NRDC
THE EARTH'S BEST DEFENSE

NATURAL RESOURCES DEFENSE COUNCIL

July 6, 2009

Via electronic mail

Executive Officer and Members of the Board
California Regional Water Quality Control Board, North Coast Region
5550 Skylane Boulevard, Suite A
Santa Rosa, California 95403

Re: Comments on Draft Order No. R1-2009-0050

Dear Ms. Kuhlman and Members of the Board:

We write on behalf of the Natural Resources Defense Council (NRDC) and our over 100,000 California members. We have reviewed Draft Order No. R9-2009-0050, NPDES Permit No. CA0025054 — the latest draft of the Waste Discharge Requirements for The City of Santa Rosa, the County of Sonoma, and the Sonoma County Water Agency Storm Water and Non-Storm Water Discharges from Municipal Separate Storm Sewer Systems, Sonoma County, NPDES Permit, released on May 22, 2009. We appreciate the opportunity to submit the following comments on the second draft order ("Draft Permit" or "Permit").

I. Introduction.

We commented on the last version of the Draft Permit. In that letter, we highlighted our principal concern with the lack of a specific numeric criterion to require onsite retention of stormwater through low-impact development ("LID") techniques. We also commented on problematic aspects of the hydromodification control criteria and alternative post-construction stormwater mitigation programs—since the substance of these provisions remains the same in the current draft, however, we incorporate our prior comments here and reiterate the need to address these issues in the next draft of the permit.

With respect to LID in particular, the Draft Permit still does not include an adequate numeric performance criterion for LID implementation to ensure that the Draft Permit meets the Clean Water Act's ("CWA's") "maximum extent practicable" ("MEP") standard for pollutant removal. In our last letter, we suggested the adoption of an "effective impervious area" ("EIA") limitation that would require onsite retention of the vast majority of the 85th percentile storm ("design storm"). The critical aspect of this standard is that it mandates the onsite retention of a certain quantity of stormwater since

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this is the most effective way to ensure maximal pollutant reduction. The Draft Permit includes no such requirement and merely prioritizes LID techniques above other BMPs while submitting all structural treatment controls to the decade-old SUSMP hydraulic sizing criteria.

The flaws in the approach taken by the Draft Permit are more apparent in contrast to the recent adoption by the Los Angeles Regional Water Quality Control Board of LID provisions which require onsite retention of nearly all of the 85th percentile design storm.[1] The requirements imposed by the Los Angeles Regional Board also require offsite mitigation when onsite compliance is not feasible. Notably, NRDC, other environmental groups, and all of the permittees in Ventura County *supported* these provisions. As detailed below, many other MS4 permits and stormwater regulations in California and around the country have adopted similar standards, and we strongly urge revisions to the Sonoma County Permit that will make it consistent with these other standards and compliant with the MEP standard.

II. The Draft Permit Is Inadequate to Control Stormwater Pollution from New Development and Redevelopment and Fails to Ensure Compliance with the Minimum Requirements of State and Federal Law.

The Draft Permit's Planning and Land Development Program (Section E, Part 4) and New Development/Redevelopment Integrated Water Quality/Resource Plan (Section E, Part 5) remain inadequate. As currently written, the Draft Permit does not require any specific level of LID implementation, but the Planning and Land Development Program and New Development/Redevelopment Integrated Water Quality/Resource Plan are particularly critical for addressing the root causes of stormwater pollution, which is why we have focused significant attention on these requirements. As the U.S. EPA has noted:

> Most stormwater runoff is the result of the man-made hydrologic modifications that normally accompany development. The addition of impervious surfaces, soil compaction, and tree and vegetation removal result in alterations to the movement of water through the environment. As interception, evapotranspiration, and infiltration are reduced and precipitation is converted to overland flow, these modifications affect not only the characteristics of the developed site but also the watershed in which the development is located. Stormwater has been identified as one of the leading sources of pollution for all waterbody types in the United

[1] Los Angeles Regional Water Quality Control Board, Ventura County Municipal Separate Storm Sewer System Permit, Order No. R4-2009-0057, NPDES Permit No. CAS004002, (adopted May 7, 2009), at ¶ III.1-2 (New Development/Redevelopment Performance Criteria).

States. Furthermore, the impacts of stormwater pollution are not static; they usually increase with more development and urbanization.[2]

A. The Standard of Practice in the U.S. Requires the Imposition of Low-Impact Development Techniques Implemented with Clear Metrics for New Development and Redevelopment Activities.

LID has been established as a *superior and practicable* strategy[3] and, therefore, must be required. Accordingly, the United States Environmental Protection Agency ("EPA") has called upon Regional Boards across California to prioritize the implementation of LID, recently threatening to "consider objecting to the [San Francisco Bay region's] permit" if it does not include "additional, prescriptive requirements" for LID.[4] Along with the prioritization of LID implementation, "EPA's primary objective for incorporating LID into renewed MS4 permits, especially for those that represent the third or fourth generation of permits regulating these discharges, is that the permit must include clear, measurable, enforceable provisions for implementation of LID…. [P]ermit[s] should [also] include a clearly defined, enforceable process for requiring off-site mitigation for projects where use of LID design elements is infeasible."[5] In North Orange County, EPA likewise observed that "the permit must include clear, measurable, enforceable provisions for implementation of LID…. We would not support replacing [volume retention-based] approaches with qualitative provisions that do not include measurable goals."[6]

Other government agencies in California and around the U.S. have come to the same conclusions. The California Ocean Protection Council, for instance, strongly endorsed LID last year by "resolv[ing] to promote the policy that new developments and redevelopments should be designed consistent with LID principles" because "LID is a practicable and superior approach … to minimize and mitigate increases in runoff and runoff pollutants and the resulting impacts on downstream uses, coastal resources and

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[2] U.S. Environmental Protection Agency (December 2007) *Reducing Stormwater Costs through Low Impact Development (LID) Strategies and Practices*, at v.

[3] California Ocean Protection Council (May 15, 2008) *Resolution of the California Ocean Protection Council Regarding Low Impact Development*, at 2.

[4] Letter from Douglas E. Eberhardt, EPA, to Dale Bowyer, San Francisco Bay Regional Water Quality Control Board (April 3, 2009), at 1.

[5] *Id.* at 1-2.

[6] Letter from Douglas E. Eberhardt, EPA, to Michael Adackapara, Santa Ana Regional Water Quality Control Board (February 13, 2009), at 2-3.

communities."[7] In Washington State, the Pollution Control Hearings Board has found that LID techniques are technologically and economically feasible and must, therefore, be required in MS4 permits.[8] The National Academy of Sciences recently issued a comprehensive report with the same recommendation for stormwater management programs: "Municipal permittees would be required under general state regulations to make [LID] techniques top priorities for implementation in approving new developments and redevelopments, to be used unless they are formally and convincingly demonstrated to be infeasible."[9]

Critically, as demonstrated in the EPA comments quoted above, the prioritization of LID practices is insufficient by itself to meet the MEP standard and *must* be paired with a measurable requirement for the implementation of LID. Since its inception, the MS4 permitting program has been seriously hampered by a pervasive absence of numeric performance standards for the implementation of best management practices ("BMPs") such as LID. For this reason, in December 2007, the State Water Resources Control Board commissioned a report which found that "[t]he important concept across all of [the] approaches [described in the report] is that the regulations established a *performance requirement* to limit the volume of stormwater discharges."[10] The report also noted that "[m]unicipal permits have the standard of Maximum Extent Practicable (MEP) which lends itself more naturally to specifying and enforcing a level of compliance for low impact development."[11] Another study, completed for the Ocean Protection Council, recommended the following standard: "Regulated development projects shall reduce the percentage of effective impervious area to less than five percent of total project area by draining stormwater into landscaped, pervious areas."[12]

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[7] California Ocean Protection Council (May 15, 2008) *Resolution of the California Ocean Protection Council Regarding Low Impact Development*, at 2.

[8] *Puget Soundkeeper Alliance et al. v. State of Washington, Dept. of Ecology, et al.* (2008) Pollution Control Hearings Board, State of Washington, No. 07-021, 07-026, 07-027, 07-028, 07-029, 07-030, 07-037, Phase I Final, at 6, 46, 57-58.

[9] National Academy of Sciences, Committee on Reducing Stormwater Discharge Contributions to Water Pollution, National Research Council (2008) *Urban Stormwater Management in the United States*, at 500.

[10] State Water Resources Control Board (December 2007) *A Review of Low Impact Development Policies: Removing Institutional Barriers to Adoption*, at 23 (emphasis added) (hereinafter "SWRCB LID Report").

[11] *Id.* at 4.

[12] Ocean Protection Council of California (January 2008) *State and Local Policies Encouraging or Requiring Low Impact Development in California*, at 27.

While we appreciate the fact that the Draft Permit does require LID to be prioritized unless the Co-Permittee approves substitute BMPs for the project (Section E, Part 5-2(b)(1)), the Draft Permit remains legally insufficient due to the lack of an onsite stormwater retention requirement for LID implementation. This type of standard guarantees that no polluted runoff will flow from developed sites during the design storm—whenever treat-and-discharge techniques are allowed, there is always a danger that ineffective BMPs, which may technically satisfy the permit's requirements, will be installed and allow considerable amounts of polluted runoff to enter receiving waters. Moreover, even the most effective treat-and-discharge BMPs still allow pollutants to enter the storm sewer system and are, thus, not as effective as retention-based BMPs, as demonstrated in the attached studies by national stormwater expert Dr. Richard Horner.[13] Given that the implementation of retention-based BMPs to accommodate the design storm volume is feasible in most circumstances, requiring onsite retention is necessary to reduce pollutant discharges to the maximum extent practicable.

B. The Draft Permit Does Not Contain Specific Standards for LID Implementation that Will Ensure the Maximum Practicable Pollution Reduction Benefits.

As noted in our previous letter, the Draft Permit needs to require onsite retention of the design storm volume in order to pass muster under the Clean Water Act. Wherever this is infeasible, the Draft Permit should require offsite mitigation of the volume that is not retained onsite. The new Ventura County MS4 permit includes the type of standard that is lacking in the Sonoma County Permit. It requires that 95% of the volume from the 85th percentile storm be retained onsite through infiltration, harvesting and reuse, or evapotranspiration. If full onsite management of the design storm volume is technically infeasible, the retention obligation may be reduced, but offsite mitigation with equivalent results must be performed (or funds must be contributed to a public mitigation fund in an amount sufficient to offset the project's onsite non-compliance).[14] This requirement resulted from a collaboration and agreement between NRDC, Heal the Bay, and all of the Ventura County permittees. The recently adopted North Orange County MS4 permit includes a similar requirement, except that, in cases of infeasibility, biotreatment

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[13] *See, e.g.*, R. Horner (2007) *Initial Investigation of the Feasibility and Benefits of Low-Impact Site Design Practices ("LID") for the San Francisco Bay Area*; R. Horner (2007) *Supplementary Investigation of the Feasibility and Benefits of Low-Impact Site Design Practices ("LID") for the San Francisco Bay Area.*

[14] Los Angeles Regional Water Quality Control Board, Ventura County Municipal Separate Storm Sewer System Permit, Order No. R4-2009-0057, NPDES Permit No. CAS004002, (adopted May 7, 2009), ¶ 5.E.III.

practices may count toward a project's volumetric obligation.[15] (We note however, that we do not support the North Orange County permit's allowance of biotreatment as a means of meeting a project's volumetric obligation for the reasons discussed in this letter.)

The specific provisions that fail to establish the necessary, numeric performance standard are the "Post-Construction BMP Choice Methodology" provisions. (Section E, Part 5-2(b).) Nowhere in these provisions or even in Part 5, however, is there a requirement that establishes a level of implementation for LID practices. Indeed, the closest thing to a numeric performance standard is the section on "Numeric Sizing Criteria" (Section E, Part 4-4), which merely mirrors the SUSMP criteria of the State Board's *Bellflower* decision.[16] These are not referenced or included as a numeric performance standard in the LID provisions, though, which simply contain a prioritized list of BMPs, including LID. The Draft Permit, instead, requires that "all storm water runoff … [be] treated using LID design and landscape-based BMPs," unless a project "cannot comply," in which case "substitute BMPs [may be] approved." (Section E, Part 5-2(b)(1)-(2).) The quantity of stormwater that constitutes "all storm water runoff," however, is undefined and surely does not mean all stormwater runoff from an entire year, yet it is not clear what it *does* mean. Additionally, the Draft Permit provides no criteria for determining when a project "cannot comply" with the LID implementation requirement, and fails to require any offsite mitigation or other alternative compliance for projects that do not fully implement LID practices.

To remedy these problems, Part 5-2-(b) could be revised as follows:

(1) The Co-Permittees shall ensure that the design storm volume (as defined in Part 4-4(a)) ~~all storm water runoff~~ from New Development and Redevelopment Projects (as defined in Part 4-6) ~~projects that meet the new development and redevelopment criteria in Part 4 and/or the hydromodification criteria in Part 5-2(c), below,~~ is ~~treated using LID design and landscape-based BMPs~~ be retained onsite, without any surface runoff, through infiltration, evapotranspiration, or harvesting and reuse.

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[15] Santa Ana Regional Water Quality Control Board, Waste Discharge Requirements for the County of Orange, Orange County Flood Control District and The Incorporated Cities of Orange County within the Santa Ana Region Areawide Urban Storm Water Runoff Management Program, Order No. R8-2009-0030, NPDES Permit No. CAS618030, (adopted May 22, 2009), ¶ XII.C.

[16] State Water Resources Control Board (2000) Water Quality Order No. 2000-11, at 15-18.

> *(2) If a project cannot comply with Part 5-2(b)(1) and substitute BMPs are approved for the project, the Co-Permittees shall document justification for the substitution and retain the records until adoption of an updated Order or until the project is constructed, whichever is longer. The Co-Permittees shall also require that any portion of the design storm volume not retained onsite be mitigated through the Mitigation Funding program (Part 6-4) such that equivalent reductions in stormwater volume and pollutant loadings (in comparison to onsite retention of the entire design storm volume) are achieved.*

Onsite retention standards of this form are becoming prevalent across the country (in Phase II as well as Phase I permits), as discussed below, and since their implementation is not only feasible, but will result in better stormwater pollution reduction, the Sonoma County Permit cannot meet the Clean Water Act's MEP standard without such a performance requirement.

C. Other Stormwater Permits and Regulatory Documents Around the Country Have Adopted Stronger, Practicable Requirements for the Implementation of Post-Construction Stormwater BMPs, and the Draft Permit Lags Behind these Precedents.

Communities around the country have adopted or are considering provisions that exceed those in the Draft Permit in terms of environmental performance. The widespread implementation of other, more stringent requirements listed below—as well as the technical analyses conducted by Dr. Horner, based on various California localities including the San Francisco Bay area—create a presumption that such requirements would be practicable in Sonoma County.

Many jurisdictions outside of Sonoma County have recognized the paramount importance of mandating onsite retention of a certain quantity of stormwater since onsite retention prevents *all* pollution in that volume of rainfall from being discharged to receiving waters:

- **Ventura County:** Retain onsite at least 95% of the rainfall that results from the 85th percentile storm; offsite mitigation is allowed if complete onsite retention is technically infeasible, but offsite mitigation must provide equivalent results and can only substitute for approximately 25% of the onsite retention volume;[17]

[17] Los Angeles Regional Water Quality Control Board, Ventura County Municipal Separate Storm Sewer System Permit, Order No. R4-2009-0057, NPDES Permit No. CAS004002, (adopted May 7, 2009), at ¶ III.1-2 (New Development/Redevelopment Performance Criteria).

- **North Orange County:** Retain onsite the 85th percentile storm volume and implement biotreatment BMPs only when onsite retention is technically infeasible; alternative compliance is required when the design storm volume is not either retained or biotreated onsite;[18]

- **Anacostia, Washington, D.C.:** Retain onsite the first one inch of rainfall and provide water quality treatment for rainfall up to the two-year storm volume; offsite mitigation is allowed when onsite retention is infeasible, but only at a ratio of either 1:1.5 (for physical offsets) or 1:2 (for in-lieu fee payments);[19]

- **Central Coast, California (RWQCB, Phase II):** Limit EIA at development projects to no more than 5% of total project area (interim criteria); establish an EIA limitation between 3% and 10% in local stormwater management plans (permanent criteria);[20]

- **Federal Buildings over 5,000 square feet** (under EPA's draft guidance for implementation of the Energy Independence and Security Act of 2007): Manage onsite (*i.e.*, prevent the offsite discharge of) the 95th percentile storm through infiltration, harvesting, and/or evapotranspiration;

- **Pennsylvania:** Capture at least the first two inches of rainfall from all impervious surfaces and retain onsite at least the first one inch of runoff (through reuse, evaporation, transpiration, and/or infiltration); at least 0.5 inches must be infiltrated;[21]

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[18] Santa Ana Regional Water Quality Control Board, Waste Discharge Requirements for the County of Orange, Orange County Flood Control District and The Incorporated Cities of Orange County within the Santa Ana Region Areawide Urban Storm Water Runoff Management Program, Order No. R8-2009-0030, NPDES Permit No. CAS618030, (adopted May 22, 2009), ¶ XII.C.

[19] Anacostia Waterfront Corporation (June 1, 2007) Final Environmental Standards, at 16; *see also*, State Water Resources Control Board (December 2007) A Review of Low Impact Development Policies: Removing Institutional Barriers to Adoption, at 20-21.

[20] Central Coast Regional Water Quality Control Board, Letter from Roger Briggs re Notification to Traditional, Small MS4s on Process for Enrolling under the State's General NPDES Permit for Storm Water Discharges (Feb. 15, 2008) (hereinafter "Central Coast Phase II Letter").

[21] Pennsylvania Department of Environmental Protection (December 30, 2006) *Pennsylvania Stormwater Best Management Practices Manual*, Chapter 3, at 7.

- **Philadelphia, PA:** Infiltrate the first one inch of rainfall from all impervious surfaces; if onsite infiltration is infeasible, the same performance must be achieved offsite;[22] and

- **West Virginia (Phase II):** Retain onsite the first one inch of rainfall from a 24-hour storm preceded by 48 hours of no measurable precipitation.[23]

With such precedents in California and in other parts of the country, the Draft Permit's failure to adopt a numeric performance standard beyond the SUSMP hydraulic sizing criteria makes the Draft Permit insufficient under the MEP standard.

D. The Draft Permit's Applicability Criteria Must Set Lower Thresholds to Meet the MEP Standard.

The Draft Permit's applicability criteria stand out as weak compared to other MS4 permits recently adopted or under consideration for adoption in California and must be revised accordingly. Of particular concern is that the Draft Permit's applicability criteria have been substantially weakened from the previous version of the Permit without explanation, such that the current threshold for applicability for most specific land use categories of New Development and Redevelopment projects has increased from 5,000 square feet to 10,000 square feet. (Section E, Part 4.6.) Of further concern is that the Draft Permit's catchall criteria for new development and redevelopment of one acre will allow for a substantial amount of development and redevelopment to occur without being subject to requirements for the design and implementation of post-construction treatment controls to mitigate stormwater pollution. The current criteria cannot be construed as meeting the MEP standard when, for instance, both the San Francisco Bay and North Orange County MS4 permits contain more stringent applicability criteria, setting thresholds for many, if not most, specific categories of development and redevelopment at 5,000 square feet.[24] The Permit should set the catchall at or below 10,000 square feet,

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[22] City of Philadelphia, Philadelphia Stormwater Regulations § 600.5; City of Philadelphia (2006) *Philadelphia Stormwater Management Guidance Manual: Version 2.0*, at 1-1, Appendix F.4.1.

[23] State of West Virginia Department of Environmental Protection, Division of Water and Waste Management, General National Pollution Discharge Elimination System Water Pollution Control Permit, NPDES Permit No. WV0116025, at 13-14.

[24] Santa Ana Regional Water Quality Control Board, Waste Discharge Requirements for the County of Orange, Orange County Flood Control District and The Incorporated Cities of Orange County within the Santa Ana Region Areawide Urban Storm Water Runoff Management Program, Order No. R8-2009-0030, NPDES Permit No. CAS618030, (adopted May 22, 2009), ¶ XII.C, at XII.B.2; San Francisco Regional Water Quality

commensurate with other California MS4 permits (such as the draft San Francisco Permit) and with the significant, cumulative impacts that projects under one acre can have. Applicability criteria for specific land uses that generate especially high levels of pollution should be restored to the lower threshold of 5,000 square feet.

III. The Draft Permit Fails to Include Provisions that Effectively Prohibit all Non-Stormwater Discharges, as Required by the Clean Water Act.

Federal law requires that MS4 permits "shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers." (33 U.S.C. § 1342(p)(3)(B)(ii).) However, the Draft Permit states that, "In lieu of a strict prohibition, the Co-Permittees may submit a plan for Executive Officer authorization that includes categories of non-storm water discharges and associated BMPs to minimize or eliminate non-storm water discharges to the MS4." (Section A.5(a).) This exception violates the clear language of the CWA and its implementing regulations. Section 402(p)(3)(B)(ii) of the CWA requires that permits for discharge from municipal sewers "effectively prohibit non-stormwater discharges," 33 U.S.C. § 1342(p)(3)(B)(ii), and does not create any authorization for simply "minimizing," or otherwise allowing such discharges.

The Draft Permit states that, "The Executive Officer will consider authorizing the discharge of non-storm water flows [that are listed in Table 1], and are not a significant source of pollutants. Upon request by a Co-Permittee, the Executive Officer may consider authorizing the discharge of additional non-storm water flows." (Section A.5(d).) While we appreciate the Regional Board's attempts to limit the circumstances under which non-stormwater discharges to the MS4 may occur rather than creating a blanket exemption for certain categories of discharge, section 402(p) places a clear, mandatory duty on the Co-Permitees to prohibit non-stormwater discharges to the MS4. The Co-Permittee, or Regional Board, has no discretion to deviate from this requirement. In ascertaining the meaning of a statute, construction must begin with the text. (*Duncan v. Walker* (2001) 533 U.S. 167, 172.) "If there is no ambiguity, then we presume the lawmakers meant what they said, and the plain meaning of the language governs." (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272.) There is no ambiguity present in the CWA's requirement that a permit "effectively prohibit nonstormwater discharges," and the Draft Permit's provision of categorical exceptions stands in violation of its terms.

Further, the Draft Permit's attempt to allow for authorization of non-stormwater discharges to the MS4, in opposition to section 402(p)'s prohibition, is not supported by the CWA's implementing regulations under 40 C.F.R. § 122.26(d)(2)(iv)(B)(1). This provision merely states the circumstances under which a Co-Permittee must specifically design a program to prevent certain types of illicit discharges: "the following category of

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Control Board, Tentative Order R2-2009-00XX, NPDES Permit No. CAS612008, San Francisco Bay Draft MS4 Permit, at 16-19.

non-storm water discharges or flows shall be addressed where such discharges are identified by the municipality as sources of pollutants to waters of the United States." (40 C.F.R. § 122.26(d)(2)(iv)(B)(1).) The regulation, providing for an enforcement program to "prevent illicit discharges," does not support the interpretation that certain non-stormwater discharges need not be prohibited. Even if the regulations allowed some conditional discharge authorization, they do not provide that non-stormwater discharges are permissible when they fall into a specified category and are not "a *significant* source of pollutants." (Section A.5(d) (emphasis added).) The regulations explicitly state that the identified non-stormwater discharges "shall be addressed where such discharges are identified by the municipality *as sources of pollutants to waters of the United States*" in any quantity, whether or not it is considered significant. 40 C.F.R. § 122.26(d)(2)(iv)(B)(1).

Nor does the regulation allow, under any circumstance, for the Regional Board or Permittees to authorize the discharge of "additional non-storm water flows" at the Executive Officer's discretion. (See Section A.5(d).) While we question the Regional Board's authority to authorize the discharge of *any* category of non-stormwater flow from section 402(p)'s prohibition against discharges to the MS4 system at all, there is patently no legal basis for the Executive Officer to authorize the discharge of a non-stormwater flow outside of those categories identified in 40 C.F.R. 122.26(d)(2)(iv)(B)(1). Thus, a clear reading of the regulation, and one that elaborates on Section 402(p)(3)(B)(ii) of the CWA rather than contradicting it, is that while non-stormwater discharges must be prohibited by the text of the CWA, illicit discharge enforcement programs need only specifically address the enumerated list of non-stormwater discharges set forth in the regulations where such discharges have been identified as a source of pollutants. As such, we urge the Regional Board to revise the Draft Permit such that it is consistent with both the regulations and the statute it purports to implement.

Even if the Co-Permittees were afforded authority under 40 C.F.R. § 122.26(d) to exempt non-stormwater sources from the discharge prohibitions required by the CWA, as stated earlier, such discharges must be prohibited where the category of discharge is identified as a source of pollutants to waters of the United States. Of particular concern in this regard is the Draft Permit's allowance for authorizing discharges of reclaimed and potable landscape irrigation runoff, even though pollutants from these sources are a known, significant source of impairment to waters in the Sonoma County region and throughout California.[25] (Section A.5(d), Table 1.) A finding that these discharges are "not []sources of pollutants to receiving waters" as required under 40 C.F.R. 122.26(d)(2)(iv)(B)(1), or even that they are not "a significant source of pollutants" as the Draft Permit would set as the standard for discharge under Section A.5(d), is unlawful and would be inconsistent with facts in the record. First, a non-source of pollutants

[25] See 2006 CWA Section 303(d) List of Water Quality Limited Segments; Draft Permit Fact Sheet at 26-28, Table 1.

finding would stand contrary to extensive research that has proved the opposite: studies have consistently shown that non-stormwater discharges from irrigation water or lawn water are a significant source of pollutants for which Sonoma County waters are impaired.[26] As the Draft Permit's Fact Sheet duly notes, "Pollutants contained in such discharges include ... nutrients and toxic chemicals." (Draft Permit Fact Sheet at 44.) Lawn and garden use has been identified generally as one of the main sources of pesticides found in urban streams. Lawns have been identified as a "hot spot" for nutrient contamination in urban watersheds—lawns "contribute greater concentrations of Total N, Total P and dissolved phosphorus than other urban source areas … source research suggests that nutrient concentrations in lawn runoff can be as much as four times greater than other urban sources such as streets, rooftops or driveways."[27] Thus, any claim that irrigation water is unequivocally not a source of pollutants to receiving waters cannot be sustained. As a result, any authorization, or potential for authorization, of this type of discharge should be removed from the Draft Permit.

In total, the Draft Permit's approach does not equal the CWA's mandate that Co-Permittees "effectively prohibit non-stormwater discharges into the storm sewers." (33 U.S.C. § 1342(p)(3)(B)(ii).) Given that pollution from nutrients and other contaminants constitutes a serious and ongoing problem in receiving waters under the jurisdiction of the Co-Permittees, the conditional exemption of irrigation or lawn watering from prohibitions against non-stormwater discharge violates the clear requirements of the CWA and its implementing regulations. As with our comments in Section II of this letter, we underscore that these concerns emphasize the need for specific, LID-based, onsite stormwater retention requirements since these approaches will reduce non-stormwater runoff from new development to zero when properly implemented.

[26] Id.

[27] Center for Watershed Protection (March 2003) *Impacts of Impervious Cover on Aquatic Systems* at 69; see also H.S. Garn (2002) *Effects of lawn fertilizer on nutrient concentration in runoff from lakeshore lawns, Lauderdale Lakes, Wisconsin.* U.S. Geological Survey Water-Resources Investigations Report 02-4130 (In an investigation of runoff from lawns in Wisconsin, runoff from fertilized lawns contained elevated concentrations of phosphorous and dissolved phosphorous).

IV. Conclusion.

For the aforementioned reasons, the Draft Permit is not yet legally adequate and needs revision to pass legal muster under the Clean Water Act's MEP standard and to produce the significant reductions in stormwater pollution that are feasible and necessary to meet water quality standards. We urge the Regional Board and its staff to revise the Draft Permit to address these concerns, as discussed above. Please feel free to contact us with any questions you might have, and we look forward to working with the Board to produce a Permit that will meet the requirements of the Clean Water Act and protect the region's water resources.

Sincerely,

David S. Beckman
Bart Lounsbury
Noah Garrison
Natural Resources Defense Council