exits."
67		Permit-17	Section VIII.D.6	Protection of BMPs.	This provision that BMPs are to be "protected" should be deleted as it is too vague as to what is the standard for "protection". The acts of inspecting and maintaining BMPs should adequately address the issue of a BMP being damaged.
68	**YES**	Permit-17	Section VIII.D.7	Tracking control.... "This does preclude the need to reduce sediment tracking in the first place."	On linear projects, due to the numerous locations where vehicles need to get on and off existing paved roads, the BMP may be daily (i.e., on days of operation) inspection of construction entrances and exits and sweeping when necessary, as it may not be feasible to stabilize every single location where a vehicle needs to access the linear project.
69	**YES**	Permit-18	Section VIII.F.1.a	Inventory of products used or expected to be used and end products.	Any inventory should only be of types of materials as opposed to a specific parts list with quantities as the actual materials and number of items will always be changing. Also, on linear projects, much of the "inventory" is kept on trucks which come and go from the project. The inventory should also not include materials and equipment that are designed to be exposed to the elements

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					and are brought on-site in the final form in which they will be when the project is completed (e.g., tower structures, poles, insulators, hardware, etc.).
70		Permit-18	Section VIII.F.1.b	Covering/ berming loose stockpiled construction materials…"not actively being used".	This provision "not actively being used" needs to be revised so that it is clear what is meant. Covering the stockpile should be required no more frequently than at the end of the work day (or work night). Also, this requirement is not practical or necessary for certain large materials, such as electric transmission line poles/ structures, or pipes. The purpose of this requirement is duplicative with VIII.F.1.d. The Permit should only require covering materials that are not designed for exposure; meaning that poles, etc. are okay to leave uncovered.
71	YES	Permit-18	Section VIII.F.1.d	Minimizing contact of construction materials with precipitation.	This should apply to materials that are not designed to be exposed once construction is complete. For example, this should not apply to power poles, tower components, insulators, etc.
72		Permit-18	Section VIII.F.1.e	Implementing BMPs to reduce or prevent the offsite tracking of loose construction and landscape materials.	See Comment Nos. 66 and 68.
73		Permit-18	Section VIII.F.2.b	Berming sanitation facilities (e.g., Porta Potties) and avoiding a direct connection to the storm water drainage system or receiving water.	The permit needs to clarify what is meant by a direct connection. For instance, does this mean a pipe or hose from the sanitation facility to a surface water?
74		Permit-18	Section VIII.F.2.d	Covering waste disposal containers when they are not in use and avoiding a direct connection to the storm water drainage system or receiving water.	The permit should clarify that "when not in use" means after work hours. For example, leaving the covers off during the day (and/ or night) when construction activity is taking place is okay. However, once construction is stopped for the day and/ or night, the containers need to be covered.

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					Also, see Comment No. 73 regarding "direct connection".
75		Permit-18	Section VIII.F.2.e	Berming and securely protecting stockpiled waste material from wind and rain at all times unless actively being used.	This provision "unless actively being used" needs to be revised so that it is clear what is meant. Covering the stockpile should be required no more frequently than at the end of the work day (or work night).
76	YES	Permit-19	Section VIII.F.2.h	Washout areas shall be positioned away from drain inlets or waterways and be clearly labeled.	This may not always be possible on linear projects in urban areas. We recommend that this requirement be changed to state "Washout areas shall be positioned so as to not immediately drain to stormwater inlets or waterways."
77	YES	Permit-19	Section VIII.F.3.b	Placing all equipment or vehicles, which are to be fueled, maintained and stored in a designated area fitted with appropriate BMPs.	This provision needs to be revised to allow these activities to occur where appropriate BMPs are implemented, rather than just at a "designated area", as vehicles on a linear project may not be able to be moved to a central designated area.
78		Permit-19	Section VIII.F.4.b	Discontinuing the application of any erodible landscape material within 2 days before a forecasted rain event or during periods of precipitation.	This requirement should specify a forecasted rain event above a certain size (e.g., 0.25 inch). Especially in southern California many of the "forecasted rain events" never occur or do not have measureable rainfall.
79		Permit-19	Section VIII.F.5	The discharger shall conduct an assessment and create a list of potential pollutant sources and identify any areas of the site where additional BMPs are necessary to reduce or prevent pollutants in storm water discharges and authorized non-storm water discharges. This potential pollutant list shall be kept with the SWPPP and shall identify all non-visible pollutants which are known, or should be known, to occur on the construction site.	The permit needs to clarify that this assessment is to be conducted at the beginning of the project. See also the Comment No. 69.
80		Permit-20	Section VIII.F.6	The discharger shall implement appropriate controls throughout all stages of construction to address air deposition issues.	The permit needs to clarify what the "air deposition issues" are to which this language is referring. Without this clarification, we cannot

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					provide comment on this requirement.
81	**YES**	Permit-21	Section VIII.H.2 – H.4	New development and redevelopment performance standards.	Linear projects should be exempt from the proposed new development and redevelopment storm water performance standards. (See also Comment No. 5) Typical linear construction projects include the placement of certain structures (manholes, cabinets, tower foundations, etc.) with impervious surfaces, however they are very small in areal extent and spread apart and their impact on the pre-project water balance would be insignificant. Placing structural control measures (e.g., vegetated swales, rain cisterns, rain gardens) in undeveloped areas would be infeasible. Linear projects also should not materially impact the pre-project drainage density or time of runoff concentration due to the small amount of new impervious area located in any one place and the lack of wholesale landform changes that are typical of a conventional footprint development project. Also, the proposed permit requires the RWQCB to approve structural controls, which is another step that will impact RWQCB resources. Obtaining these approvals will have to occur far in advance of a construction project finalization so that changes can be made if required by the RWQCB staff. We recommend that the requirement for RWQCB approval should be deleted.
82	**YES**	Permit-21	Section VIII.I.2	Inspections must be conducted at least once during each 24-hour period during an	Access roads along an electric transmission line project can be in very isolated and topographically

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				extended storm event.	challenged areas and can be unsafe to drive on until they have dried out after the storm. Additionally, driving on the access roads while they are wet creates ruts that accelerate erosion problems. For the safety of the inspector, this Section should state that the inspections shall be conducted once it is safe to do so. Although the issue of safety is mentioned in Section VIII.I.2, it would be clearer if it is also stated in this Section.
83		Permit-21	Section VIII.I.4	Refers to Section "J".	This reference should be to "I.5"
84	YES	Permit-22	Section VIII.I.5.c	Requires site inspections to identify site information, including stage of construction, activities completed, and approximate area of the site exposed.	To the extent this permit will cover large linear projects, this information would be different for different segments of the project, so the permit needs to allow reports to be conducted by segment.
85	YES	Permit-22	Section VIII.I.5.d	The permit requires when it is not safe to access the construction site: "...list result of visual inspection at relevant outfall, discharge point, or downstream location and projected required maintenance activities".	This may not be possible to do on linear construction sites in undeveloped areas. This provision should allow inspections to be conducted once it is safe to access the site.
86		Permit-22	Section VIII.J.1	"All persons responsible for implementing requirements of this General Permit shall be appropriately trained. This includes those personnel responsible for installation, inspection, maintenance, and repair of BMPs. Training should be both formal and informal, occur on an ongoing basis, and should include training offered by recognized governmental agencies or professional organizations."	The permit needs to clarify whether these personnel need to be "Qualified SWPPP Practitioners" or if this is a lesser category of training requirement.
87	YES	Permit-22	Section IX.A.1	Qualified SWPPP Developer.	This section requires that all SWPPPs be "...written, amended and certified..." by a Qualified SWPPP Developer. We have the following comments and recommendations: • The proposed required qualifications will

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					serve to increase the cost of developing and implementing SWPPPs. Most SWPPPs contain routine conditions which do not merit excessive credentials and associated cost. This is especially true for large linear projects conducted in developed areas (e.g., existing paved streets, parkways, etc.). • There is no provision for personnel that have been preparing SWPPPs, but do not have the certifications specified in the permit, to continue preparing SWPPPs (i.e., during the initial two years after permit adoption) until they obtain their certification, such as CEPSC or CPSWQ. • We recommend that this section be revised to state that "The Qualified SWPPP Developer shall certify the SWPPP". This language would clarify that the Qualify SWPPP Developer can either directly prepare or oversee the preparation of the SWPPP, but is responsible for its certification. • The requirement that "Effective two years after the adoption date of this General Permit, shall have attended a State Water Board-sponsored or approved Qualified SWPPP Developer training course" should be revised to state that the training needs to be completed within two years after the adoption date of this General Permit or within two years of the SWRCB making the training generally available (i.e., available at many times/locations throughout state) to all parties wishing to obtain the training (whichever is later). The revised language preserves the two year period for obtaining the training in the event the training is not available when

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					the permit is adopted and will prevent the situation (outside of the Qualified SWPPP Developers' control) in which the training is not available in time for applicants to complete this requirement. • Based on the focus of this permit (i.e., conventional footprint development projects), this training is likely to focus only on standard land development projects. To the extent linear projects are covered by this permit, the training also needs to address issues that are specific to linear projects.
88		Permit-23	Section IX.A.2	Amendments to the SWPPP.	The permit needs to clarify what needs to be submitted to the SWRCB (if anything) whenever a SWPPP is amended, what the process is for doing this and if there is a waiting period after the amendment is submitted. The permit should also distinguish the difference between an "amendment" and a "revision".
89		Permit-23	Section IX.A.4	Qualified SWPPP Practitioner.	The proposed language requires that within two years from the date of adoption of the General Permit, a Qualified SWPPP Practitioner shall be either a Qualified SWPPP Developer or have one of the specified certifications. We recommend that the SWRCB's training should be satisfactory to qualify people to meet this qualification, so that they either have the specified certification or they have the SWRCB's training/ certification. The proposed language also requires personnel that conduct sampling and analysis are required to obtain the specified certifications and training. We recommend that employees of certified labs be included on the list of persons authorized to conduct sampling and analysis (i.e., they do not

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					need additional certifications). The permit needs to better clarify which personnel actually need to be certified. For example, the permit should clarify that those personnel that are working under the direction of a Qualified SWPPP Practitioner (e.g., personnel performing the manual labor to install and maintain BMPs), do not require certification. The permit needs to clarify when certifications made by a SWPPP Practitioner need to also comply with EPA's NPDES requirements for certifications.
90		Permit-24	Section IX.A.6	Names of individuals responsible for SWPPP implementation.	The permit should clarify that this condition refers specifically to those persons that are responsible for ensuring these activities are conducted, but does not include the names of the personnel conducting the manual labor to actually conduct the work (e.g., placement of fiber rolls)
91	**YES**	Permit-24	Section X.2	For projects in Risk Levels 2 and 3, the discharger shall develop a REAP 48 hours prior to any likely precipitation event. A likely precipitation event is any weather pattern that is forecasted to have a 50% or greater chance of producing precipitation in the project area.	In southern California there are many forecasted rain events that produce very little or no precipitation. This condition should specify a minimum amount of predicted rainfall (e.g. 0.25 inch) as part of the criteria. The REAP should be able to be a generic list of actions to take that can be applied on multiple rain events rather than having to be prepared for each rain event. Particularly for linear projects, similar circumstances will repeat, such that a certain action plan would be appropriate to address predicted rainfall amounts for many locations along long spans of a project, perhaps over long periods of time.

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					The permit should clarify if the development of a REAP is required to start or end 48 hours prior to any likely precipitation event
92	YES	Permit-24	Section X.3	The discharger shall begin implementation and make the REAP available onsite no later than 24 hours prior to the likely precipitation event.	In southern California there are many forecasted rain events that produce very little or no precipitation. This condition should specify a minimum amount of predicted rainfall (e.g. 0.25 inch) as part of the criteria. Linear projects do not typically have construction trailers located on-site and if they do it may be at one end of a long project. This permit would need to incorporate the language in the SLUP that allows the SWPPP to be retained in a project vehicle with the requirement that it must be made available within a reasonable period of time upon request of an inspector.
93	YES	Permit-25	Section XI.1	When construction is complete or ownership has been transferred, the discharger shall electronically file a NOT, a final site map, and photos (as necessary) in accordance with Attachment B.	This reference to Attachment B appears to be incorrect. To the extent linear projects are covered under this permit, they should be able to "terminate" discrete locations on the project as stabilization is completed. This needs to be described in this section.
94		Permit-25	Section XI.1.d	Compliance with the New and Re-development Standards in Section I of this General Permit has been demonstrated.	This reference to Section I appears to be incorrect.
95		Permit-25	Section XI.1.e	Post-construction storm water management measures have been installed and a satisfactory long-term maintenance plan has been established.	The permit should clarify what constitutes a "satisfactory" long-term maintenance plan. The permit should clarify the process, if any, for approving the plan.
96		Permit-25	Section XI.3.a + footnote 12	"...actively growing plant matter in contact with the soil[12]	The permit should retain the stabilization requirements from the existing order, which included:

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				[12]This coverage shall be self-sustaining and at least 35% of the soil shall be uniformly covered by live actively growing plant matter in contact with the soil. The remaining exposed soil (65%) shall be partially covered by at least 2" of fallen plant litter or standing dead plant litter.	(1) All disturbed areas of the construction site must be stabilized. Final stabilization for the purposes of submitting a NOT is satisfied when: -All soil disturbing activities are completed AND EITHER OF THE TWO FOLLOWING CRITERIA ARE MET: -A uniform vegetative cover with 70 percent coverage has been established OR: -equivalent stabilization measures have been employed. These measures include the use of such BMPs as blankets, reinforced channel liners, soil cement, fiber matrices, geotextiles, or other erosion resistant soil coverings or treatments. (2) Where background native vegetation covers less than 100 percent of the surface, such as in arid areas, the 70 percent coverage criteria is adjusted as follows: If the native vegetation covers 50 percent of the ground surface, 70 percent of 50 percent (.70 X .50=.35) would require 35 percent total uniform surface coverage. Also, for large linear permits, it should also include the following alternative criteria from the SLUP: • Where no vegetation is present prior to

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					construction, the site is returned to its original line and grade and/or compacted to achieve stabilization; Many natural habitats in southern California do not have growing plant matter that is "in contact with the soil" (e.g., shrubs) making this requirement unreasonable especially in undeveloped areas. The requirement: "The remaining exposed soil (65%) shall be partially covered by at least 2" of fallen plant litter or standing dead plant litter" is unrealistic and could potentially be a fire hazard in southern California; therefore it should be deleted.
97		Permit-26	Section XI.3.b	"C Factor Method:" equivalent stabilization measures have been employed that provide a RUSLE "C Factor" of 0.003 or less on each individual parcel. These measures include erosion resistant soil coverings or treatments such as compost, rolled erosion control products, or mulch. Soil loss as predicted by RUSLE must be at or below pre-project levels.	Attachment C (Turbidity) includes a table that provides C Factors for different types of construction site BMPs. Notably, this table includes only one type of BMP (RECPs) that potentially meet the 0.003 criterion. Also, the C Factor for asphalt/ concrete pavement does not even meet this criterion which means that trenches and excavations conducted within paved streets that are repaved could not achieve "final stabilization" under this criterion. This criterion is much too stringent and needs to be set at a level that provides more selection of alternative BMPs that achieve a reasonable level of stabilization. Also, the fact sheet should provide the original data source of the C Factors listed in Attachment C as we have been unable to locate documentation for C Factors at or below 0.003.

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98		Permit-26	Section XII.1	Regional Water Board staff may review PRDs and reject or accept permit coverage of applications or may require dischargers to submit a Report of Waste Discharge / NPDES permit application for Regional Water Board consideration of individual requirements.	The Fact Sheet (page 5-6) references two court decisions (*Environmental Defense Center v. USEPA* (344 F.3d 832) and *WaterKeeper Alliance v USEPA* (2nd Cir. 2005)) to explain why the Proposed Permit requires, in addition to the submittal of the Notice of Intent (NOI), the submittal of the permittee's Storm Water Pollution Prevention Plan (SWPPP) and other compliance related documents. Additionally, these decisions are also used to explain the inclusion of an open-ended Regional Water Quality Control Board and public review[1], with the potential for holding public hearings on a project that has submitted a complete application. Although the SWRCB acknowledges[2] that neither of these court cases is directly applicable to states implementing the USEPA regulations, which includes California, the permit has been revised to include these new requirements. The SWRCB, however, did not consider a third, more directly applicable court decision (*Texas Independent Producers and Royalty Owners Association v. EPA*, 410 F.3d 964 (7th Cir. 2005) – copy attached) that found that the Clean Water Act does not require USEPA's General Construction Stormwater Permit to mandate public availability of NOIs and SWPPPs or require USEPA to provide the public with the opportunity for a public hearing on a NOI or SWPPP (see page 13). The court found that Clean Water Act Sections 33 USC 1342(j) and 1342(1)(a) apply to "permits" and "permit applications" and NOIs and

[1] See SWRCB's Proposed Permit Sections XII.1 & 2 on Page 26
[2] See SWRCB's Proposed Permit Fact Sheet, page 6

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					SWPPPs are neither permits or permit applications. Further they concurred with USEPA's following rationale: • The General Permit does not make use of a permit application. Those wishing to operate under the General Permit must comply with the previously established permit terms, which would include the filing of an NOI; • The opportunity for public input on the General Permit was through response to the Federal Register notice of the proposed General Permit; and • Once the General Permit is issued and a discharger files a NOI, there is no need for additional notice period or public comment. Further, requiring a public hearing is completely inconsistent with the general permit scheme and would be no different from the process for obtaining an individual permit, which is also inconsistent with Congress' intent to allow use of general permits; Permittees need the assurance that, once they have submitted their NOI and they receive acknowledgement of their submittal from the SWRCB, they have a valid permit and can proceed with their construction activities without the potential for being shut down. Many construction activities have to be conducted during specific times of the year (e.g., outside of bird breeding season) so the delay of several months could postpone a project 9-12 months. Also, it is very disruptive and extremely expensive to mobilize and then demobilize a project. We urge the SWRCB to remove the Proposed Permit's requirements for submittal of SWPPPs,

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					public review and public hearings, making the Proposed Permit consistent with the Seventh District Court's decision. To the extent the Proposed Permit retains this requirement, the permit needs to clarify the process for this review, (i.e., when it will take place, the time limit for the review, the form of confirmation that will be issued by the RWQCB that the review is complete, and the criteria the RWQCB will use to make these decisions). Permittees need the assurance that they have a valid permit and can proceed with their construction activities without the threat of being shut down. The RWQCBs, if regulatorily required, need a defined process/period of review so the permittee knows when its PRDs are past the review period and they can proceed.
99		Permit-26	Section XII.2	Regional Water Boards shall review comments provided from the public on new permit applications. Based upon the public comments and Regional Water Board review of the permit application submittal, Regional Water Boards may take actions that include, but are not limited to: rescinding permit coverage, requiring public hearings or formal Regional Water Board permit approvals, requesting dischargers to revise their SWPPP and/or Monitoring Program within a specified time period, or taking no action.	See Comment No. 98. To the extent the Proposed Permit retains this requirement, the permit needs to clarify the process for this review, (i.e., when it will take place, the time limit for the review, the form of confirmation that will be issued by the RWQCB that the review is complete, and the criteria the RWQCB will use to make these decisions)
100		Permit-27	Section XII.5	Regional Water Boards may impose additional requirements on dischargers to satisfy TMDL implementation requirements or to satisfy provisions in their Basin Plans.	The permit needs to clarify the process for these RWQCB actions. Also, the requirements tied to Basin Plans may be beyond federal requirements and thus beyond the scope of this NPDES permit.
101	**YES**	Attach A-Risk	General	The risk evaluation method is not appropriate for linear projects. The factors taken into	The risk evaluation method outlined in Attachment A is both highly complex and highly subjective.

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				account in both the sediment risk and the receiving water risk are suited well for traditional construction projects, but not for linear projects.	The combination of these factors will potentially result in multiple risk assessment levels that must be aggregated into one project risk level. This approach will decrease the value of the risk based requirements contained in the rest of the permit. A simpler risk assessment method is recommended; one that uses fewer inputs that are simpler to define would provide a more consistent method of evaluating risk. The Risk Worksheets appear to be designed for conventional footprint development projects and not linear projects. Assessment of the risk level for a linear project does not fit the method prescribed in Attachment A. For example, the risk assessment method requires that a single soil type be entered for the project; a single rainfall factor; a single channel evaluation score, among many other factors. However, a linear project by nature will cross many soil types, many rainfall areas, and discharge to many receiving waters. As proposed, a discharger cannot accurately determine a project's risk level using the method defined in Attachment A and develop a risk factor that is meaningful. If average or maximum numbers are used for the factors, the risk level loses its meaning. In addition, completing the Risk Worksheets for linear projects would be very time consuming and complicated. See also Comment No. 7. Under the current worksheet parameters, it is likely that linear projects may be considered a "medium" to "high" sediment risk because of the following:

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					• K Factor – Various Soils Encountered • R Factor – Various Slopes Encountered Projects that discharge directly or indirectly to CWA 303(d) listed waterways are by definition high risk and projects that discharge to specified designated beneficial waterways will likely be considered high risk. Based on the combined sediment and receiving water risks, these projects could be considered, at a minimum Risk Level 2 or 3, and possibly Risk Level 4.
102	YES	Attach A-Risk	Sediment Worksheet-General	Risk Factors. The method of determining risk does not account for a project's area.	The risk factors involved in determining sediment risk (i.e., rainfall factor, soil erodibility factor, and slope-length factor) will almost certainly vary over the distance of a linear project. For instance, a linear project that stretches five or more miles could cross multiple areas with different rainfall factors, multiple soil types, and vastly different slope gradients and lengths. The risk factor for a project should take the project area into account. While the Fact Sheet indicates that a project's area will be considered when determining the risk level, the risk evaluation method in Attachment A does not consider the project's area. This needs to be corrected so that projects whose area within a sub-watershed is small would tend to have a lower risk level than a larger project. See also Comment No. 7.
103	YES	Attach A-Risk	Sediment Worksheet-A	R Values.	If maps do not exist for specific areas, the permit should describe how is this information obtained For linear projects that may span more than one

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					"R value" area, the permit should describe how the R Factor value is calculated. See also Comment No. 7.
104	YES	Attach A-Risk	Sediment Worksheet-B	K Values.	The Attachment needs to clarify how the "K value" is calculated for linear projects that may have many more than one characterization of the "K value". See also Comment No. 7.
105	YES	Attach A-Risk	Sediment Worksheet-C	LS Values.	The Attachment needs to clarify how the "LS value" is calculated for linear projects that may have many more than one characterization of the "LS value". See also Comment No. 7.
106	YES	Attach A-Risk	Receiving Water Worksheet-General	Receiving Water risk factors.	The factors involved in determining receiving water risk (i.e., impairments to receiving water, beneficial uses to receiving water, flood prone width of receiving water, channel stability index, and use of ATS) are highly site specific. A linear project may cross multiple sub-watersheds, which would result in multiple receiving waters that may or may not have CWA 303(d) impairment and have different beneficial uses, different floodprone widths, and/or channel configurations. In addition, the ability to use an ATS to reduce the risk level would typically not be feasible for a linear project. It is nearly impossible to identify a project as low risk, even if the project is located far away from a waterbody and does not discharge directly or indirectly to a sediment impaired waterbody. In addition, the channel stability index used in the

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					Receiving Water Risk Factor seems time consuming and confusing to fill out. There is no explanation of each of the point items. Our first recommendation would be to revise the spreadsheet base point amount (i.e., 10 points) so that it is possible to gain a "Low" rating in areas that have little erosion, are far away and not contributing to a 303(d) water body. In addition, we would suggest providing an example project with the worksheet and explanations on each of the point items since it is unclear whether this is "engineering judgment" or field measurements. Also, the risk spreadsheet does not take into consideration what season you are constructing during (i.e. non-rainy season construction should be identified as a lower risk). See also Comment No. 7.
107		Attach A-Risk	Receiving Water Worksheet-A.1	Definitions of "direct" and "indirect". Sediment impaired waters.	The Attachment needs to clarify the definitions of "direct" and "indirect". This section states that the receiving water risk factor is automatically "high" if the answer is yes to A.1; however, it seems that a project that answers "yes" could still possibly have a "medium" receiving water risk factor if an ATS treats all discharges from the site. The statement "proceed to Combined worksheet" is not consistent with the scoring system.
108		Attach A-Risk	Receiving Water Worksheet-A.2	"Cold" and Spawn" beneficial uses.	In southern Ca, many streams are ephemeral or intermittent. To the extent unnamed tributaries to named tributaries with specified beneficial uses are considered to have the same beneficial uses as the named tributaries, it is unclear if a project could be required to add 10 points because runoff

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					from its disturbed area will discharge to a dry ephemeral "stream" that has the "Cold" or Spawn" beneficial use only by virtue that it is tributary to a named stream segment that has this beneficial use. In such cases, where the discharge is to an intermittent or ephemeral stream the worksheet should not require adding any points.
109	YES	Attach A-Risk	Receiving Water Worksheet-B.1	Sensitive receiving waters.	"Sensitive receiving waters" needs to be defined. This factor should include a statement that if the discharge is not to a sensitive receiving water, 5 points should be subtracted
110		Attach A-Risk	Receiving Water Worksheet-B.2	Channel evaluation.	The channel evaluation worksheet should include better explanations for several of the questions. For instance, question 3 asks for an evaluation of the "degree of incision" and provides an explanation that says "relative elevation of "normal" low water; floodplain/terraces @ 100%." This question and its associated explanation are confusing. A question such as this, asking for an advanced evaluation of a channel, should include sufficient explanation so that most people would be able to answer it. In addition, questions 5, 6, and 12 are repetitive, asking the same question in three ways. The associated worksheet is too complicated, does not specify if the measurements are to be taken upstream, downstream, immediately adjacent to the project, or some combination thereof, does not identify how to combine the results from the 2 plus sites that would be evaluated, and does not identify how it applies to waterbodies other than streams (e.g., lakes, ponds, estuaries). This evaluation would be very difficult to prepare for long linear projects for

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					which multiple streams or other waterbodies would be evaluated. The attachment needs to clarify how this worksheet will be used for discharges into MS4 conveyance systems or lined (e.g., concrete wall) streams.
111	YES	Attach A-Risk	Receiving Water Worksheet-B.3	Sensitive receiving waters.	The attachment needs to define "Sensitive receiving waters". The attachment needs to clarify that in those cases where the water body is not "sensitive", zero points should be added.
112	YES	Attach B- M&RP-04	Table 3	Effluent Monitoring.	Effluent monitoring as required by the Proposed Permit will be extremely expensive and time consuming for a linear project. Linear projects can be very long, and may have hundreds of discharge points. Monitoring of all discharge points would be overly burdensome, and very expensive.
113	YES	Attach B- M&RP-05	Section E	Receiving Water Monitoring.	A linear project could cross multiple watersheds, which means it could discharge to multiple receiving waters. The requirement to monitor the receiving waters for a linear project is infeasible due to the potentially large number of locations where receiving water monitoring could be required. In addition to the logistical and cost impacts to a project imposed by receiving water monitoring, the issues of access to the receiving water, are multiplied when multiple receiving water monitoring locations are required.
114	YES	Attach B- M&RP-05	Table 4	Receiving Water Monitoring – Decision of Where to Sample.	In some areas, discharges from a site can enter the storm drain, remain underground for several miles, and commingle with runoff from multiple sites, before eventually daylighting into a large, engineered channel. In these cases, the initial

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					challenge will be locating the precise point where the discharge meets the receiving water. The challenge of locating the discharge location combined with the challenge of taking samples at specific points (upstream or downstream of an identified discharge point) would reduce the value of the data gained from receiving water monitoring.
115	YES	Attach B- M&RP-05	Table 4	Bioassessment	The requirement to perform a benthic macro-invertebrate assessment will multiply costs for linear construction due to discharges to multiple receiving waters. Conducting these assessments in ephemeral and intermittent streams would also not be of much benefit. This requirement should be deleted.
116		Attach B-M&RP-03	Section D.1	"The discharger shall visually observe (inspect) storm water discharges at all discharge locations within one business day after each qualifying rain event."	The attachment needs to be consistent in its requirements for inspections. Table 2 specifies that the post-rain event inspections need to be conducted within "2 days" after a qualifying rain event, Section D.7 specifies "2 business days" and this provision specifies "1 business day". The table and these sections need to be revised to consistently state "...2 business days..." See also Comment No. 82.
117		Attach B-M&RP-03	Section D.5	"Within 48 hours of each qualifying rain event..."	For clarity, this should be revised to state: "Within 48 hours prior to each qualifying rain event..."
118	YES	Attach B-M&RP-03	Section D.8	"The discharger shall maintain on-site records of all visual observations..."	Linear projects do not typically have construction trailers located on-site and if they do it may be at one end of a long project. This permit would need to incorporate the language in the SLUP that allows the SWPPP to be retained in a project vehicle with the requirement that it must be made available within a reasonable period of time upon

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					request of an inspector.
119	YES	Attach B-M&RP-04	Section E-Table 3	This table specifies the frequency of stormwater monitoring.	Large linear projects covered under this permit would have multiple discharge points located along its route. It is infeasible to require sampling within the first hour of discharge and then the first and last hour of each working day during the entire storm event. For linear construction in existing developed areas (e.g., paved streets), this could be interpreted to require sampling at each storm drain inlet. For construction in undeveloped areas, it is frequently too dangerous to access many areas of the project until after the rain has ended and the dirt access roads have dried out. Also, not driving on the dirt access roads until they have dried out prevents creating additional erosion from creating ruts in the roads. For linear projects, the permit instead of requiring sampling during storm events should focus on confirming the SWPPP's BMPs are implemented and maintained prior to the rain event. Note few, if any, linear projects are anticipated to be considered Risk Level 1. The term "Effluent" is used in Table 3 and elsewhere. What is not immediately clear is that this applies to "...any discharge of water by a discharger either to the receiving water or beyond the property boundary controlled by the discharger". Based on the frequency shown in this table for Risk Level 1, no sampling of non-stormwater discharges is required. The Attachment should make this clearer.
120	YES	Attach B-M&RP-05	Section E.5	"Risk Level 2 discharger sites that have violated the turbidity NEL shall analyze subsequent effluent samples for all the parameters specified in Section E.4. and	This provision needs to be revised to clarify that the "subsequent sampling" in which SSC analyses need to be conducted applies to just the next sample.

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				Suspended Sediment Concentration (SSC)".	Since linear projects will have multiple discharge locations, if this provision were to be applicable, it should only apply to the specific discharge point at which the NEL is exceeded.
121	YES	Attach B-M&RP-05	Section E.6	"In the event that a Risk Level 2 discharger violates an NEL contained in this General Permit, the discharger shall subsequently sample receiving waters for all parameter(s) required in Section E.4 above for the duration of coverage under this General Permit".	This provision needs to be revised so that the additional sampling that is required does not last for the entire period of permit coverage. It should be limited to the next sampling event, consistent with Table 4. It should also be limited to the specific parameter (i.e., pH, turbidity) that exceeded its NEL. Since linear projects will have multiple discharge locations, if this provision were to be applicable, it should only apply to the specific discharge point at which the NEL is exceeded.
122		Attach B-M&RP-06	Section E.8	Risk Level 3 dischargers shall conduct or participate in benthic macro-invertebrate bioassessment of receiving waters prior to commencement of construction activity.	Neither the permit or fact sheet provides a rationale for conducting bioassessments or what or how this information would be used. This parameter should be deleted. To the extent bioassessments are required, this provision is inconsistent with Table 4 which states that all sampling events shall include effluent and receiving water monitoring and includes bioassessment as a parameter. If the requirement for a bioassessment is retained in the permit, this provision needs to clarify that bioassessment is only required prior to construction.
123	YES	Attach B--M&RP-06	Section E.11	Sampling requirements and safety issues.	Attachment B, Non-visible pollutant monitoring requirements, item 11, states that samples shall be collected at all discharge locations that can be safely accessed. The permit should provide guidance on any necessary documentation or

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					other actions required when access to the discharge location is not safe.
124	YES	Attach B- M&RP-06	Section E.12	It is unclear or unspecified how or what criteria will be used to compare the uncontaminated sample to the discharge sample.	Clarification on how these samples are to be compared should be provided in the permit.
125		Attach B-M&RP-06	Section E.13	"Samples shall be collected during the first two hours of discharge from rain events that occur during daylight hours and which generate runoff".	This provision applies to non-visible pollutant monitoring and it specifies when to sample. This provision is inconsistent with Table 3 requirements for sampling storm water effluent.
126		Attach B-M&RP-08	Section E.16.e.i	"Any indications of toxicity or other violations of water quality objectives…"	The permit needs to clarify that "any indications of toxicity" means exceedance of a toxicity limit.
127	YES	Attach B- M&RP-08	Section F	Sampling in all drainage areas where there is construction activity.	A linear project could stretch over many miles, and multiple drainage areas. This requirement could result in the need to sample at dozens of points across a linear project. This requirement is infeasible for a linear project. We recommend that a linear type of project, such as "electrical transmission lines", would only require sampling at a few representative drainage areas, and only when the conditions are safe to do so.
128	YES	Attach B-M&RP-08	Section F.1	"The discharger shall perform sampling of storm water discharges from all drainage areas associated with construction activity. The storm water discharge collected and observed shall represent the effluent in each drainage area based on visual observation of the water and upstream conditions. For example, if there has been concrete work recently in an area, or drywall scrap is exposed to the rain, a pH sample shall be taken of drainage from the relevant work area. Similarly, if muddy water is flowing through some parts of a silt fence, samples	As stated this will be infeasible for large linear projects that have long distances under construction through multiple drainages. EPA's regulations require that samples be representative of the actual discharge. Requiring that samples be taken in a manner that is not representative (e.g., "…if muddy water is flowing through some parts of a silt fence, samples shall be taken of the muddy water even if most water flowing through the fence is clear") is inconsistent with EPA's regulations and needs to be deleted.

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				shall be taken of the muddy water even if most water flowing through the fence is clear."	The permit also needs to clarify when sampling in a particular drainage can be terminated. Once active construction is complete, sampling should be able to be discontinued.
129	YES	Attach B- M&RP-09	Section F.6-8	Access to Receiving Water Sampling Locations.	In many locations, the only area where access to the channel is available is via busy freeway or street bridges over the channel. Receiving water samples would have to be taken by throwing a bucket with a rope over the rail, lowering it as much as 50 feet, and hauling it back up for sampling. The bridges over the Santa Ana River occur sometimes every mile or so. Where the bridge over the river is for a freeway, access would most likely not be granted by the County, and samples would have to be taken from another mile downstream. All of these issues increase the cost of a project, and at the same time reduce the value of data gained from this type of monitoring. Another concern is that receiving water monitoring can also be dangerous in urbanized areas. The Permit should justify the need for receiving water monitoring in urbanized areas. The Permit should also take into account the dangers and difficulties involved in acquiring samples in these areas. The challenges of receiving water monitoring should also be weighed against the quality of data that will be obtained from urban area receiving water monitoring. The linkage between construction site runoff and receiving water quality should be taken into account when a construction site is many miles from the first available point for receiving water monitoring, and the requirement to monitor receiving water should be reduced when the data gained will have limited value.

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130	YES	Attach B- M&RP-12	Section H.11	The dischargers will have to supply "qualified and trained" samplers and the sampling requirements for SSC and Non-Visible Pollutants can be complex.	These tests should be performed by lab personnel trained in sampling techniques specific to the methods.
131	YES	Attach B- M&RP-13	Section I.2	pH and Turbidity are to be conducted by the discharger with no requirement for using a state accredited laboratory.	This could result in data of questionable quality and unknown precision and accuracy, resulting in "Bias" in the results. See also Comment No. 38
132	YES	Attach B- M&RP-13	Section J.3	There seems to be a contradiction in Section 2 that would require all analysis to be conducted by a DHS certified laboratory yet Suspended Sediment Concentration (SSC) ATSM Method D3977-97 is not currently a certifiable test.	The State of California DHS currently recognizes Standard Methods 2540 F. for measuring "Settleable Solids"
133	YES	Attach B- M&RP-15	Section L.4.b	There is a requirement to report the reporting units and Method Detection Limit.	Most laboratories report reporting limits rather than MDLs. This requirement will create confusion and incorrect reporting. The reporting limits should be adequate and provide a higher level of confidence in the data. MDLs should not be required to be reported.
134	YES	Attach F-1	New and Redevelop-ment Require-ments for Runoff Reduction	Hydromodification is included in this Permit.	We understand that the Board is only requiring runoff reduction (hydromodification) in areas that are not covered under a separate MS4 Permit. However, hydromodification should more appropriately be addressed during the planning and design stages of a project. Typically, the SWPPP isn't even prepared until the design is completed. In addition, if the New and Redevelopment Requirements remain in the Permit, the spreadsheet provided in Attachment F is difficult to understand and fill out. We would suggest adding an example project to this section or more detail on how to fill out the spreadsheet

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					and further explanation of input and output cells. See also Comment No. 5.
135	YES	Attach G	REAP	Proposed preparation requirements for REAP are not practical for linear projects.	In southern California there are many forecasted rain events that produce very little or no precipitation. This condition should specify a minimum amount of predicted rainfall (e.g. 0.25 inch) as part of the criteria. The REAP should be able to be a generic list of actions to take that can be applied on multiple rain events rather than having to be prepared for each rain event. Particularly for linear projects, similar circumstances will repeat, such that a certain action plan would be appropriate to address predicted rainfall amounts for many locations along/large spans of a project, perhaps over long periods of time.
136		Attach I	Section I.1	The LRP is the person who represents the Property Owner for the regulated site. LRPs shall electronically submit PDRs and NOTs via the California Integrated Water Quality System (CIWQS).	It is important that the Proposed Permit not limit the number of LRPs that a corporation may have, as corporations with large service territories may have qualified personnel/ positions that are located regionally that could perform this responsibility, rather than one centrally located person/ position. The key requirement should be that the person/ position satisfy EPA's criteria for a Responsible Corporate Officer.
137		Attach I	Section I.2	All SWPPP revisions, annual reports, or other information required by the General Permit (other than PDRs and NOTs) or requested by the Regional Water Board, State Water Board, USEPA, or local storm water management agency shall be certified and submitted by the LRP as described above or	EPA's regulations that apply to this permit specify that the duly authorized representative can be either a person or position. The Proposed Permit needs to clarify that the duly authorized representative can be a named position per 40 CFR 122.22.b.2.

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				by the LRP's duly authorized representative. A person is a duly authorized representative only if the LRP electronically provides the authorization via CIWQS.	
138		Fact Sheet-21	Section II.B	Construction does not include emergency construction activities required to immediately protect public health and safety or routine maintenance to maintain original line and grade, hydraulic capacity, or original purpose of the facility. As used above, routine maintenance only applies to road shoulder work, dirt or gravel road re-grading, or ditch clean-outs. For municipal operators, repaving of asphalt roads is routine maintenance except where the underlying and/or surrounding soil is cleared, graded, or excavated as part of the repaving operation. Where clearing, grading, or excavating of underlying soil takes place, permit coverage is required if more than one acre is disturbed or part of a larger plan or if the activity is part of more activities part of a municipality's Capital Improvement Project Plan.	The Fact Sheet modifies the language that currently exists in Order 99-08 for emergency work and for maintenance work. • The Proposed Permit would limit "emergency" construction activities to those required to "immediately" protect public health and safety. Utilities provide essential public services (electricity, gas, communications, etc.) and all construction activities required to respond to emergency situations that affect these services need to be exempted from construction stormwater permitting. • The Fact Sheet would limit "routine maintenance" to "...road shoulder work, dirt or gravel road re-grading, or ditch clean-outs". This unnecessarily limits this exemption and may preclude other maintenance activities that otherwise would be covered by this exemption. This language should be revised to be consistent with EPA's exemption language. • Note that repaving may also be conducted by utilities and categorization of this as maintenance should not be limited to "municipal operators".

FACT SHEET
FOR
WATER QUALITY ORDER 2003 – 0007 - DWQ

STATE WATER RESOURCES CONTROL BOARD (SWRCB)
1001 I STREET, SACRAMENTO, CALIFORNIA 95814

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES) GENERAL PERMIT FOR STORM WATER DISCHARGES ASSOCIATED WITH CONSTRUCTION ACTIVITY FROM SMALL LINEAR UNDERGROUND/OVERHEAD PROJECTS (GENERAL PERMIT)

BACKGROUND

In 1972, the Federal Water Pollution Control Act (also referred to as the Clean Water Act [CWA]) was amended to provide that the discharge of pollutants to waters of the United States from any point source is unlawful unless the discharge is in compliance with an NPDES permit. The 1987 amendments to the CWA added Section 402(p) that establishes a framework for regulating municipal and industrial storm water discharges under the NPDES Program. On November 16, 1990, the U.S. Environmental Protection Agency (USEPA) promulgated final regulations that establish storm water permit application requirements for specified categories of industries. These regulations require that discharges of storm water to waters of the United States associated with construction activities from projects that result in land disturbance greater than five (5) or more acres to be subject to an NPDES Permit. Regulations (Phase II Rule) that were promulgated on December 8, 1999 expand the existing NPDES program to address storm water discharges from construction sites that disturb land equal to or greater than one (1) acre and less then five (5) acres (small construction activity). These regulations require that small construction activity, other than those regulated under an individual or Regional Water Quality Control Board (RWQCB) General Permit, must be permitted no later than March 10, 2003.

Currently the SWRCB has adopted one statewide NPDES General Storm Water Permit for Storm Water Discharges Associated with Construction Activities (Water Quality Order 99-08-DWQ referred to as Order 99-08) that applies to all storm water discharges associated with construction activities that disturb greater than one-acre of land unless the discharge is covered by a different NPDES permit. Requirements established in Order 99-08 are applied mostly to the more traditional construction projects such as residential and commercial developments, and large linear projects, that typically result in areas of disturbed land being exposed for extended periods of time. Construction activities associated with small linear underground/overhead projects that result in land disturbances greater than one acre, but less than five acres (hereafter referred to as small LUPs), are not like traditional construction projects. Small LUPs have a lower potential to impact receiving waters because these projects are typically short duration and constructed within or around hard paved surfaces that result in minimal disturbed land areas being exposed at the close of the construction day. Therefore, this

410 F.3d 964, *; 2005 U.S. App. LEXIS 11064, **;
60 ERC (BNA) 1513; 35 ELR 20131

TEXAS INDEPENDENT PRODUCERS AND ROYALTY OWNERS ASSOCIATION, et al., Petitioners, v. ENVIRONMENTAL PROTECTION AGENCY, Respondent.

Nos. 03-3277, 03-3278, 03-3279, 03-3280, 03-3281 & 03-3865

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

410 F.3d 964; 2005 U.S. App. LEXIS 11064; 60 ERC (BNA) 1513; 35 ELR 20131

December 7, 2004, Argued
June 13, 2005, Decided

SUBSEQUENT HISTORY: Rehearing denied by, Rehearing, en banc, denied by *NRDC v. EPA, 2005 U.S. App. LEXIS 18825 (7th Cir., Aug. 26, 2005)*
Petition dismissed by *Tex. Indep. Producers & Royalty Owners Ass'n v. EPA, 435 F.3d 758, 2006 U.S. App. LEXIS 2009 (7th Cir., Jan. 27, 2006)*

PRIOR HISTORY: **[**1]** Petitions for Review of an Order of the Environmental Protection Agency. No. 02-OW-55.

COUNSEL: For TEXAS INDEPENDENT PRODUCERS AND ROYALTY OWNERS ASSOCIATION, INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, U.S. OIL & GAS ASSOCITION, TEXAS ALLIANCE OF ENERGY PRODUCERS, LOUSIANA OIL AND GAS ASSOCIATION, INDEPENDENT OIL AND GAS ASSOCIATION OF PENNSYLVANIA, OHIO OIL AND GAS ASSOCIATION, Petitioners: Janet L. McQuaid, FULBRIGHT & JAWORSKI, Austin, TX USA.

For ENVIRONMENTAL PROTECTION AGENCY, Respondent: Alan D. Greenberg, DEPARTMENT OF JUSTICE, Environment & Natural Resources Division, Denver, CO USA.

For DEPARTMENT OF NATURAL RESOURCES, Amicus Curiae: Isaac Jackson, Jr., OFFICE OF THE ATTORNEY GENERAL, Civil Division, Baton Rouge, LA USA.

For RAILROAD COMMISSION OF THE STATE OF TEXAS, Amicus Curiae: David W. Cooney, Jr., Austin, TX USA.

For OKLAHOMA CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, Amicus Curiae: Michael Decker, OKLAHOMA CORPORATION COMMISSION, Oklahoma City, OK USA.

For NATURAL RESOURCES DEFENSE COUNCIL, INCORPORATED, Petitioner: Barry Sullivan, JENNER & BLOCK, Chicago, IL USA.

For ENVIRONMENTAL PROTECTION AGENCY, Respondent: Bharat Mathur, ENVIRONMENTAL [**2] PROTECTION AGENCY, Region 5, Office of the Regional Counsel, Chicago, IL USA; Ann R. Klee, ENVIRONMENTAL PROTECTION AGENCY, Office of General Counsel, Washington, DC USA; Alan D. Greenberg, DEPARTMENT OF JUSTICE, Environment & Natural Resources Division, Denver, CO USA.

For MARIANNE L. HORIKNO, Respondent: Bharat Mathur, ENVIRONMENTAL PROTECTION AGENCY, Region 5, Office of the Regional Counsel, Chicago, IL USA; Ann R. Klee, ENVIRONMENTAL PROTECTION AGENCY, Office of General Counsel, Washington, DC USA.

For WISCONSIN BUILDERS ASSOCIATION, Intervenor: Ellen B. Steen, CROWELL & MORING, Washington, DC USA.

For ASSOCIATED GENERAL CONTRACTORS OF AMERICA, Intervenor: R. Timothy McCrum, CROWELL & MORING, Washington, DC USA; Jeffrey S. Longsworth, BARNES & THORNBURG, Washington, DC USA.

For NATIONAL ASSOCIATION OF HOME BUILDERS, Intervenor: Ellen B. Steen, Timothy McCrum, CROWELL & MORING, Washington, DC USA.

JUDGES: Before BAUER, MANION, and WILLIAMS, Circuit Judges.

OPINION BY: MANION

OPINION

[*967] MANION, *Circuit Judge*. On July 1, 2003, the Environmental Protection Agency issued its "Final National Pollutant Discharge Elimination System General Permit for Storm Water Discharges From [**3] Construction Activities" ("General Permit"). *68 Fed. Reg. 39,087 (July 1, 2003)*. Several organizations filed petitions for review of this final agency action, and those petitions were consolidated before this court. For the reasons that follow, we hold that the General Permit does not violate the *Clean Water Act*'s requirements for public notice and public hearing. We also hold that in issuing the General Permit, the Environmental Protection Agency complied with the requirements of the *Endangered Species Act*. However, petitioner Natural Resources Defense Council, Inc., lacks standing to challenge other aspects of the General Permit, and accordingly we dismiss the remainder of its petition. As to the remaining petitioners who represent the interests of the oil and gas industries, we stay consideration of their challenges to the General Permit pending resolution by the Fifth Circuit as to whether those petitioners are required to obtain a permit in the first instance.

I.

Congress enacted the Clean Water Act ("CWA" or "Act") "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *33 U.S.C. § 1251(a)*. [**4] The CWA

prohibits the "discharge of any pollutant" except in compliance with the Act's provisions. *33 U.S.C. § 1311(a)*. Under the Act's provisions, the discharge of pollutants into navigable waters is illegal unless authorized by a permit issued pursuant to § 402 of the Act. *33 U.S.C. § 1342. Section 402* established the National Pollutant Discharge Elimination System ("NPDES"), and requires dischargers to obtain a permit from the Environmental Protection Agency ("EPA") or an authorized state. *33 U.S.C. § 1342(a)(1), (b)*.

1 An appendix to this opinion provides a comprehensive list of the numerous abbreviations used throughout the opinion.

2 "The EPA administers the NPDES program in each state unless the EPA previously authorized a state program to issue NPDES permits." *Am. Paper Inst., Inc. v. EPA, 890 F.2d 869, 871 (7th Cir. 1989)* (citing *33 U.S.C. § 1342(b)*).

The NPDES permitting **[**5]** system originally used individual permits, which was feasible for regulating discharges from wastewater facilities or industrial plants. However, by the 1980's it became clear that the individual permitting process was unworkable to regulate storm water discharges **[*968]** which can occur virtually anywhere. *56 Fed. Reg. 40948, 40949-50 (Aug. 16, 1991)*. Congress responded in 1987 by adding § 402(p) to the CWA. *33 U.S.C. § 1342(p)*. This section established a two-step phased approach to regulating storm water discharges. *See 33 U.S.C. § 1342(p)*.

In Phase I, Congress required NPDES permits for storm water discharges from "industrial activities," *33 U.S.C. § 1342(p)(3)(A)*, defined as construction activities involving five or more acres, as well as discharges from certain large municipal storm sewer systems. *55 Fed. Reg. 47990, 48066 (Nov. 16, 1990)*. To implement the permit requirement for Phase I, the EPA decided to use a general permit system, as opposed to a system requiring individual permits for each construction activity. *55 Fed. Reg. 47,990, 48005-48006 (Nov. 16, 1990)*. With **[**6]** a general permit, the EPA issues a permit for specific types of activities and establishes specific rules for complying with the permit. Then, rather than apply for an individual permit, operators must file a Notice of Intent ("NOI") stating that they plan to operate under the general permit, and absent a negative ruling by the EPA, discharges that comply with the terms of the general permit are automatically authorized. The EPA uses a general permit system to assure "adequate environmental safeguards . . . without the administrative and resource burdens involved in an individual permit issuance." *56 Fed. Reg. at 40961*. The EPA issued its first general permit for construction-related storm water discharges in 1992, *57 Fed. Reg. 41176 (Sept. 9, 1992)*, and proposed a revised general permit in 1997. *62 Fed Reg. 29786 (June 2, 1997)*. Neither of these general permits is at issue in this case.

In preparation for Phase II, the EPA, as directed by Congress, studied all remaining storm water discharges and established "procedures and methods to control storm water discharges to the extent necessary to mitigate impacts on water quality." *33 U.S.C. § 1342(p)(5)*. **[**7]** Then, in 1999, the EPA issued its Phase II storm water rules, designating as Phase II sources small construction sites (one to five acres), smaller municipalities, and additional sources that might be designated on a case-by-case basis. *64 Fed. Reg. 68722 (Dec. 8, 1999); 40 C.F.R. § 122.26(b)(15)*.

On December 20, 2002, the EPA proposed a third General Permit for storm water discharges from both large and small construction sites. *67 Fed. Reg. 78116 (Dec. 20, 2002)*. The General Permit applies only in those jurisdictions where the EPA has not authorized the State or Indian Tribe to administer its own NPDES permitting program. These jurisdictions include Massachusetts,

New Hampshire, Idaho, New Mexico, Alaska, and certain tribal lands. *33 U.S.C. § 1342(c).* [3] After holding a series of public meetings and considering public comments, the EPA published notice of the final General Permit on July 1, 2003. *68 Fed. Reg. 39087.*

3 Although the EPA imposed the NPDES permitting requirements on small construction sites (one to five acres) it was not required to do so by statute. Rather, Congress merely directed the EPA in Phase II to issue comprehensive regulations addressing additional discharges as necessary, by "performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate." *33 U.S.C. § 1342(p)(6).* Accordingly, the EPA was not required to subject the smaller construction sites to the terms of the General Permit at issue here.

[8]**

4 The EPA also maintains that the General Permit applies to certain construction activities associated with oil and gas exploration in the States of Oklahoma and Texas.

The final General Permit issued by the EPA requires operators to submit an NOI **[*969]** to be covered by the General Permit, and mandates that a responsible corporate official certify the basis for eligibility for such coverage. General Permit, Appendix G at 11A.1. The General Permit also requires that the operator create, maintain, and implement a site-specific Storm Water Pollution Prevention Plan ("SWPPP"), which must also be certified by a corporate official. General Permit 3.13; General Permit, Appendix G at 11A.1. The discharger must further implement best management practices ("BMP") necessary to comply with water quality standards, assure weekly site inspections, and document those inspections, including detailing weather conditions. *See* General Permit 4.5A (construction operators must "select, install, and maintain BMPs at your construction site" that minimize pollutants in the discharges as necessary to meet applicable **[**9]** water quality standards); General Permit 3.10.A (detailing requirements for inspections).

Shortly before it published the final regulation for the General Permit, the EPA issued *68 Fed. Reg. 11325 (March 10, 2003).* That final rule provided that "discharges associated with small construction activity at such oil and gas sites will require permit authorization by March 10, 2005." *68 Fed. Reg. at 11330.* [5] On June 9, 2003, several organizations representing business interests in the oil and gas industry ("Oil and Gas Petitioners") filed a petition challenging that regulation in the Fifth Circuit. In their petition, the Oil and Gas Petitioners claimed that the EPA lacks authority to require storm water discharge permits for oil and gas construction activities based on *§ 402(l)(2)* of the *CWA. In § 402(l)(2),* Congress expressly prohibited the EPA from requiring a *§ 402* permit for storm water discharges for oil and gas activities unless the discharges were contaminated by contact with materials located on the site of such operations. *33 U.S.C. § 1342(l)(2).* [6] That petition is still pending before the Fifth Circuit. *See Indep. Petro* **[**10]** *v. EPA*, No. 03-60506 (5th Cir. oral argument Jan. 31, 2005).

5 The EPA has since postponed the effective date to June 12, 2006. *70 Fed. Reg. 11560 (March 9, 2005).*

6 *Section 402(l)(2)* provides:

> The Administrator shall not require a permit under this section, nor shall the Administrator directly or indirectly require any State to require a permit, for discharges of storm water runoff from mining operations or oil and gas exploration,

> production, processing, or treatment operations or transmission facilities, composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with, or do not come into contact with any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations.

In addition to challenging the EPA's proposed final **[**11]** rule, arguing that they are exempt from the permit requirements, the Oil and Gas Petitioners filed a petition for review of the terms of the General Permit in the Fifth Circuit. The Natural Resources Defense Council ("NRDC"), an environmental advocacy organization, also filed a petition for review of the General Permit. That petition was filed before this court. The Oil and Gas Petitioners' petition was consolidated with the NRDC petition pending in this court, and leave was granted the National Association of Home Builders, the Wisconsin Builders Association, and the Associated General Contractors of America (collectively "Builder Groups"), to intervene in support of the General Permit regulation.

II.

On appeal, petitioner NRDC raises three main arguments. First, the NRDC **[*970]** argues that the General Permit violates the mandates of the CWA by "authorizing the discharge of pollutants without ensuring that the discharge will meet the water quality and technology requirements of the CWA." Second, the NRDC challenges the "General Permit's failure to mandate public availability of the NOI and the SWPPP, as well as its failure to provide the public with the opportunity for a public hearing **[**12]** on the NOI and the SWPPP. . . ." Third, the NRDC claims that the General Permit violates the Endangered Species Act ("ESA"). *16 U.S.C. §§ 1531, et seq.*

For their part, the Oil and Gas Petitioners first reiterate their position that the storm water permit requirements do not apply to construction activities in the oil and gas industry. The Oil and Gas Petitioners maintain, however, that in this appeal, they are not challenging the EPA's decision that they must obtain storm water discharge permits, as that question is currently pending before the Fifth Circuit. Rather, the Oil and Gas Petitioners assume, for purposes of this appeal, that they must obtain a permit, and instead they challenge the requirements of the General Permit established by the EPA in *68 Fed. Reg. 39,087*. Specifically, the Oil and Gas Petitioners argue that the EPA's definition of "common plan" contained in the General Permit is so broad, ambiguous, and vague that it violates their rights to due process because they do not know if they need to apply for a General Permit. The Oil and Gas Petitioners also argue that the EPA's definition of "final stabilization" is too vague. **[**13]** Alternatively, the Oil and Gas Petitioners argue that the EPA's definitions of "common plan" and "final stabilization" are arbitrary and capricious because the definitions do not take into account the differences in construction activities related to oil and gas exploration and conventional residential and commercial activities.

The State of Louisiana's Department of Natural Resources, the Railroad Commission of the State of Texas, and the State of Oklahoma's Corporation Commission filed *amici curiae* briefs in support of the Oil and Gas Petitioners. The *amici* support the Oil and Gas Petitioners' claims that the EPA acted arbitrarily and capriciously in failing to tailor the permit criteria to construction activities

in the oil and gas industries. The *amici* also highlight the importance of the oil and gas industries to their States' economies, and stress that their States currently address environmental concerns related to the oil and gas industry.

In the cross-fire is the EPA, which maintains the middle ground, asserting that it acted reasonably in adopting the General Permit and that the regulations are neither too harsh nor too lax. The Builders Group supports the EPA's **[**14]** position, submitting a brief as Intervening Respondents to oppose the claims asserted by the NRDC. We begin by addressing the arguments presented by the NRDC, and then consider the Oil and Gas Petitioners' claims.

A. The NRDC's Petition

1. Standing.

Before we can address the merits of the NRDC's arguments, however, we must first determine whether the parties have standing to sue, an issue raised by the Builders Group, but one this court must in any event, determine in the first instance. [7] *See Heartwood, Inc. v. United* **[*971]** *States Forest Serv., 230 F.3d 947, 951 (7th Cir. 2000)* ("As always, before the court may consider the merits of a case, we must determine whether Plaintiffs have presented a justiciable claim.").

7 The NRDC claims that it need not establish standing unless or until it is challenged. However, this court admonished litigants in *Rhodes v. Johnson, 153 F.3d 785, 787 (7th Cir. 1998)*, to "be mindful of our obligation to satisfy ourselves of our jurisdiction and when, in cases like this, standing is an obvious issue, . . . they [should] cite to the relevant parts of the record to avoid wasting judicial time and resources."

[15]** *Section 509(b)(1)(F) of the CWA* authorizes any "interested person" to obtain review of an EPA action in a Circuit Court of Appeals. *33 U.S.C. § 1369(b)(1)(F)*. To qualify as an "interested person" under *§ 509(b)(1)(F)*, a party, at a minimum, must have Article III standing. *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992)* (hereinafter *Lujan II*). When a plaintiff is an association, the association has Article III standing to represent the interests of its members if the individuals have standing in their own right; the interests represented are germane to the association's purpose; and the relief sought does not require the participation of the individual members. *Hunt v. Wash. State Apple Adv. Comm'n, 432 U.S. 333, 343, 53 L. Ed. 2d 383, 97 S. Ct. 2434 (1977). See, e.g., Sierra Club v. Marita, 46 F.3d 606, 611-12 (7th Cir. 1995)* (holding that "Sierra Club may maintain standing on behalf of its members"). Plaintiffs, as the parties invoking federal jurisdiction, have the burden of proof and persuasion as to the existence of standing. *Lujan II, 504 U.S. at 561*.

At oral argument, **[**16]** we directed the NRDC to file a supplemental brief addressing whether it satisfied these requirements. In its supplemental brief, the NRDC asserts that it has standing to sue on behalf of its members as the interests involved are germane to the association's purpose, and the relief sought does not require the participation of individual members. No one takes issue with those propositions. The only real question is whether the individual members would have standing to sue in their own right. The NRDC claims that it has identified three members who have standing in their own right by virtue of living near and making use of "water bodies that receive storm water discharges authorized" by the General Permit. To determine whether this is sufficient, we turn then to the requirements for individual standing in general and, specifically, standing in an environmental case.

Generally, to establish standing a petitioner must demonstrate an injury in fact; a causal link between the injury and the challenged action; and redressability through a favorable court decision. *Id. at 560-61*; *see also Area Transp., Inc. v. Ettinger, 219 F.3d 671, 672 (7th Cir. 2000)*. However, **[**17]** when, as here, "a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed." *Lujan II, 504 U.S. at 562* (emphasis in original). As the Supreme Court in *Lujan II* explained, that is because in such a situation, "causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction -- and perhaps on the response of others as well." *Id.* Thus, the plaintiff must "adduce facts showing that those choices have been, or will be, made in such manner as to produce causation and permit redressability of injury." *Id.* Accordingly, as *Lujan II* explained, "when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily substantially more difficult to establish." *Id.* (internal quotations omitted).

Notwithstanding this difficult standard, the NRDC maintains that it has standing **[*972]** to challenge the General Permit because three of its members use various bodies of water which are polluted and that the pollution lessens their **[**18]** enjoyment and use of the water bodies. The NRDC asserts that that is enough to establish environmental standing, citing numerous environmental cases holding that such an interest is sufficient.

The NRDC is correct that injury to recreational or aesthetic interests constitutes a cognizable injury for purposes of standing. *See Friends of the Earth, Inc. v. Laidlaw, 528 U.S. 167, 183, 145 L. Ed. 2d 610, 120 S. Ct. 693 (2000)* (stating that injury to aesthetic and recreational values constitutes sufficient injury for standing); *Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 886, 111 L. Ed. 2d 695, 110 S. Ct. 3177 (1990)* (herein-after *Lujan I*) ("We have no doubt that 'recreational use and aesthetic enjoyment' are among the *sorts* of interests those statutes were specifically designed to protect."). However, to establish standing, the NRDC must establish not just " 'injury in fact' -- an invasion of a legally protected interest which is (a) concrete and particularized,' " but also that there is "a causal connection between the injury and the conduct complained of . . . ." *Lujan II, 504 U.S. at 560*. In other words, "the injury has to be 'fairly . . . traceable to the **[**19]** challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court." *Id.*

Simply put, the NRDC must tie the asserted injury, namely its members' reduced aesthetic and recreational enjoyment, to the challenged conduct, namely the EPA's issuance of the General Permit. The NRDC asserts its members "will be directly affected by the General Permit," as it "has members in each of the states in which construction activities will be regulated by the General Permit," and that its "members swim and engage in other recreational activities in water bodies directly affected by pollution from construction activities subject to the General Permit." These contentions, however, fail to establish the requisite causal connections for standing for numerous reasons.

Initially, we note that the NRDC fails to adduce specific facts in its proffered affidavits to support its claim that the water bodies are "directly affected by pollution from construction activities subject to the General Permit." Rather, in the three affidavits presented in the NRDC's reply brief to establish standing, the members merely repeat the conclusory allegations **[**20]** of the NRDC's opening brief. For instance, one affiant stated: "In recent years, there has been much construction activity near the waters that I use in Idaho . . . . I believe that that [sic] these construction projects contribute to sediment, turbidity and water quality problems in the Boise River, Snake River, and Clearwater River." However, the affidavit fails to identify any specific construction project author-

ized under the General Permit to discharge into these bodies of water, and more significantly it fails to present evidence that discharges of sediment from the sites are actually occurring. Similarly, a second affidavit merely states: "The construction that has been occurring in and around Taos has negatively affected water quality and harmed me and my family in the process." Again, this conclusory statement does not identify any specific construction sites authorized under the General Permit and fails to present evidence of any discharges into the water bodies at issue. Finally, although the third affidavit identifies a construction project approved under the EPA's General Permit, that affidavit does not specify any discharge from that project into the water body at issue. **[**21]** [8] **[*973]** As petitioning party, the NRDC bears the burden of proof, *Lujan II, 504 U.S. at 561*, and because it has sought a ruling as a matter of law, it must present record evidence establishing standing. *Sierra Club v. EPA, 352 U.S. App. D.C. 191, 292 F.3d 895, 899 (D.C. Cir. 2002)*. Repeating the conclusory allegations of a complaint is not enough. *Lujan I, 497 U.S. at 888*. Yet that is what the NRDC has done, opining that the construction activities result in pollution, without citing any supporting evidence.

8 Ironically, while the affiants conclusorily declare that discharges from the construction sites pollute the water bodies at issue, the NRDC's acknowledgment in its brief that it cannot "determine which point-sources might be responsible for harmful discharges" calls into question the veracity of these declarations.

The NRDC seeks to overcome the deficiencies in the affidavits by citing in its Supplemental Brief to several NOIs filed with the EPA, including **[**22]** some from construction companies providing a notice of an intent to discharge under the General Permit in the bodies of water used by the three affiants. There are several problems with this approach. First, the water bodies at issue span, in some cases, hundreds of miles. For instance, the Rio Grande runs the entire length of New Mexico, and pointing to an NOI seeking coverage under the General Permit for discharges into the Rio Grande does not establish an injury to the portion of the river used by the affiant. This is fatal, as "averments which state only that one of respondent's members uses unspecified portions of an immense tract of territory, on some portions of which [regulated] . . . activity has occurred or probably will occur by virtue of the governmental action, are insufficient to show that the member's rights have been adversely affected or aggrieved by Government action." *Lujan I, 497 U.S. at 889*. Moreover, to satisfy the "fairly traceable" causation requirement, there must be a distinction between "the plaintiffs who lie within the discharge zone of a polluter and those who are so far downstream that their injuries cannot fairly be traced to that **[**23]** defendant." *Friends of the Earth, Inc. v. Gaston Copper Recy., Corp., 204 F.3d 149, 162 (4th Cir. 2000). See also Lujan II, 504 U.S. at 565-66* ("Plaintiffs claiming injury from environmental damage must use the area affected by the challenged activity and not an area roughly 'in the vicinity' of it."). Thus, for instance, the Fifth Circuit held in *Friends of the Earth, Inc. v. Crown Cent. Petroleum Corp., 95 F.3d 358, 360-61 (5th Cir. 1996)*, that an eighteen-mile distance is "too large to infer causation." Likewise here, where the specific water bodies used by NRDC members run a great distance, pointing to NOIs that authorize discharges in those water bodies is insufficient to establish the discharges are within the zone to infer causation. *See Lujan I, 497 U.S. at 887-89*.

Second, the NOIs relied upon by the NRDC do not establish that any discharge has actually occurred into the water bodies. *See, e.g., 69 Fed. Reg. 76743, 76746 (Dec. 22, 2004)* (In discussing the General Permit, the EPA characterizes the CWA and its implementing regulations as requiring "certain *potential* dischargers to seek permit **[**24]** cover-age."). Nor do any of the affidavits filed pre-

sent evidence of the discharge of pollutants. "It will not do to 'presume' the missing facts because without them the affidavits would not establish the injury that they generally allege." *Lujan I, 497 U.S. at 889*. Additionally, even if discharges were occurring into the water bodies, the NRDC must still trace the alleged polluted conditions of the water bodies to the discharges. Although a plaintiff need not establish such a nexus with "scientific certainty," **[*974]** *Gaston Copper, 204 F.3d at 161*, a plaintiff must show "that a defendant discharges a pollutant [which] causes or contributes to the kinds of injuries alleged in the specific geographic area of concern." *Id.* (internal citations omitted). In *Gaston Copper*, the Fourth Circuit noted that "where a plaintiff has pointed to a polluting source as the seed of his injury, and the owner of the polluting source has supplied no alternative culprit, the 'fairly traceable' requirement can be said to be fairly met." *Id. at 162*. Here, however, the NRDC failed to establish "any seed of [its] injury." The NRDC also ignores the existing **[**25]** polluted condition of at least three of the water bodies, the Anacostia and Potomac Rivers, and Rock Creek, in Washington D.C. This condition is in large part caused by the "estimated 3.2 billion gallons of untreated raw sewage that flows into the rivers each year from the area's sewer systems." Department of Justice Press Release, U.S. -- WASA Sewage Settlement to Clean up D.C.'s Anacostia River, December 16, 2004.

Finally, and most significantly, pointing to NOIs filed with the EPA is insufficient because for the NRDC to have standing to sue, it is not enough to assert that water bodies used by its members receive storm water discharges authorized by the General Permit. Rather, the NRDC must show that the discharge caused the complained -- of legally cognizable aesthetic or recreational injury. Establishing a discharge does not also establish an injury. That is because the EPA "may issue permits authorizing the discharge of pollutants in accordance with specified conditions," and such authorized discharges are not illegal. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 52, 98 L. Ed. 2d 306, 108 S. Ct. 376 (1987)* (citing *33 U.S.C. § 1342*). **[**26]** Therefore, to establish causation and, in turn, standing, the NRDC must establish that the discharge violated the General Permit or the terms of the CWA. The NRDC has established neither.

This distinguishes our case from those relied upon by the NRDC wherein the courts found environmental standing, as those cases alleged aesthetic and recreational injuries caused by violations of a permit. For instance, in *Laidlaw* the plaintiffs sued for injunctive relief for alleged violations of an NPDES permit by a hazardous waste incinerator. The Supreme Court found standing in *Laidlaw*, reasoning: "It is undisputed that Laidlaw's unlawful conduct -- discharging pollutants in excess of permit limits -- was occurring at the time the complaint was filed." *Laidlaw, 528 U.S. at 184*. Similarly, in *Ecological Rights Found. v. Pac. Lumber Co., 230 F.3d 1141, 1146 (9th Cir. 2000)*, the Ninth Circuit held the plaintiffs had standing because they alleged that their individual members used the water bodies at issue and that their aesthetic and recreational interests were impaired by the alleged violations of the 1992 General Permit. Likewise in *Gaston Copper, 204 F.3d at 156*, **[**27]** the Fourth Circuit held that the plaintiff had standing to sue because the plaintiff was "a property owner whose lake lies in the path of Gaston Copper's toxic chemical discharge. He and his family swim and fish in this lake. [Plaintiff] testified that he and his family swim less in and eat less fish from the lake because of his fears of pollution from Gaston Copper's permit *exceedances*." (emphasis added). The court in *Gaston* continued: "Plaintiff here established the required nexus for the alleged injury by presenting evidence consisting of reports showing over 500 violations of the company's discharge limits, including unlawful releases of cadmium, copper, iron, lead and zinc, as well as pH violations." *Id. at 157* (internal quotation omitted).

[*975] Conversely, in this case, the NRDC does not assert any violation of the General Permit. The NRDC responds that it need not establish a violation of the General Permit because it is attacking the General Permit scheme and not a specific discharge. However, to attack the General Permit scheme, the NRDC must still establish standing, which means the petitioner must demonstrate its members suffered an injury from the [**28] General Permit scheme. Yet the only potential injury to its members is one that could occur in the future should a contractor violate the terms of the General Permit.

Moreover, it would be illogical to hold that a petitioner has standing to challenge a General Permit *scheme* because a discharger *may* in the future violate the terms of the permit, where the Supreme Court has held that a citizen lacks standing to sue for *actual* violations of a permit where the discharger corrects the violation within the sixty-day notice period. [9] *See Atlantic States Legal Found., Inc. v. Stroh Die Casting Co., 116 F.3d 814, 825 (7th Cir. 1997)* ("In *Gwaltney*, the Supreme Court set forth a test for standing under the Act: a plaintiff must make a 'good-faith allegation of continuous or intermittent violation.' *484 U.S. at 64*. This means that a citizen plaintiff does not have standing to maintain a suit for civil penalties for wholly past violations of the act.") (citing *Gwaltney, 484 U.S. at 54*).

9 *Section 1365 (b)(1)(A)* authorizes private suits for violations of the terms of an existing NPDES permit, but "citizens may not bring suit, however, unless and until they have given 60 days' notice of their intent to sue to the alleged violator (as well as the Administrator and the state)". *Atlantic States, 116 F.3d at 818* (citing *33 U.S.C. § 1365(b)(1)(A)*).

[**29] Allowing an attack on the General Permit scheme where no actual violation has occurred also defeats the goal of the regulatory provisions requiring that the notice of a permit violation provide the alleged discharger with specific details so the discharger knows what it is doing wrong and what corrective actions will avert a lawsuit. *Id.* Where there is no alleged violation, the dischargers have no opportunity to take corrective action, as Congress and the EPA desired. *Gwaltney, 484 U.S. at 60* (stating that the sixty-day notice requirement provides the alleged violator "an opportunity to bring itself into compliance with the Act and thus like-wise render unnecessary a citizen suit"). Moreover, allowing such suits would conflict with Congress' intent that "the great volume of enforcement actions be brought by the State," and with Congress' design that citizen suits be brought only "if the Federal, State, and local agencies fail to exercise their enforcement responsibility." *Ailor v. City of Maynardville, Tenn., 368 F.3d 587, 598 (6th Cir. 2004)* (quoting S. Rep. No. 92-414, p.64 (1971)).

Of course, that does not mean that the NRDC would be without [**30] standing to challenge a discharge that complies with the terms of the General Permit but violates the terms of the CWA. Such a discharge would be illegal, whether or not the EPA authorized it. Some language from the NRDC's briefs could be read as presenting such an argument. For instance, in its reply brief, the NRDC frames the issue as whether the EPA has "authority to issue a General Permit that authorizes discharges that do not comply with the law." However, the NRDC has presented no evidence of a discharge authorized by the General Permit that violates the terms of the CWA. The NRDC's other briefs also demonstrate that that is not the NRDC's real contention. Rather, the NRDC's complaint is that the General Permit scheme allows for the possibility that a contractor may violate the terms of the General Permit. [*976] But to have standing to present such a claim premised on a third party's action or inaction, the NRDC must adduce facts showing that "those choices have been, or will be, made in such manner as to produce causation and permit redressability of injury." *Lujan II, 504 U.S.*

at 562. This it has failed to do. Therefore, it lacks standing to challenge the substantive **[**31]** provisions of the General Permit.

Because the NRDC has failed to establish standing to present its substantive challenges to the General Permit, this court lacks jurisdiction to consider the NRDC's objections to the General Permit scheme. Thus, its reliance on decisions from the Ninth and Second Circuits addressing the validity of other General Permit schemes is misplaced. Specifically, the NRDC cites the Ninth Circuit's decision in *Environmental Defense Center, Inc. v. EPA, 344 F.3d 832 (9th Cir. 2003)*, [10] and the Second Circuit's decision in *Waterkeeper Alliance, Inc. v. EPA, 399 F.3d 486 (2d Cir. 2005)*, [11] in support of its challenge to the General Permit scheme. However, neither the Ninth nor the Second Circuit addressed the initial question of standing, at least as to whether environmental plaintiffs not subject to the regulation have standing to challenge the general permit. [12] Without standing, this court cannot reach the merits of the petitioner's substantive challenges to the General Permit. *In the Matter of Memorial Estates, Inc., 950 F.2d 1364, 1369 (7th Cir. 1991)*.

10 In *Envirnomental Defense Center*, the Ninth Circuit considered a general permit authorizing municipal storm water discharges. *344 F.3d 832*.

[32]**

11 In *Waterkeeper*, the Second Circuit considered the validity of a general permit authorizing discharges by *Concentrated Animal Feeding Operations. 399 F.3d 486*.

12 The Second Circuit did not address the issue of standing at all. *Waterkeeper Alliance, 399 F.3d 486*. The Ninth Circuit addressed standing in considering challenges to the general permit pre-sented by the industries subject to the permit requirements, and it concluded those petitioners lacked standing. *Environmental Defense, 344 F.3d at 863, 867-68*. The Ninth Circuit, however, did not mention the question of whether the environmental petitioners had standing. The Ninth Circuit did hold that the environmental petitioners' claim was ripe, noting that "we are addressing whether the EPA, in promulgating the Phase II Rule, has accomplished the substantive controls for municipal storm-water that Congress mandated in *§ 402(p) of the Clean Water Act, . . .* [and that] question is ripe for review." *Id. at 852 n.30*. Although ripeness and standing overlap in some respects, in passing on ripeness, as the above excerpt demonstrates, the Ninth Circuit failed to consider whether the Phase II Rule at issue in that case caused an actual injury to the environmental petitioners. *Id. at 852 n.30*. That is significant because, as the above analysis demonstrates, the NRDC lacks standing to challenge the General Permit at issue in this case because it failed to present sufficient evidence that the General Permit caused a legally cognizable injury to any of its members.

[33]** Whether the NRDC has standing to present procedural challenges to the General Permit, namely by attacking the General Permit's failure to mandate public availability of the NOI and SWPPP, and its failure to provide the public with the opportunity for a public hearing on the NOI and the SWPPP, however, is a separate question. Here the NRDC seeks to vindicate procedural rights established by statute to participate in the process. "The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy." *Lujan II, 504 U.S. at 572 n.7*. *Lujan II* illustrated this point, noting that individuals living adjacent to a site for proposed construction have standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though **[*977]** they "cannot establish with any certainty that the statement will cause the license to be withheld or altered and even though the dam will not be completed for many years." *Id.* This court

also recognized standing to vindicate a procedural right in *Sierra Club v. Marita, 46 F.3d 606 (7th Cir. 1995)*, **[**34]** holding that the plaintiffs had standing to challenge a forest management plan because "once the plan has passed administrative review, the procedural injury has been inflicted, [and] unless a plaintiff's purported interest in the matter is wholly speculative, waiting any longer to address that injury makes little sense." *Id. at 612*.

So too here: Even though the NRDC members cannot establish the immediacy of an injury from construction activities operating under the General Permit, the NRDC nonetheless has standing to challenge the EPA's failure to mandate public availability of the NOI and the SWPPP, and its failure to provide the opportunity for a public hearing related to the NOI and the SWPPP. This is because the NRDC has presented evidence that its members use water bodies that may receive discharges authorized by the General Permit and the three affiants stated that they would participate in the decision making process if allowed.

This contrasts with the *Lujan II* case in which, after reaffirming the principle of procedural standing, the Supreme Court nonetheless held that the plaintiffs lacked standing to present such a challenge because they failed to **[**35]** satisfactorily establish their future use of the property affected by the alleged procedural violation. *Lujan II, 504 U.S. at 564, 572-73*. Conversely, here, the NRDC members stated that they regularly use the water bodies. Accordingly, the NRDC has procedural standing. *See Rhodes, 153 F.3d at 787* (holding that the plaintiffs have standing because they alleged they used the forest at issue and that the Forest Service's decision would diminish this use and enjoyment, and "that the defendant's failure to permit them to participate in the public review of the decision is causally connected to their harm"); *Heartwood, 230 F.3d at 952* (holding that under *Rhodes*, plaintiffs had standing to challenge the Forest Service's exclusion of certain classes of actions from procedural safeguards designed to determine the environmental impact of those actions, and that plaintiffs had an informational injury justifying standing as well, where the alleged violation prevented them from commenting on or challenging the agency's decision).

2. Public notice and hearing.

Having concluded that the NRDC has standing to pursue its procedural injury **[**36]** claims, we turn to the merits of those claims. As noted above, the NRDC presents two procedural challenges: the NRDC challenges the General Permit's failure to mandate public availability of the NOIs and the SWPPP, and its failure to provide the public with the opportunity for a public hearing on the NOI and the SWPPP. In support of its position, the NRDC cites *33 U.S.C. §§ 1342(j)* and *1342(a)(1)*.

Section 1342(j) of the CWA provides that "[a] copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or permit, or portion thereof, shall further be available on request for the purpose of reproduction." *Section 1342(a)(1)* authorizes the EPA "after opportunity for public hearing, [to] issue a permit for the discharge of any pollutant, or combination of pollutants . . . ." The NRDC claims this statutory language requires the EPA to make the NOIs and SWPPPs publicly available and to provide for the opportunity for a public hearing. The EPA responds that *Sections 1342(j)* **[*978]** and *1342(a)(1)* do not apply to the NOIs and SWPPPs because NOIs and SWPPPs are neither permits nor permit applications.

[37]** This presents an issue of statutory interpretation, which is governed by the two-step test set forth in *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc., 467 U.S. 837, 842-43*,

81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). Under the first step, a reviewing court must determine "whether Congress has directly spoken to the precise question at issue." *Id. at 842*. If Congress' intent is clear from the statutory language, a court must "give effect to the unambiguously expressed intent of Congress." *Id. at 842-43*. However, if the statute is "silent or ambiguous with respect to the specific issue," the court must decide whether the Agency's interpretation is based on a permissible construction of the statute. *Id. at 843*. To uphold an agency's interpretation of a statute, this court need only find the interpretation permissible. *Id.*

The statutory language quoted above speaks only to "permits" and "permit applications," and not NOIs or SWPPPs. Thus, Congress has not spoken directly to the precise question at issue, or at best, it is ambiguous as to whether Congress intended to treat NOIs and SWPPPs as permits or permit applications **[**38]** for purposes of *Sections 1342(j)* and *1342(a)(1)*. Accordingly, under *Chevron*, we must decide whether the EPA gave a permissible construction to the term "permit applications" and "permits."

Maintaining that NOIs and SWPPPs do not constitute "permit applications" or "permits" for purposes of *Sections 1342(j)* and *1342(a)(1)*, the EPA stresses that the General Permit scheme does not make use of a permit application. Rather, general permits are proposed through a notice in the Federal Register, and the EPA solicits and receives public comments on the proposed general permits. It is at that time that the public has the opportunity to request a public hearing. Once a general permit issues, a discharger wishing to operate under the general permit must comply with the previously established permit terms. Therefore, according to the EPA, there is no need for additional public comment or a notice period. Moreover, the EPA maintains that requiring "an additional public hearing on each individual NOI and SWPPP would eviscerate the administrative efficiency inherent in the general permitting concept," in effect making the general permit scheme no different from the process for obtaining individual **[**39]** permits. This would be inconsistent with Congress' intent to allow for the use of general permits. *See* Pub. L. 102-240 (Dec. 18, 1991) ("The Administrator shall issue final regulations with respect to general permits for storm water discharges associated with industrial activity on or before Feb. 1, 1992."). These rationales are eminently reasonable. Therefore, we conclude that the EPA's interpretation of the terms "permit application" and "permit" as not including NOIs and SWPPPs is a permissible construction. Under the EPA's interpretation, then, NOIs and SWPPPs are not subject to the requirements of *Sections 1342(j)* and *1342(a)(1)*, and, accordingly, the EPA did not violate those sections of the CWA in issuing the General Permit at issue. [13]

13 The Ninth Circuit's majority opinion in *Environmental Defense Center* found under step one of *Chevron* that Congress clearly intended NOIs to be subject to the public availability and public hearing requirements because NOIs are the functional equivalent of a permit application. *344 F.3d at 856*. However, as discussed above, the statutory language at issue addresses only "permit applications" and fails to include any mention of NOIs, SWPPPs, or other so-called "functional equivalents." Thus, as the dissent in *Environmental Defense Center* concludes, the majority erred in concluding that Congress clearly spoke to the issue. *Id. at 880-81* (Tallman, J., dissenting). Because this opinion creates a split between the circuits, we circulated it in advance of publication to the full court pursuant to *Seventh Circuit Rule 40(e)*. No judge in active service voted to hear the case en banc. (Chief Judge Flaum and Judge Ripple did not participate in consideration of whether to hear the case en banc.)

[40] [*979] 3. Endangered Species Act.**

Finally, the NRDC claims that the General Permit violates Section 7 of the Endangered Species Act ("ESA"). *16 U.S.C. §§ 1531, et seq. Section 7* requires each federal agency to ensure that any action authorized, funded, or carried out by that agency "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification" of designated critical habitat. *16 U.S.C. § 1536(a)(2)*. The relevant regulations further require any agency proposing an action to pursue either informal or formal consultation with the Fish and Wildlife Service and/or the National Marine Fisheries Service (together "Service") if the proposed federal action "may affect" a threatened or endangered species. *50 C.F.R. § 402.14(a)*.

The NRDC claims that the General Permit violates *Section 7* because the EPA does not consult with the Service upon receipt of an NOI and the completion of a SWPPP. Again, we begin by considering the NRDC's standing. As above, the NRDC's claimed injury here is a procedural injury -- the lack of statutorily **[**41]** required consultation. Therefore, the standing requirements are more relaxed. In this case, the NRDC alleged that some of its members use bodies of water which endangered species inhabit, and that pollution threatens the proliferation of these species. For at least one of the members, a claimed harm exists: Affiant Justin Hayes claims his use and enjoyment of the water bodies is diminished because the polluted conditions prevent endangered fish species from flourishing, which means that he cannot keep the fish he catches, but must instead release them back into the water. Given that the claimed harm is a procedural injury stemming from the EPA's failure to consult with the Service, we conclude the NRDC has standing to challenge the lack of consultation. *See supra* at 20-22.

However, on the merits the NRDC loses because *Section 7* only requires consultation with the Service whenever *a federal action* "may affect" a threatened or endangered species. *16 U.S.C. § 1536(a)(2)*. A private actor, however, files an NOI and creates a SWPPP, and neither the filing of an NOI nor the creation of a SWPPP by a private contractor requires any federal action. Without a **[**42]** federal action, the consultation requirements of *Section 7* are not triggered. Therefore, the EPA need not engage in consultation with the Service every time an NOI is filed or a SWPPP is prepared. Consultation was required earlier, when the EPA issued the General Permit, but at that time the EPA undertook and concluded informal consultation with the Service on the issuance of the General Permit. Specifically, the EPA and the Service developed a detailed procedure designed to accommodate listed species and critical habitats and the Service agreed that the issuance of the General Permit was not likely to adversely affect those species and habitats. Accordingly, the EPA complied with the ESA in issuing the General Permit. *See 50 C.F.R. § 402.13* (explaining that the consultation requirement is satisfied if during the informal consultation the Service concurs in writing that the action "is not likely to adversely affect" a listed species).

[*980] B. Oil and Gas Petitioners

The Oil and Gas Petitioners also challenge the terms of the General Permit, taking issue with various definitions and provisions, arguing in essence that the EPA acted arbitrarily and **[**43]** capriciously by failing to take into account the differences in construction activities related to oil and gas exploration and conventional residential and commercial activities. However, as noted above, the Oil and Gas Petitioners also maintain that the EPA lacks the authority to require a permit for construction activities related to oil and gas exploration. That question is currently pending before the Fifth Circuit. The Oil and Gas Petitioners acknowledge that should the Fifth Circuit rule in their favor, their claims would be moot. We agree. Accordingly, we stay consideration of the Oil and Gas Petition until the Fifth Circuit determines the initial question of whether the Oil and Gas Petitioners

are subject to the permitting requirements of the CWA. *See Landis v. N. Am. Co., 299 U.S. 248, 254, 81 L. Ed. 153, 57 S. Ct. 163 (1936)* (stating that "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants); *Aetna State Bank v. Altheimer, 430 F.2d 750, 755 (7th Cir. 1970)* ("A stay pending the outcome of litigation **[**44]** in another court between the same parties, involving the same or controlling issues is an acceptable means of avoiding unnecessary duplication of judicial machinery.").

III.

In sum, we conclude that the NRDC lacks standing to challenge the terms of the General Permit because it has failed to show any of its members have standing to sue in their own right; the NRDC failed to present evidence establishing the General Permit caused an actual injury to the aesthetic or recreational interests of its members. However, the NRDC has standing to present its procedural challenges to the General Permit, but those challenges fail because NOIs and SWPPPS are not permits or permit applications and therefore the CWA's public notice and hearing requirements do not apply. Likewise, while the NRDC has standing to present a procedural ESA claim, that claim fails on the merits because the filing of an NOI and the creation of a SWPPP by a private actor does not constitute "federal action," and, therefore, the consultation requirements of the ESA are not implicated. Accordingly, we DENY the NRDC's PETITION FOR REVIEW, IN PART, and DISMISS IT IN PART FOR LACK OF STANDING. We further STAY consideration **[**45]** of the Oil and Gas Petitioners' petition pending a decision from the Fifth Circuit as to whether the permit requirements of the CWA apply to the Oil and Gas Petitioners. **[*981]**

Appendix:	
The Act:	The Clean Water Act
BMP:	Best Management Practices
Builders Groups:	National Association of Home Builders, the Wisconsin Builders Association, and the Associated General Contractors of America
CWA:	The Clean Water Act
EPA:	The Environmental Protection Agency
ESA:	Endangered Species Act
General Permit:	Final National Pollutant Discharge Elimination System General Permit for Storm Water Discharges From Construction Activities
NRDC:	Natural Resources Defense Council
NOI:	Notice of Intent
NPDES:	The National Pollutant Discharge Elimination System
Oil and Gas Petitioners:	Texas Independent Producers and Royalty Owners Association; Independent Petroleum Association of America, U.S. Oil and Gas Association, Texas Alliance of Energy Producers, Louisiana Oil and Gas Associations, Independent Gas and Gas Association of Pennsylvania, Ohio Oil and Gas Association, and Oklahoma Independent Petroleum Association
SWPP:	Storm Water Pollution Prevention Plan

[46]**