



December 17, 2012

Chair Charles Hoppin and Board Members
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814
Sent via Email to: commentletters@waterboards.ca.gov



RE: Comment Letter – Revised Draft Phase II Small MS4 Permit

Dear Chair Hoppin and Board Members:

On behalf of California Coastkeeper Alliance (CCKA), we are writing with regard to the Draft Waste Discharge Requirements (WDRs) for Storm Water Discharges from Small Municipal Separate Storm Sewer Systems (MS4s) (General Permit), NPDES General Permit No. CASXXXXXX dated November 16, 2012 (Revised Draft Permit). CCKA and our California Waterkeepers have a vested interest in the development, adoption, implementation and enforcement of this Revised Draft Permit, and have been part of the reissuance process since its inception. We appreciate the opportunity to comment. As outlined in the public notice, we limit our comments to the changes in the Revised Draft Permit. We incorporate by reference our previous comment letter submitted on July 23, 2012.

We appreciate the State Water Board's work to address issues raised in our previous comments. For example, we support the State Water Board's inclusion of industrial and commercial inspections as a required action under the Illicit Discharge Detection and Elimination section of the Revised Draft Permit. We also appreciate staff's inclusion of receiving water limits in the permit. In addition, we generally support the post-construction requirements in the Revised Draft Permit. The Revised Draft Permit makes important strides in this area from previous drafts of the permit.

However, several critical flaws remain in the Revised Draft Permit. We urge the State Water Board to address outstanding issues so that the Final Permit meets water quality objectives, improves the use of pollution control technology in a clear and objective way for all parties to determine permit compliance, and ensures the collection of more and better data. We summarize outstanding issues here and describe them in further detail below:

- Best management practice (BMP) implementation strategies must be strengthened.
- The Post-Construction Program must be clarified to ensure full compliance with the maximum extent practicable (MEP) standard.
- The Draft Permit must include all applicable total maximum daily loads (TMDL) waste load allocations (WLAs).
- Regional Water Boards' Executive Officers cannot determine whether a Permittee shall comply with this Renewed Permit or self-selected BMPs.
- All Permittees must be required to implement the new MS4 Permit's Post-Construction and Monitoring Programs.

- The Permit must ensure that significant progress is made on trash reduction during the permit term.
- Revisions to the incidental runoff section create ambiguity, conflict, and leave the section obsolete.
- Water quality monitoring must ensure that stormwater discharges do not degrade water quality.

I. BMP Implementation Strategies Must Be Strengthened.

While we support that the Revised Draft Permit contemplates “Program Effectiveness Assessment and Improvement” requirements¹, we believe that this section should be clarified in order to improve water quality.

First, the “Municipal Watershed Pollutant Load Quantification” has been removed from the Revised Draft Permit. These provisions required BMP efficiency calculations in previous drafts. One of the most significant shortcomings in previous stormwater permits is the lack of performance-based criteria for BMPs. As a result, BMPs are added as part of permit requirements or pollution abatement efforts without any focus on the quality of the water exiting the BMPs. It is important that the Permit include requirements to evaluate BMP performance. We recommend that the Revised Draft Permit require a performance evaluation for all structural BMPs used by the discharger to comply with the Revised Draft Permit, including retrofits and iterative requirements. We recommend that *at least once per permit cycle, the Permittee should submit a report to the State Water Board or regional board that includes a BMP performance evaluation.*

Furthermore, the Revised Draft Permit replaces the requirement in previous drafts to evaluate each BMP with a new requirement to evaluate only “prioritized” BMPs. However, it is unclear how Permittees are to classify prioritized BMPs. *The Revised Draft Permit should provide guidance or clarification on how to identify “prioritized BMPs.*

In addition, the Revised Draft Permit’s Effectiveness Assessment no longer requires Permittees to evaluate effectiveness during the permit cycle.² Long-term assessment is important, but it is crucial that the Revised Draft Permit require Permittees to evaluate BMPs during the permit term and make adjustments accordingly. If the Revised Draft Permit only requires long-term assessment, then Permittees will continue using less effective controls during this permit-term. We urge the Board to *require effectiveness assessment within the permit term, so that management decisions can be modified appropriately.*

II. The Post-Construction Program Must Be Clarified to Ensure Full Compliance with the Maximum Extent Practicable Standard.

We support the Revised Draft Permit requirement that all “[p]ermittees must implement post-construction and monitoring programs as specified in this Order.” We agree with the Revised Draft Permit’s Finding One that, in addition to that low impact development (LID) pollution mitigation benefits, flooding reduction, creation of green space, and fish and wildlife habitat enhancement, **“[s]torm water is a resource and an asset and should not be treated as a waste product. Managing rainwater and storm**

¹ National Pollutant Discharge Elimination System, WASTE DISCHARGE REQUIREMENTS FOR STORM WATER DISCHARGES FROM SMALL MUNICIPAL SEPARATE STORMSEWER SYSTEMS, at Section.14 (November 16, 2012); (hereinafter “Revised Draft Permit”).

² Revised Draft Permit, at 95.

water at the sources is a more effective and sustainable alternative to augmenting water supply. . .³
There is substantial opportunity in California to increase water supplies through use of captured stormwater, while providing protection of water quality to the MEP.

However, we are concerned that language in the Revised Draft Permit creates the potential for approval or implementation of such in-lieu programs in place of the Revised Draft Permit's Post Construction controls. Further, several provisions lack clarity and could allow for regulated projects to escape requirements to implement the Revised Draft Permit's otherwise applicable terms. These issues must be addressed so that the Revised Draft Permit meets the Clean Water Act's MEP standard, and to maximize the benefits of stormwater capture as a sustainable water supply option.

A. The Revised Draft Permit must ensure that all development is covered by its core performance criteria and provisions.

We fully support the Revised Draft Permit's generally applicable standard requiring retention of the 85th percentile, 24-hour storm event. However, we are concerned that the Revised Draft Permit's definitions for "Regulated Project Categories" under section E.12.d.1.a could be construed as unlawfully limiting the type of development that the permit's LID provisions are applied. For example, while the Revised Draft Permit requires projects under specific commercial designations to comply with the Revised Draft Permit's LID controls, as well as broadly "industrial," "mixed-use," and "residential housing subdivisions," there is no catch-all category for commercial development generally.

We recommend that the Revised Draft Permit include all commercial development under its categories of Regulated Projects, and that the Draft Permit additionally *provide a catch-all for "all other development not specified under the category of Regulated Projects, with a threshold trigger of creating and/or replacing 10,000 square feet of impervious surface."*

B. The Revised Draft Permit's Alternative Designs Criteria must require all criteria to be met to allow an alternative design, and specify that alternative designs are not permitted where on-site retention is feasible.

To the extent that the Revised Draft Permit allows use of biofiltration in place of retention to meet a project's LID requirements, the Revised Draft Permit must specify that biofiltration is available only in cases of technical infeasibility for on-site retention, and then must, consistent with other permits in California, require a performance multiplier to ensure that receiving waters are adequately protected. Therefore, we request the Revised Draft Permit be revised to *allow for biofiltration as an alternative design only when it is proven to be infeasible, and then require a 1.5 multiplier for any off-site project.*

C. Hydromodification standards must be re-inserted into the Revised Draft Permit.

All of the hydromodification management provisions (formerly Section E.12.3) have been removed from the Revised Draft Permit. Section E.12.e. required that:

[w]ithin the third year of the effective date of the permit, the Permittee shall develop and implement Hydromodification Management procedures. Hydromodification management projects are Regulated Projects that create and/or replace one acre or more of impervious surface. A project that does not increase impervious surface area over the pre-project condition is not a hydromodification management project.⁴

³ Revised Draft Permit, at 5.

⁴ Revised Draft Permit, at 71.

The Revised Draft Permit contains baseline hydromodification provisions, but unfortunately those provisions do not provide the same protections as previous versions of the Permit. Hydromodification requirements rely on matching a specific peak flow, an approach commonly implemented in flood management. The peak flow matching standard is protective of stream channels because all projects are required to reduce runoff volume through implementation of LID, resulting in post-project volumes that mimic pre-project conditions. We request that *Section E.12.e be re-inserted in its entirety to protect stream channels from flooding by mimicking pre-project conditions.*

D. The Revised Draft Permit requires numerous technical revisions to provide clear and concise standards in order to meet MEP.

The Revised Draft Permit requires Permittees to implement site design measures for all projects between 2,500 square feet and 5,000 square feet, including “detached single family homes that create and/or replace 2,500 square feet or more of impervious surface and are not part of a larger plan of development,” (Section E.12.b.i.).⁵ The Revised Draft Permit also requires Permittees to implement site design measures for all projects over 5,000 square feet, but exempts detached single family homes (Section E.12.c.ii).⁶

These provisions read together provide a loophole for detached single family homes exceeding 5,000 square feet. A single family home over 5,000 square feet is not covered under Section E.12.b., which identifies projects between 2,500 to 5,000 square feet, nor is it covered under Section E.12.c.ii. because of the exemption for detached single family homes. *We request that the State Water Board close this loophole by clarifying that all single family homes over 2,500 square feet must comply with Section E.12.b., even if that home exceeds the 5,000 square foot threshold.*

The Revised Draft Permit requires Permittees to implement one or more site-design measures identified within the section. *We request that Second, Section E.12.b.ii. be revised to require at least two site design measures be implemented per project.*

The Revised Draft Permit provides exceptions for on-site retention, contingent on a demonstration that use of bioretention or a facility of equivalent effectiveness is infeasible. However, it is unclear whether the State Water Board intends to apply these exceptions to only bioretention facilities, or a more broad definition. We therefore request that Section E.12.e(ii) be revised to state: “*Exceptions to Requirements for All Retention Facilities.*” *We also request that any reference to bioretention within that section be revised to the broader term of “retention.”*

III. The Revised Draft Permit Must Include All Applicable TMDL Waste Load Allocations.

Stormwater discharges that are regulated under Phase I or Phase II of the NPDES stormwater program are point sources that must be included in the Waste Load Allocation (WLA) portion of a TMDL.⁷ Decisions about allocations of pollutant loads within a TMDL are driven by the quantity and quality of existing and readily available water quality data. Nevertheless, EPA expects TMDL authorities will make separate aggregate allocations to NPDES-regulated stormwater discharges (in the form of WLAs). NPDES permits must also specify the monitoring necessary to determine compliance with effluent limitations.⁸ Where effluent limits are specified as BMPs, the permit should also specify the monitoring necessary to assess if the expected load reductions attributed to BMP implementation are achieved (e.g., BMP performance data).

⁵ Revised Draft Permit at 60 (Section E.12.b.i.).

⁶ Revised Draft Permit at 60 (Section E.12.c.ii).

⁷ See 40 C.F.R. § 130.2(h).

⁸ See 40 C.F.R. § 122.44(i).

Section E.15 of the Revised Draft Permit appropriately states that Permittees comply with all applicable TMDL waste load allocations, load allocations, effluent limitations, implementation requirements and monitoring requirements in the regional water board basin plans.⁹ Attachment G of the Revised Draft Permit outlines TMDL WLAs and specific implementation requirements.

However, Attachment G is still incomplete. For example, the Revised Draft Permit now lists Region Four TMDLs but does not include the necessary deliverables and actions.¹⁰ There are thirteen TMDLs that are inappropriately missing from the Attachment such as the Long Beach City Beaches and Los Angeles River Estuary Bacteria TMDL and Marina del Rey Toxics TMDL. The Permit provides regional boards one year (previously 6 months) to propose revisions to Attachment G. Further, the Draft Permit states that there “may” be a reopener to include the updates.

Instead, State Water Board staff should coordinate with all regions to ensure that all applicable TMDL WLAs and implementation measures are reflected in Attachment G upon adoption of the Permit. Consultation with the regional boards should already have occurred, and TMDL requirements should be implemented and enforced as of the effective date of this Permit. The State Water Board has explained that the exclusion of these TMDLs was due to the fact that they don’t currently have an associated Phase II Permittee identified in Attachments A and B. However, the omission of these TMDLs is inappropriate, as these watersheds may have Phase II Permittees designated within the permit cycle. At a minimum, the Revised Draft Permit should state that the reopener *will occur* within one year. The Revised Draft Permit is the regulatory mechanism that makes the TMDL and its requirements enforceable, thus it is critical to include all these requirements to ensure that they are actually undertaken by the Permittee and that water quality standards are attained.

IV. Regional Water Boards’ Executive Officers Cannot Determine Permittee Compliance with this Renewed Permit or Self-Selected BMPs.

The Revised Draft Permit, Section E.1.b., provides Regional Water Boards’ Executive Officers with expanded authority to determine that if:

[A] Renewal Traditional Small MS4 Permittee’s current implementation of BMPs is equally or more effective at reducing pollutant discharges than implementation of the requirements of a given subsection, the Executive Officer may require continued implementation of the Permittee’s current BMPs and reporting requirements in lieu of implementation of the requirements of that subsection.¹¹

We recognize the State Water Board’s interest in providing Executive Officers with the flexibility to require Permittees to continue implementing BMPs that are more effective at reducing pollutant discharges. However, an Executive Officer’s unchecked discretion to disregard the newly adopted MS4 Phase II Permit constitutes self-regulation and is illegal. Eliminating meaningful agency review and public oversight violates fundamental provisions of the Clean Water Act, and has been expressly invalidated by the Ninth Circuit. In *Environmental Defense Center, Inc. v. U.S. E.P.A.*, the Court held:

Stormwater management programs that are designed by regulated parties must, in every instance, be subject to meaningful review by an appropriate regulating entity to ensure

⁹ Revised Draft Permit, at 97.

¹⁰ Revised Draft Permit, at Attachment G, 44.

¹¹ Revised Draft Permit, at 20.

that each such program reduces the discharge of pollutants to the maximum extent practicable.¹²

The Ninth Circuit further reasoned that “Congress identified public participation rights as a critical means of advancing the goals of the Clean Water Act in its primary statement of the Act’s approach and philosophy.”¹³ Thus the public must be given the opportunity to participate in the permitting and compliance process.

Finding 31 on page 10, and Section E.1.b. on page 20, circumvents the public review and comment requirements of the Clean Water Act by allowing a Regional Water Boards’ Executive Officer alone to determine whether a Permittee’s stormwater management plan (SWMP) controls pollution to the MEP. As such, this section violates the Clean Water Act and is directly contrary to the Ninth Circuit’s ruling in *Environmental Defense Center*. We request that Finding 31 and Section E.1.b. be deleted in its entirety.

Finding 31 and Section E.1.b. suggests that the State Water Board believes the Revised Draft Permit contains weaker BMP requirements than what current Permittees are implementing. If BMPs are currently being implemented that are more effective than proposed requirements, the State Water Board must incorporate those BMPs into the Revised Draft Permit to meet the MEP standard required by the Clean Water Act.

V. All Permittees Must be Required to Implement the New MS4 Permit’s Post-Construction and Monitoring Programs.

As discussed above, the Revised Draft Permit illegally grants Regional Water Board Executive Officers the discretion to determine whether Permittees may continue implementing BMPs from a previous permit and no longer requires such Permittees to implement the new post-construction and monitoring programs as specified in the Revised Draft Permit. In accordance with that discretion, the previous Draft Permit, Section E.1.b., page 21, specified that “[a]ll Permittees must implement post-construction and monitoring programs as specified in this Order.” This provision has been deleted from the Revised Draft Permit.

The Revised Draft Permit’s stated goals include implementing “more specific and comprehensive storm water monitoring, including monitoring for 303(d) listed pollutants;” and incorporating “emerging technologies, especially those that are being increasingly utilized by municipalities (e.g., low impact development).”¹⁴ Deleting Section E.1.b.’s requirement to require Permittees operating under a previous SWMP to implement the Revised Draft Permit’s post-construction and monitoring programs does not achieve those stated goals.

We request that Section E.1.b. be revised to require: “*All Permittees must implement post-construction and monitoring programs as specified in this Order.*”

VI. The Permit Must Ensure that Significant Progress is Made on Trash Reduction During the Permit Term.

Trash is a ubiquitous pollution problem in California. A delay in reducing the amount of trash in our waterways is unacceptable. The Revised Draft Permit recognizes that trash is a “pervasive problem in California.”¹⁵ Thus, it is critical that the Revised Draft Permit address trash pollution in a comprehensive

¹² 344 F.3d 832, 854-56 (9th Cir. 2003).

¹³ *Id.* at 856-57.

¹⁴ Revised Fact Sheet, at 3.

¹⁵ Revised Draft Permit, at 5.

manner. CCKA's July 23, 2012 Letter describes in detail ways to strengthen the Revised Draft Permit's provisions on trash pollution. We also note some additional concerns with the requirements for trash abatement.

The Revised Draft Permit should properly define a "high priority" catchment. The Revised Draft Permit requires storm drain system assessment and prioritization.¹⁶ Specifically, it requires the prioritization of high priority catch basins and defines what constitutes a high priority catch basin. The definition appears to require that five criterion be met in order for the catch basin to be deemed high priority. The requirement to meet five criterion in order to be deemed a high priority catch basin sets an inappropriately high bar, and would slow progress on trash abatement. Instead, we urge the State Water Board to require that a catch basin be deemed high priority if it meets any one of the criterion. We recommend the language on page 53 of the Revised Draft Permit be modified as follows:

"In particular, assign high priority to catch basins meeting any of the following criteria...."

We appreciate the added reopener for the pending statewide trash policy. However, it is inappropriate to rely on the Trash Policy's projected adoption in mid-2013. The development and adoption of State Water Board policies can take years. The Once-Through Cooling (OTC) Policy began in 2005, and was not adopted until 2010. Even after adoption, amendments to the Policy and legal challenges are still ongoing, delaying implementation and making compliance requirements uncertain. We ask that the Revised Draft Permit include a *mandatory* re-opener to ensure that progress is made on trash reduction during the term of the permit.

VII. The Revisions to the Incidental Runoff Section Create Ambiguity, Conflict, and Leave the Section Obsolete.

Section B.4., page 18, no longer requires incidental runoff to involve the specific use of recycled water, leaving the entire section ambiguous and obsolete. In the previous Draft Permit, incidental runoff was defined as the "unintended amounts of runoff from potable and recycled water use areas..." The Revised Draft Permit now states:

Discharges in excess of an amount deemed to be incidental runoff shall be controlled. Regulated Small MS4s shall require parties responsible for such to implement Sections B.4.a-e below to control the incidental runoff. Incidental runoff is defined as unintended amounts (volume) of runoff, such as unintended, minimal over-spray from sprinklers that escapes the area of intended use. Water leaving an intended use area is not considered incidental if it is part of the facility design, if it is due to excessive application, if it is due to intentional overflow or application, or if it is due to negligence.¹⁷

First, the revised first sentence only clouds the permit requirement to control incidental runoff. The Revised Draft Permit is supposed to "include more specificity in Order language."¹⁸ This revision creates ambiguity. As drafted, the provision will be difficult for Permittees to interpret and implement, and will be difficult for Board staff to enforce. We request that the original language be re-inserted: "*Discharges of incidental runoff shall be controlled.*"

Second, the revised language omits reference to recycled water use areas as it pertains to incidental runoff. With the revised language only referencing "runoff," the section's intent is expanded to runoff

¹⁶ Revised Draft Permit, at 53.

¹⁷ Revised Draft Permit, at 18.

¹⁸ Revised Draft Fact sheet, at 3.

from all water sources, creating a conflict within the section. The Revised Draft Permit defines incidental runoff as the “unintended, minimal over-spray from sprinklers that escapes the area of intended use.”¹⁹ But the Revised Draft Permit also states that runoff is not incidental runoff if “it is part of the facility design, if it is due to excessive application, if it is due to intentional overflow or application, or if it’s due to negligence.”²⁰ The Revised Draft Permit carves out exceptions for so many types of runoff that are not considered “incidental runoff,” that it is hard to identify what would be considered incidental runoff under Section B.4.

We propose the following revision to Section B.4. to address these issues: “*Discharges of incidental runoff shall be controlled. Regulated Small MS4s shall require parties responsible for incidental runoff to implement Sections B.4.a-e below to control the incidental runoff. Incidental runoff is defined as any unintended amounts (volume) of runoff, such as unintended, minimal over-spray from sprinklers that escapes the area of intended use.*”

VIII. Water Quality Monitoring Must Ensure That Stormwater Discharges Do Not Degrade Water Quality.

The water quality monitoring program continues to fail its legal responsibility to ensure that stormwater discharges are not degrading water quality. In the response to comments on the May 21, 2012 draft, staff agrees with many of our concerns for inadequate monitoring, yet points to Permittee cost constraints as an excuse for not strengthening the monitoring program. For instance, the response to comments states that “[s]taff recognizes the importance of monitoring end-of-pipe outfalls, however, the cost of implementation for both receiving water monitoring and effluent is infeasible for most Phase II Permittees.”²¹ Water quality monitoring is not part of the MEP standard, and thus cost is an irrelevant reason for failing to meet Clean Water Act requirements.

The Clean Water Act and its implementing regulations explicitly require monitoring for NPDES permits.²² NPDES permits must specify monitoring requirements necessary to determine compliance with effluent limitations.²³ The Clean Water Act mandates, “[t]he Administrator shall require the owner or operator of any point source to . . . install, use and maintain such monitoring equipment and methods,” which includes biological monitoring and sampling of effluent.²⁴ Since monitoring requirements are pivotal to the Clean Water Act’s permitting program, the Act clearly views monitoring as an integral part of all permits.

Many elements of the Monitoring Program under section E.13 of the Revised Draft Permit must be strengthened in order to meet this requirement. The Revised Draft Permit must contain minimum monitoring requirements, which are necessary to assess compliance and impacts from the MS4. Our July 23, 2012 comments specify elements of the monitoring program that should be strengthened. In sum, the monitoring program must be strengthened in order to ensure that discharges do not degrade water quality.

A. Receiving Water Monitoring Must Be Unconditionally Required.

The Revised Draft Permit limits monitoring requirements to Permittees falling under specific categories. Water quality monitoring in the Revised Draft Permit is only required if a Permittee: 1) discharges into an

¹⁹ Revised Draft Permit, at 18.

²⁰ *Id.*

²¹ May 21, 2012 Response to Comments at 180.

²² See 33 U.S.C. § 1318(a); 40 C.F.R. §§ 122.48, 122.41.

²³ See CWA section 402(a)(2); 40 C.F.R. I 22.44(i).

²⁴ See 33 U.S.C. § 1318(a).

ASBS, 2) discharges into a waterbody with a TMDL and is identified as a responsible party, 3) discharges into a § 303(d) listed waterbody, or 4) has a population greater than or equal to 50,000 and is listed in Attachment A. In addition to the limited categories of Permittees required to conduct monitoring, we are concerned that modifications in the Revised Draft Permit provide additional “off-ramps” to monitoring requirements as described below.

The Revised Draft Permit requires receiving water monitoring only when no ASBS, TMDL or 303(d) monitoring is conducted.²⁵ This provision is completely inappropriate and should be removed. In a hypothetical situation, a Permittee could monitor for a single waterbody-pollutant impairment and have no additional monitoring requirements. ASBS, TMDL and 303(d) monitoring is not necessarily sufficient to assess the condition of the waterbody and impacts from the discharge. These types of monitoring all serve different purposes. The Revised Draft Permit should not focus solely on known impairments but instead should assess the overall water quality.

In addition the Revised Draft Permit allows for special studies in place of receiving water monitoring: “[w]ithin the first year of the effective date of the permit, the Permittee, as an alternative to Receiving Water Monitoring, may develop and implement a special study monitoring program...”²⁶

Receiving water monitoring is a critical component of an adequate monitoring regime and should not be eliminated under any circumstances. Further this provision is especially concerning because the Revised Draft Permit states that the special study may focus on “assessment of effectiveness of habitat enhancement efforts and assessment of effectiveness of stream restoration projects.”²⁷ This study goal has nothing to do with evaluating a storm water program and the “management questions” outlined in the Revised Draft Permit. In other words, monitoring under this proposal may not provide any insight to determine if water quality is improving or what the pollution sources may be.

Another relaxation to the monitoring requirements in the Revised Draft Permit is the provision providing Permittees to participate in a regional monitoring program in lieu of requirements in sections E.13.i-iv. In other words, the Revised Draft Permit allows a Permittee to participate in a yet-to-be-developed regional program instead of doing critical ASBS, TMDL and 303(d) monitoring. While we support regional monitoring efforts and efficient use of resources, excusing Permittees from other priority monitoring is inappropriate and illegal.

In sum, the various off-ramps to monitoring requirements discussed above further weaken an already insufficient monitoring program. It is critical that Permittees gather sufficient water quality monitoring data consistently statewide in order to better understand impacts from MS4 dischargers and determine appropriate management decisions. Thus, we urge the State Water Board to remove these weakening provisions and strengthen the program, as described in our July 23, 2012 letter.

B. Receiving Water Monitoring Objectives Must Be Comprehensive.

The Revised Draft Permit requires each Permittee to monitor at only two receiving water locations for a minimal list of parameters at low frequencies. There will be extremely limited monitoring data collected under this scheme. While we appreciate the addition of benthic algal biomass and percent cover monitoring and strongly support bioassessment monitoring, the Revised Draft Permit lacks key monitoring parameters that are often found in storm water. For instance nutrients, metals (copper and zinc), and conventional pollutants (TSS, TDS, specific conductance, pH, turbidity, total hardness) are

²⁵ Revised Draft Permit, at 83.

²⁶ Revised Draft Permit, at 91.

²⁷ Revised Draft Permit, at 91.

notably absent. The State Water Board should include these parameters in order to meet the goals of a receiving water program.

Another concern with the Revised Draft Permit is the stated sole objective of the urban/rural monitoring site. The only stated objective for the “urban/rural interface” location is to understand “...receiving water quality change[s] as LID BMPs are integrated into new development.”²⁸ The objectives of a receiving water program should be much more far-reaching. A receiving water monitoring program will determine if receiving water limits are being achieved, assess trends in pollutant concentrations over time and determine whether designated beneficial uses are fully supportive. While assessing LID is a good goal, it is hard to imagine with the slow pace of new and redevelopment projects that specific benefits will be measurable within two years of adoption of the permit, especially given the limited nature of the proposed monitoring scheme. Thus, the additional goals outlined above should be incorporated in the requirements and utilized to develop a sufficient receiving water monitoring program.

C. TMDL and 303(d) Monitoring Must Commence Immediately.

The Revised Draft Permit requires that TMDL responsible parties and Permittees discharging to 303(d) waterbodies consult with the regional boards within one year (previously six months) of adoption to create a monitoring plan. It is concerning that there are TMDL monitoring requirements absent from Attachment G, especially given the lengthy development process for this Permit.

At a minimum, we urge the State Water Board to require that approved TMDL monitoring *begin*, not only be developed, within one year from the adoption date of the Permit. Many of these TMDLs have been in effect for numerous years. Monitoring should have already started, and in cases where it has not been implemented, it should immediately.

TMDL monitoring requirements must be incorporated in Attachment G of the Draft Permit. “Once a TMDL is developed, effluent limitations in NPDES permits must be consistent with the WLA’s in the TMDL.”²⁹ As a result, TMDL requirements such as monitoring must be included in the Revised Draft Permit, as all requirements are vital steps in ensuring that dischargers are on-track for ultimate compliance with a TMDL’s WLAs.

For the aforementioned reasons, the Revised Draft Permit does not meet the legal standard of controlling pollutants to the MEP. We look forward to working with Board members and staff to ensure that the Final Permit will meet these requirements and ultimately protect California’s water resources.

Sincerely,



Sara Aminzadeh
Executive Director



Sean Bothwell
Staff Attorney

²⁸ Revised Draft Permit, at 85.

²⁹ See *Communities for a Better Env’t v. State Water Res. Control Bd.* (2005) 132 Cal.App.4th 1313, 1322 (citing 40 C.F.R. § 122.44(d)(1)(vii)(B) (NPDES permits must be “consistent with the assumptions and requirements of any available waste load allocation for the discharge prepared by the State and approved by the EPA”); See also, *City of Arcadia v. State Water Resources Control Board* (2006) 135 Cal.App.4th 1392, 1404.).



July 23, 2012

Chair Charles Hoppin and Board Members
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814
Sent via Email to: commentletters@waterboards.ca.gov

RE: Comment Letter –Second Draft Phase II Small MS4 General Permit

Dear Chair Hoppin and Board Members:

The California Coastkeeper Alliance (CCKA) represents 12 Waterkeeper groups spanning the coast from the Oregon border to San Diego. CCKA and its member Waterkeepers have a vested interest in the development, adoption, implementation and enforcement of this Draft Permit, and have been part of this permit reissuance process since its inception. American Rivers is a national non-profit organization dedicated to the protection and restoration of rivers, with regional offices in Berkeley and Nevada City. CCKA and American Rivers thank the State Water Board for the opportunity to provide comment on the National Pollutant Discharge Elimination System (NPDES) Permit for the Stormwater Discharges from Small Municipal Separate Storm Sewer Systems (MS4 Phase II) dated May 18, 2012 (Revised Draft Permit).

Polluted runoff (both contaminated stormwater and non-stormwater runoff) is the most significant and widespread source of contamination of coastal waters. The negative impacts of polluted runoff can also be seen throughout California's inland waterways. Seventy-nine percent of the Sierra Nevada's vast network of rivers and streams are too polluted for fishing, and 83 percent of the region's waterways are too polluted for swimming.¹ Despite the substantial economic, public health and environmental impacts of stormwater runoff to California's waterways, the Revised Draft Permit reflects a dramatic retreat from previous iterations of the MS4 Phase II Permit. Additionally, many of the concerns outlined in our September 2011 letter remain unaddressed. We believe that the Revised Draft Permit fails to address the significant, known discharges from Small Municipal MS4s into the waters of the state, and is inconsistent with the law. We urge the State Water Board (Board) to ensure that the Revised Draft Permit:

- Incorporates numeric effluent limitations;
- Recognizes that the iterative process does not provide a safe harbor from liability in citizen suits;
- Requires all MS4s to conduct water quality monitoring to ensure stormwater discharges do not degrade water quality;
- Retains watershed management zones as a framework for developing region-specific low impact development strategies;
- Ensures consistent implementation of hydromodification standards for Phase II sites proximate to Phase I sites;

¹ Clayburgh, J. et al. "State of Sierra Waters: A Sierra Nevada Watershed Index" Sierra Nevada Alliance. March 2006.

- Complies with the core requirements of the post construction storm water management program;
- Requires adequate public process for any in-lieu or watershed process program;
- Meets the "maximum extent practicable" standard by removing permittee exemptions for water quality runoff standards;
- Requires inspection programs that provide full coverage;
- Contains a baseline interim trash requirement until a mandatory re-opener clause applies the pending "Trash Policy" to the Permit;
- Includes airports as Non-Traditional MS4s;
- Defines a threshold for a Permittee's ability to seek a waiver from the Permit's requirements;
- Strengthens BMP implementation strategies; and
- Retains the requirement of certified professionals.

I. NUMERIC EFFLUENT LIMITATIONS ARE FEASIBLE AND REQUIRED IN THE REVISED DRAFT PERMIT.

In November 2010, the U.S. EPA issued a memo formally recognizing the need for clearer permit requirements to address water quality impairments, and recommended that: "NPDES permitting authorities use numeric effluent limitations where feasible as these types of effluent limitations create objective and accountable means for controlling storm water discharges."² As the U.S. EPA makes clear, these recommendations reflect the fact that "the use of numeric effluent limitations is *no longer is a novel or unique approach to storm water permitting*."³ Despite the U.S. EPA's recommendation that state programs use numeric effluent limitations (NELs) where feasible, the Draft Permit is completely void of NELs, and does not contain any analysis regarding their use and feasibility.

The Clean Water Act (CWA) provides that MS4 permits shall contain controls to reduce the discharge of pollutants to the "maximum extent practicable" (MEP) and such other provisions as the Board determines appropriate for the control of such pollutants.⁴ Under this provision, the NPDES permitting authority has the discretion to include requirements for reducing pollutants in storm water discharges as necessary for compliance with water quality standards.⁵ Where the NPDES authority determines that MS4 discharges have the reasonable potential to cause or contribute to a water quality standard exceedance, the U.S. EPA recommends "that, where feasible, the NPDES permitting authority exercise its discretion to include numeric effluent limitations as necessary to meet water quality standards."⁶

The CWA does not purport to provide an alternative to imposing NELs. Case law interpreting the permitting authority's duties with respect to setting technology-based effluent limitations establishes that "[n]on-numeric limits are allowed only when numeric limits are infeasible."⁷ Conversely, "when

² James Hanlon, Office of Wastewater Management and Denise Keeher, Office of Wetlands, Oceans and Watersheds, U.S. EPA to Water Management Division Directors, U.S. EPA Regions 1-10, "Revisions to the November 22, 2002 Memorandum 'Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs'," (Nov. 12, 2010), available at http://www.epa.gov/npdes/pubs/establishingtmdlwla_revision.pdf.

³ *Id.*

⁴ *Id.*

⁵ *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1166 (9th Cir. 1999).

⁶ *Id.*

⁷ *Citizens Coal Council v. EPA*, 447 F.3d 879, 897 (6th Cir. 2006)(*emphasis added*).

numerical effluent limits are infeasible, EPA may issue permits with conditions designed to reduce the level of effluent discharges to acceptable levels.”⁸

The Board cannot solely include BMP requirements in NPDES permits.⁹ The Board’s authority to impose BMPs is supplemental to its duty to impose numeric, technology-based effluent limitations – a point the regulations themselves make clear when allowing for BMPs when they are “reasonably necessary to achieve effluent limitations,” (i.e., to supplement the effluent limitations by ensuring measures are taken to meet them).¹⁰ The allowance for BMPs in NPDES permits is separate and distinct from the requirement that permits contain numeric, technology-based effluent limitations.

The level of restriction and degree of water quality protection afforded by narrative effluent limitations and NELs are intended to be the same under the CWA. However, the precision, clarity, and enforceability of an NEL is greater than that of a narrative effluent limitation. NELs provide a simple and transparent regulatory scheme that dischargers can readily comply with and that Board staff can easily enforce when necessary. For example, the more specific permit requirements in the Los Angeles or San Diego MS4 permits require permittees to be more specific in how they implement their stormwater program.¹¹ In contrast, programs with more general stormwater permit requirements, where the emphasis is on implementation of a stormwater management plan, generally do not have stormwater programs that are as comprehensive or progressive.¹²

Currently, dozens of small MS4s regulated under the Phase II MS4 Permit discharge into waters regulated by Total Maximum Daily Loads (TMDLs), or those that are impaired by stormwater related pollutants.¹³ These permittees are required, by law and this Permit, to ensure that their stormwater discharges either comply with TMDL waste load allocations or avoid exceedances of basin water quality standards.¹⁴ Compliance with these provisions is only feasible if the Waste Load Allocations (WLAs) or water quality standards are translated into effective, targeted numeric effluent limitations. While monitoring stormwater discharges for compliance with NELs can be challenging, the State Water Board’s own experience, coupled with other states stormwater permits, has demonstrated that compliance is feasible.¹⁵

II. THE ITERATIVE PROCESS DOES NOT PROVIDE A SAFE HARBOR FROM LIABILITY IN CITIZEN SUITS FOR VIOLATIONS OF PERMIT TERMS PROHIBITING EXCEEDANCES OF WATER QUALITY STANDARDS.

The discharge community is putting increasing pressure on the State Water Board to incorporate safe harbor provisions from citizen suits into permits. This is illegal and wholly inappropriate. Section 505 of the CWA explicitly authorizes citizen suits.¹⁶ To supplement state and federal enforcement of the CWA, Congress empowered citizens to serve as "private attorneys general" and bring their own lawsuits

⁸ *NRDC v. Costle*, 568 F.2d 1369, 1380 (DC Cir. 1977).

⁹ *See* 40 C.F.R. § 122.44(k).

¹⁰ *See id.*

¹¹ *Id.*

¹² Tetra Tech, Kosco, Evaluation of California MS4 Program, 19 (2006).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *See, e.g.,* Washington Dep’t. of Ecology, Construction Stormwater General Permit at S.4(c)(5); South Carolina Dep’t of Health and Environmental Control, NPDES General Permit for Storm Water Discharges Associated with Industrial Activity, at sec. 8; CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD SAN DIEGO REGION, NPDES General Permit for Stormwater, Order No. R9-2009-0002, at Findings E (2009), *available at* http://www.waterboards.ca.gov/water_issues/programs/stormwater/docs/phase1r9_2009_0002.pdf.

¹⁶ 33 U.S.C. 1365.

to stop illegal pollution discharges.¹⁷ When self-reported exceedances of an NPDES permit occur, the CWA allows citizens to bring suit to enforce the terms of the Permit.¹⁸ Courts recognize that “[t]he plain language of Section 505 of the Clean Water Act authorizes citizens to enforce *all* permit conditions.”¹⁹ The CWA is clear in its intent to guard against all sources and superintendents of water pollution and “clearly contemplates citizen suits to enforce ‘a permit or condition thereof.’”²⁰ In *Natural Resources Defense Council, Inc. v. County of Los Angeles*,²¹ the Ninth Circuit held that “engagement in the iterative process does not provide a safe harbor from liability for violations of permit terms prohibiting exceedances of water quality standards.”²² This holding is consistent with the position of the State and Regional Water Boards that exceedances of water quality standards in an MS4 permit constitute violations of permit terms subject to enforcement by the Boards or through a citizen suit.²³

Regardless of whether or not a Permittee is engaged in an iterative process, exceedances of water quality standards constitute a permit violation subject to enforcement action by the Water Boards, or through public citizen suits. This is not illogically punitive, as has been suggested. Rather, this result is necessary to ensure that MS4 permit holders actually comply with their obligations to review, analyze, and respond to shortcomings in their stormwater management programs, as required by the Permit. Providing an automatic safe harbor to permittees would have the likely effect of undermining the Board’s and the public’s ability to ensure compliance with the Permit and the protection of public waterways.

III. THE REVISED DRAFT PERMIT SHOULD REQUIRE ALL MS4S TO CONDUCT MONITORING TO ENSURE STORMWATER DISCHARGES DO NOT DEGRADE WATER QUALITY.

While we appreciate the addition of monitoring requirements for Areas of Special Biological Significance (ASBS), the Revised Draft Permit’s remaining monitoring requirements do not meet legal requirements. Water quality monitoring in the Revised Draft Permit is only required if a Permittee: 1) discharges into an ASBS, 2) discharges into a waterbody with a TMDL, 3) discharges into a § 303(d) listed waterbody, or 4) has a population greater than or equal to 50,000 and listed in Attachment A. The Revised Draft Permit does not require monitoring for a Permittee not falling into one of the four categories. The purpose of a Phase II MS4 Permit is to protect and improve water quality, which cannot be attained without monitoring to demonstrate that water quality standards are being iteratively approached or met. Furthermore, all Permittees are prohibited from discharging in a manner that degrades natural water quality. This mandate is impossible to meet without monitoring to provide both the permit holder and the public with necessary certainty. Because the prohibition on discharges that violate water quality standards applies to *all* Permittees, baseline water quality monitoring likewise must be mandatory for all Permittees.

¹⁷ *NRDC v. County of L.A.*, 636 F.3d 1235, 1244, 9455 (9th Cir. 2011).

¹⁸ *Id.*

¹⁹ *Nw. Env'tl. Advocates*, 56 F.3d at 986 (*emphasis added*).

²⁰ *Id.* (citing 33 U.S.C. § 1365(f)(2), (f)(6)); *see also W. Va. Highlands Conservancy, Inc. v. Huffman*, 625 F.3d 159, 167 (4th Cir. 2010) (“In other words, the statute takes the water’s point of view: water is indifferent about who initially polluted it so long as pollution continues to occur.”).

²¹ *Natural Resources Defense Council, Inc. v. County of Los Angeles* ((2011) __ F.3d __, 2011 WL 2712963).

²² *Id.*

²³ (“Citizen suits to enforce water quality standards effectuate complementary provisions of the CWA and the 9446 *NRDC v. COUNTY OF LOS ANGELES* underlying purpose of the statute as a whole.”); *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1225 (11th Cir. 2009) (citing *Nat’l Wildlife Fed’n v. Gorsuch*, 693 F.2d 156,175-76 (D.C. Cir. 1982) (“There is indeed some basis in the legislative history for the position that Congress viewed the NPDES program as its most effective weapon against pollution.”)).

The CWA and its implementing regulations explicitly require monitoring for NPDES permits.²⁴ NPDES permits must specify monitoring requirements necessary to determine compliance with effluent limitations.²⁵ Where water quality based effluent limits (WQBELs) are expressed as BMPs, the permit must require adequate monitoring to determine if the BMPs are performing as necessary.²⁶ The CWA mandates, “[t]he Administrator shall require the owner or operator of any point source to . . . install, use and maintain such monitoring equipment and methods”, which includes biological monitoring and sampling of effluent.²⁷ Likewise, the federal regulations provide that “all permits shall specify . . . [r]equired monitoring including type, intervals, and frequency.”²⁸

Monitoring and assessment represents a critical component in understanding the link between permit requirements, the benefits achieved due to those requirements, and the condition of receiving waters. Aside from general knowledge that storm water discharges from urbanized watersheds contribute pollutants to receiving waters, little is known about the effectiveness of MS4 storm water management practices because municipal discharges are not evaluated through end of pipe or receiving water monitoring.²⁹ This fundamental flaw undermines the Board’s Phase II MS4 program, and deprives the public of assurances that municipal stormwater management efforts both comply with the CWA and meaningfully reduce stormwater pollutants. In order to correct this, the Revised Draft Permit must be revised to contain details about the type of monitoring that must be done, and when and where it must occur, constituents to be monitored and actions required upon receipt of monitoring results. Without these explicit details, the Draft Permit cannot satisfy the legal requirement that the “monitoring provisions ensur[e] that permit conditions are satisfied.”³⁰

The Board has impermissibly considered monitoring costs in deciding to exempt some Permittees from the obligation to perform baseline water quality monitoring. The CWA sections cited above make no exceptions for cost, nor do they assume (as the Board has) that compliance with the CWA will be financially burdensome. We note that the Board offers no support in the record for its assertion that “larger Permittees are assumed to have the resources to undertake monitoring.”³¹ By making a determination about monitoring costs, the Board has unlawfully exempted smaller Permittees from their legal obligation to ensure, through monitoring, that they are not “discharging in a manner that degrades water quality.”³²

Receiving water monitoring is a critical component of any water quality monitoring program. We strongly support the use of bioassessment monitoring in the Revised Draft Permit. However, we have some concerns with the program as proposed. The Draft Permit provides as an objective of the urban/rural program that “the Permittee shall develop and implement a receiving water monitoring program to determine if new development low impact development (LID) BMPs are effective at minimizing degradation in waterways.”³³ The objectives of a receiving water program should be much more far-reaching. A receiving water monitoring program should determine if receiving water limits are being achieved, assess trends in pollutant concentrations over time, and determine whether designated beneficial uses are fully supportive. The additional goals outlined above should be incorporated in the requirements and utilized to develop a sufficient receiving water monitoring program.

²⁴ See 33 U.S.C. § 1318(a); 40 C.F.R. §§ 122.48, 122.41.

²⁵ See CWA section 402(a)(2); 40 C.F.R. I 22.44(i).

²⁶ EPA 2010 memo, 4.

²⁷ 33 U.S.C. § 1318(a).

²⁸ 40 C.F.R. §§ 122.48; 122.41(j).

²⁹ Fact Sheet II, 33.

³⁰ *NRDC v. County of L.A.*, 636 F.3d 1235, 1244, 1250 (9th Cir. 2011).

³¹ *Id.*

³² *Id.*

³³ Draft Permit at 67.

Further, the current receiving water monitoring parameters are insufficient to meet the goals of a receiving water program. Pollutants such as nutrients, specific metals and conventional pollutants are notably absent. This list should be greatly expanded. This inadequacy is compounded by the fact that there is only one monitoring location per HUC 12 watershed. There will be extremely limited monitoring data collected under this scheme. We urge the Board to enhance the monitoring program by expanding the parameters monitored and the number of monitoring locations.

a. End-of Pipe Monitoring

The Draft Permit does not include any monitoring at end-of-pipe outfalls. The Board must include this type of monitoring for compliance-assurance purposes. Drainages carrying stormwater from commercial, industrial, and high-use transportation areas should be prioritized. In addition to outfall monitoring, there should be downstream receiving water monitoring for each outfall monitoring station to determine if MS4 discharges are causing or contributing to exceedances of water quality standards. Monitoring should occur at the first storm event of the wet season and two additional events. Ironically, the Program Effectiveness section of the permit states that the program assessment will be based in part of “MS4 discharge quality”³⁴ and requires municipal watershed pollutant load quantification of parameters such as nitrogen and metals.³⁵ The Board should require the collection of outfall data to ensure that Permittees accomplish these tasks.

b. TMDL Monitoring

We support the inclusion of TMDL monitoring requirements and other TMDL implementation milestones in Attachment G of the Draft Permit. “[O]nce a TMDL is developed, effluent limitations in NPDES permits must be consistent with the WLA’s in the TMDL.”³⁶ The Draft Permit requires that TMDL responsible parties consult with the regional board within six months of adoption to create a monitoring plan for those TMDLs not specified in Attachment G. It is concerning that there are entire regions and associated TMDLs absent from Attachment G, especially given the lengthy stakeholder process involved in this Permit. At a minimum, we urge the Board to require that approved TMDL monitoring begin within one year from the Permit’s adoption date. Many of these TMDLs have been in effect for numerous years. Monitoring should have already started. In cases where it has not been implemented, it should start as soon as possible.

c. Toxicity Monitoring

Storm water often contains metals, oils, pesticides, and other contaminants that can be extremely toxic to aquatic life. According to a recent report released by the Surface Water Ambient Monitoring Program (SWAMP), toxicity has been observed in all nine regions of the state.³⁷ Of the 992 sites assessed by the SWAMP program, 473 sites (48 percent) had at least one sample where toxicity was observed and 129 sites (13 percent) were classified as highly toxic.³⁸ Notwithstanding the California

³⁴ Draft Permit at 71.

³⁵ Draft Permit at 73.

³⁶ *Communities for a Better Env’t v. State Water Res. Control Bd.* (2005) 132 Cal.App.4th 1313, 1322 (citing 40 C.F.R. § 122.44(d)(1)(vii)(B) (NPDES permits must be “consistent with the assumptions and requirements of any available waste load allocation for the discharge prepared by the State and approved by the EPA”)); *see also, City of Arcadia v. State Water Resources Control Board* (2006) 135 Cal.App.4th 1392, 1404.)

³⁷ State Water Resources Control Board, Surface Water Ambient Monitoring Program (November, 2010) *Summary of Toxicity in California Waters: 2001-2009*, available at http://www.swrcb.ca.gov/water_issues/programs/swamp/docs/reports/tox_rpt.pdf.

³⁸ *Id.*

Toxics Rule (“CTR”) and narrative water quality standards that address toxicity and with which stormwater dischargers must comply, there are numerous California waterways listed as impaired for aquatic toxicity on the CWA §303(d) list, and MS4 discharges are often a source of this impairment. We are disappointed that the proposed toxicity monitoring in the previous draft has been eliminated in the Revised Draft Permit. The Revised Draft Permit should include toxicity monitoring in the receiving water and outfalls in order to evaluate if stormwater is causing or contributing to toxic impacts of aquatic life. This monitoring should be conducted at all monitoring locations at least on a *quarterly* basis, as toxicity can often be intermittent.

d. Beach Monitoring

Stormwater runoff is a major source of beach bacteria pollution. The Permittees must be on hand to undertake beach water quality monitoring at stormwater impacted sites should the Health Department discontinue weekly monitoring, as this program is crucial to a major public health issue. We are disappointed to see that beach monitoring requirements have been eliminated from the previous draft. The Revised Draft Permit should require that Permittees discharging to AB 411 beaches must comply with the Ocean Plan monitoring requirements. The monitoring program should include year-round monitoring at beach locations. Nuisance flows occur on a year-round basis and are a known source of bacteria to beaches. Specifically, the Ocean Plan requires weekly bacteria indicator samples from each site.³⁹ The Permit should additionally state clearly that monitoring be conducted in accordance with AB 411 procedures. Lastly, the Permit should specify that monitoring take place at the wave-wash directly in front of stormdrain and stream sources (point zero). This is necessary to ensure that the waters closest to the discharge are evaluated.

e. Environmental Sensitive Areas

As stated in previous comment letters, the Revised Draft Permit does not specify any Regulated Special Project Category for sites that discharge to Environmentally Sensitive Areas (“ESAs”). The Revised Draft Permit should require that any project creating and/or replacing 2,500 square feet or more of impervious surface (collectively over the entire project site) or that will increase the area of imperviousness of a proposed project site to 10 percent or more of its naturally occurring condition, and that discharges to an ESA, must meet the Water Quality Runoff Standards. In addition, all new development and redevelopment projects must meet other California laws governing discharges to ESAs. For example, the California Ocean Plan provides, “[w]aste shall not be discharged to areas designated as being of special biological significance. Discharges shall be located a sufficient distance from such designated areas to assure maintenance of natural water quality conditions in these areas.”⁴⁰

IV. THE DRAFT PERMIT MUST ENSURE COMPLIANCE WITH THE CORE REQUIREMENTS OF ITS POST CONSTRUCTION STORM WATER MANAGEMENT PROGRAM AND ENSURE ADEQUATE PUBLIC PROCESS FOR ANY IN-LIEU OR WATERSHED PROCESS PROGRAM.

Population growth and subsequent development throughout the state inevitably require the construction of impervious surfaces and new infrastructure which results in increased runoff. Implementing LID and green infrastructure strategies into permit requirements will protect natural processes and offset polluted runoff, erosion, sedimentation, lower flood risk, and encourage natural infiltration. Innovative stormwater management practices designed to work with economic growth and development to better manage runoff and protect the natural hydrology will be mutually beneficial to all.

³⁹ California Ocean Plan, at Section III.D.1.

⁴⁰ Ocean Plan, Sec. III.E.1., at 20.

We are pleased to see that the Revised Draft Permit requires that “All Permittees must implement post-construction and monitoring programs as specified in this Order.”⁴¹ However, we are concerned that the Revised Draft Permit elsewhere creates the potential for approval or implementation of such in-lieu programs in place of the permit’s Post Construction controls, including the Permit’s LID and hydromodification requirements. Further, several provisions lack clarity that could allow for regulated projects to escape requirements to implement the Draft Permit’s otherwise applicable terms. These issues must be addressed in order for the permit to pass legal muster under the CWA’s MEP standard.

a. The Draft Permit properly requires retention of the 85th percentile, 24-hour storm event.

The Draft Permit properly establishes requirements broadly for projects to retain, or “capture, infiltrate, and evapotranspire the runoff from the 85th percentile storm” to the MEP. Regulatory bodies in a wide variety of jurisdictions, including in California, have already successfully implemented requirements to retain a specified volume of rainfall such as the 85th percentile storm onsite through LID practices such as infiltration, harvesting and reuse, or evapotranspiration, thus ensuring that pollutant loads do not reach receiving waters. These include, for example:

Ventura County: MS4 permit requires onsite retention of ninety-five percent of rainfall from the 85th percentile storm; offsite mitigation allowed if onsite retention is technically infeasible.⁴²

North and South Orange County: MS4 Permit requires onsite retention of the 85th percentile storm.⁴³

Central Coast, CA: MS4 permit limits impervious surfaces that generate runoff at development projects to between three and ten percent of total project area as a permanent criterion;⁴⁴

West Virginia: Statewide Phase II MS4 permit requires on-site retention of “the first one inch of rainfall from a 24-hour storm” event unless infeasible;⁴⁵

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.⁴⁶

⁴¹ *Supra* note 33, at E.1.b. (citing exceptions to provisions allowing for in-lieu program approvals by the Regional Boards).

⁴² Los Angeles Regional Water Quality Control Board (July 8, 2010) Ventura County Municipal Separate Stormwater National Pollutant Discharge Elimination System (NPDES) Permit; Order No. R4-2009-0057; NPDES Permit No. CAS004002.

⁴³ Santa Ana Regional Water Quality Control Board, Order No. RB8-2009-0030, at ¶ XII.E.1; San Diego Regional Water Quality Control Board (December 16, 2009) Order No. R9-2009-0002 (South Orange County MS4 Permit).

⁴⁴ 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), *available at*

http://www.waterboards.ca.gov/centralcoast/water_issues/programs/stormwater/muni_phase2/ms4enrollment/docs/p_haselnotifications021228.pdf.

⁴⁵ 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 (June 22, 2009), *available at*

<http://www.dep.wv.gov/WWE/Programs/stormwater/MS4/permits/Documents/WV%20MS4%202009%20General%20Permit.pdf>.

⁴⁶ City of Philadelphia (Jan. 29, 2008) Stormwater Management Guidance Manual 2.0, at 1.1, *available at* <http://www.phillyriverinfo.org/programs/subprogrammmain.aspx?Id=StormwaterManual>.

These jurisdictions, among many others implementing similar requirements, 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.

The requirement to retain runoff from the 85th percentile storm onsite is particularly necessary for smaller MS4s, including those with populations of 25,000 or less, which include areas that may not yet have seen large scale development and whose receiving waters are still pristine.⁴⁷ As detailed above, most runoff is the result of man-made development in the landscape. California's Regional Boards have repeatedly recognized that even small increases in impervious surface within an area can have significantly deleterious effects on surface waters. For example, the Los Angeles Regional Board recently noted that, "[s]tudies have demonstrated a direct correlation between the degree of imperviousness of an area and waterbody degradation . . . Significant declines in the biological integrity and physical habitat of streams and other receiving waters have been found to occur with as little as 3-10 percent conversion from natural to impervious surfaces in a subwatershed."⁴⁸ Given the need to protect such watersheds, it is critical that the permit apply the requirement to retain the runoff produced by the 85th percentile storm to all small MS4s, not only those above a certain size threshold.

b. The Draft Permit must ensure that all development is covered by its core performance criteria and provisions.

While we fully support the Draft Permit's generally applicable standard requiring retention of the 85th percentile, 24-hour storm event, we are concerned that the Draft Permit's definitions for "Regulated Project Categories" under section E.12.d.1.a could be construed as unlawfully limiting the type of development that the permit's LID provisions are applied. For example, while the Draft Permit requires projects under specific commercial designations to comply with the Permit's LID controls, as well as broadly "industrial," "mixed-use," and "residential housing subdivisions," there is no catch-all category for commercial development generally. We suggest the Draft Permit include all commercial development under its categories of Regulated Projects, and that the Draft Permit additionally provide a catch-all for "all other development not specified under the category of Regulated Projects, with a threshold trigger of creating and/or replacing 10,000 square feet of impervious surface."

c. The Draft Permit's numeric sizing criteria for storm water retention and treatment should be referenced in the Permit's Site Design Section.

While the Permit appropriately requires retention of the 85th percentile, 24-hour storm event, the Draft Permits LID based Site Design Measures, mention that the methods employed under E.12.d.2(ii)(2) "are based on the objective of achieving infiltration, evapotranspiration and/or harvesting/reuse of the 85th percentile rainfall event," it would clarify Draft Permit requirements if this section instead referred to use of the above practices, "to the extent feasible, to meet the Permit's "Numeric Sizing Criteria for Storm Water Retention and Treatment" under Section E.12.d.2(ii)(3)d.

d. The Draft Permit's Alternative Designs Criteria must specify that all criteria must be met to be allowed, and must specify that alternative designs are not permitted where on-site retention is technically feasible.

⁴⁷ Renewal MS4 Permittees in particular, which have been subject to discharge requirements under the existing Phase II General Permit since 2003, are already familiar with the permitting structure and requirements of the NPDES program and should not be exempted from critical terms such as the Draft Permit's Water Quality Runoff Standards.

⁴⁸ Los Angeles Regional Water Quality Control Board Order No. R4-2009-0057, at Finding B.16. See also, Center for Watershed Protection (March 2003) Impacts of Impervious Cover on Aquatic Systems, available at, http://www.cwp.org/documents/cat_view/78-other-center-publications.html.

The Draft Permit's Alternative Designs provisions list 4 categories of "effectiveness" that may allow for use of an alternative design to the Permit's Stormwater Treatment Measures requirements. (See E.12.d.2(ii)(3)(a). The Draft Permit should specify that all 4 criteria must be met in order for the Permit term to apply, and given the section's reference to biotreatment (i.e., filtration with discharge), must specify that BMPs resulting in discharge of runoff and/or pollutant loading are permitted only where on-site retention of the design volume is technically infeasible.

To this end, to the extent that the Draft Permit allows use of biofiltration in place of retention to meet a project's LID requirements, the Draft Permit must specify that biofiltration is available only in cases of technical infeasibility for on-site retention, and then must, in line with other permit's in California, require a performance multiplier to ensure that receiving waters are adequately protected.

e. The use of stormwater to increase water supplies locally should be retained in the Permit.

We agree with the Board's finding that, in addition to the benefits LID provides for stormwater pollution mitigation, reduction in flooding, creation of green space, and fish and wildlife habitat enhancement, "[s]torm water is a resource and an asset and should not be treated as a waste product. Managing rainwater and storm water at the sources is a more effective and sustainable alternative to augmenting water supply. . . ." ⁴⁹ There is substantial opportunity in California to increase water supplies through use of captured stormwater, ⁵⁰ and, while ensuring protection of water quality to the MEP, this permit should encourage retention practices that serve to increase water supplies.

V. INSPECTION PROGRAMS SHOULD BE REINSERTED INTO THE PERMIT TO ENSURE FULL COVERAGE.

a. Industrial/Commercial Inspection Program

We disagree that industrial and commercial inspection requirements in the Revised Draft Permit are redundant with those in the Industrial General Permit (IGP). At the MS4 Phase II Workshops, Board Staff explained that the Industrial/Commercial Inspection Program was deleted from the Draft Permit due to redundancy with IGP requirements. The Industrial/Commercial Facility Retrofit section was deleted from the Revised Draft Permit with the same reasoning. We recommend that the State Water Board re-insert the Industrial/Commercial Inspection Program in its entirety to improve overall Permittee compliance as stated below. At a minimum, the State Water Board should ensure that no gaps exist between the Revised Draft Permit and the IGP, and when overlap does occur, the more stringent permit will have priority.

Industrial and commercial inspection programs typically apply only to Phase I MS4s. Phase II federal regulations ⁵¹ do not specifically address storm water discharges from industrial facilities and commercial businesses (other than as part of the education and outreach program). However, the U.S. EPA recommends that Phase II permitting authorities include industrial permit requirements to further reduce storm water pollutants from these facilities. ⁵² The Permittee is required to ensure that the minimum control measures are implemented at every industrial/commercial facility included in its inventory. The State Water Board has also determined that inspections of industrial facilities are

⁴⁹ Supra note 33, at Finding 1.

⁵⁰ See Natural Resources Defense Center, CLEAR BLUE FUTURE (August 2009), available at <http://www.nrdc.org/water/lid/files/lid.pdf>.

⁵¹ 40 CFR 122.34(b).

⁵² U.S. EPA, MS4 Improvement Permit Guide, EPA 833-R-10-001, at 89 (April 2010).

necessary to protect receiving waters in Phase II communities.⁵³ Numerous State Water Board audits have found industrial sites consistently in violation of MS4 permit requirements: “assessments of California’s MS4 program have shown that compliance with MS4 permit requirements ‘improves with awareness of the program and a *regular presence of compliance inspectors at the facility* or at other facilities in the same industry group or neighborhood.’⁵⁴

Private consultants agree that industrial and commercial inspections are a necessary component of a stormwater permit. In 2006, Tetra Tech released its assessment on California’s Industrial Storm Water Program. The report identified lessons learned and made recommendations for oversight of industrial facilities. Tetra Tech’s central finding was that “*compliance improves with field inspector presence.*”⁵⁵ The analysis also recognized that an “inadequate number of inspections” were a key problem with the MS4 Program.⁵⁶ Regulatory presence shows the facility operators that the Water Boards take the program seriously, and it keeps storm water compliance in the minds of the operators.⁵⁷ Tetra Tech recommended “[d]edicating staff members solely to inspect construction sites or industrial facilities for stormwater compliance,”⁵⁸ due to many permittees being lax in performing inspections and enforcing their stormwater ordinance. Permittees had no or few inspectors dedicated to addressing stormwater concerns, and they “did not train inspectors in other departments, such as pretreatment, fire safety, or health department inspectors, to look for stormwater violations.”⁵⁹ The State Water Board should heed the recommendations of Tetra Tech and re-insert the Industrial/Commercial Inspection Program into the Revised Draft permit.

b. Construction Inspection Program

We disagree with Staff’s assertion that the mandatory construction inspection frequency and inventory requirements are not necessary because of the potential to leverage the oversight provided by local health inspectors. The initial Draft Permit required Permittees to “implement procedures for inspecting public and private construction projects and conducting enforcement if necessary.”⁶⁰ Table A of the initial Draft Permit dictated the frequency of construction inspections, including prioritizing:

- (a) All sites one (1) acre or larger that discharge to a tributary listed by the state as an impaired water for sediment or turbidity under the CWA § 303(d); and
- (b) Other sites one (1) acre or more determined to be a significant threat to water quality.⁶¹

Prioritizing impaired and threatened waters is a sound policy.”⁶² Oppositely, deleting the prioritization of impaired and significantly threatened waterbodies does not meet the MEP standard, and is contrary to the Permit’s goals.⁶³ Furthermore, it is improper for the State Water Board to rely on local health inspectors who have no experience with stormwater regulations, particularly for impaired and significantly threatened waterbodies. We request that Staff re-insert Table A: Inspection Frequency’s Site

⁵³ Fact Sheet I, at 28.

⁵⁴ *Id.* (emphasis added).

⁵⁵ Fact Sheet 1, 27.

⁵⁶ *Id.* at 18.

⁵⁷ *Id.*

⁵⁸ *Id.* at 12.

⁵⁹ *Id.* at 18.

⁶⁰ Permit I, 42.

⁶¹ Permit I, 42.

⁶² Fact Sheet 2, at 3. (emphasis added)

⁶³ Fact Sheet 2, at 3. (emphasis added)

(a and b),⁶⁴ in order to ensure that the State Water Board meets its goal of enhancing actions to control 303(d) listed pollutants.

We disagree that the construction inventory requirement is an unnecessary burden. The initial Draft Permit required Permittees to “maintain an inventory of all grading and construction activity within its jurisdiction.”⁶⁵ Keeping an inventory of all construction activities in a Permittee’s jurisdiction is not a random administrative burden placed upon dischargers. An inventory of construction activities helps Regional Boards, and the public, determine the location of construction activities. This leads to better permit compliance and enforcement. Without an inventory of construction activities, Regional Water Boards will not know whether BMPs are being implemented properly. In the urban areas of Southern California, construction activities may be well documented and understood, but Northern California and more rural communities rely heavily on construction inventories to identify where BMPs should be implemented. We ask that the State Water Board re-insert the mandatory construction inspection frequency and the construction inventory and tracking requirements.

VI. BASELINE INTERIM TRASH REQUIREMENTS SHOULD BE REQUIRED UNTIL A MANDATORY REOPENER CLAUSE INSERTS THE TRASH POLICY INTO THE PERMIT.

Staff improperly removed the Trash Reduction Program from the initial Permit. At a minimum, Staff should require: a *mandatory* re-opener clause, baseline trash reduction strategies, and voluntary source reduction programs. The initial Permit required “[a]ll Traditional Small MS4 Permittees with a population greater than 25,000 shall require at least 20 percent of the Permittee's jurisdiction zoned, commercial retail/wholesale, comply with a Trash Abatement Plan.”⁶⁶ However, during recent MS4 Phase II Permit Staff Workshops, Staff indicated that the Trash Reduction Program was removed because of the pending Trash Policy, expected to be adopted in the summer of 2013.

- a. *The State Water Board cannot exempt Permittees from preventing the discharge of trash into waters of the state to the maximum extent practicable.*

Trash is a ubiquitous problem in California. Delaying controls to reduce the discharge of trash into California’s waterways is unacceptable. The Draft Permit itself finds trash to be a “pervasive problem in California.”⁶⁷ The Permit states that “[c]ontrolling trash is one of the *priorities in California* not only because of trash discharge prohibitions required in certain Regional Water Board Basin Plans, but also because trash and litter cause particularly major impacts on our enjoyment of California waterways.”⁶⁸

It is inappropriate for Board Staff to rely on the Trash Policy’s projected adoption in mid-2013 as a reason for eliminating a Trash Reduction Program from the Revised Draft Permit. The development and adoption of State Water Board policies can take years. The Once-Through Cooling (OTC) Policy began in 2005, and was not adopted until 2010. Even after adoption, amendments to the Policy and legal challenges are still ongoing, delaying implementation and making compliance requirements uncertain. Further, at the release of the first Draft Permit, Board Staff was aware that a Trash Policy was being developed. In September 2010, the State Water Board created a Scoping Document⁶⁹ to begin the CEQA process of creating a Trash Policy. In October 2010, the State Water Board held two CEQA Scoping

⁶⁴ See Permit I, at 54; Site a and b.

⁶⁵ Permit I, cite.

⁶⁶ Permit I, at 54.

⁶⁷ Permit I, 5.

⁶⁸ Permit I, 5. (emphasis added).

⁶⁹ http://www.waterboards.ca.gov/water_issues/programs/trash/docs/trashscoping.pdf.

Meetings to allow the public to comment on a proposed Trash Policy.⁷⁰ Only after a Scoping Document was released, two Scoping Meetings were held, and a Public Advisory Group was created, did the State Water Board release the first draft of the MS4 Phase II permit on June 7th, 2011. The State Water Board should not delay a Permittee's responsibility to meet the MEP standard because a pending policy may or may not be finalized during the Permit's term. We request that Staff revisit the Trash Reduction Program, and insert the minimum requirements articulated below.

b. The State Water Board should insert minimum requirements into the Permit to prevent the degradation of California's water quality due to trash.

First, Staff should re-insert an explicit and mandatory re-opener clause to require, that once enacted, the Trash Policy's provisions be inserted into the Permit. At the June 15th, 2012 MS4 Phase II Workshop, Staff stated that the Draft Permit's re-opener clause is mandatory. Unfortunately, the plain meaning of the Draft Permit states otherwise. The Draft Permit states:

The State Water Board is developing a statewide policy for trash control in California's waterways. The draft Trash Policy will identify trash as a separate pollutant and establish methods to control trash pollution in waterways, statewide. Upon adoption of the draft Trash Policy, the State Water Board *may re-open the Order* to incorporate water body trash pollution control methods and introduce Trash Reduction Program requirements.⁷¹

The phrase "may re-open the Order" is not a mandatory re-opener clause—as Staff incorrectly stated at the June 15th Workshop. Furthermore, Staff's Response to Comments state numerous times that "the Trash Reduction Policy is expected to be adopted summer 2013 and *the permit may be re-opened* to include the Trash Reduction Policy requirements."⁷² However, in the Board's Response to Comments for Comment 102.15 states that "the draft order *will be* re-opened upon adoption of the Statewide Trash Policy."⁷³ This language is contradictory, and needs to be clarified. CCKA asks Staff to amend its Response to Comments, to explicitly state its intent regarding the re-opener clause. Additionally, CCKA requests that the Draft Permit be revised to state that "[u]pon adoption of the draft Trash Policy, the State Water Board *shall* re-open the Order..."

Second, the Draft Permit needs to require baseline trash reduction requirements. At a minimum, the Permittee should evaluate and prioritize trash hot spot areas within its jurisdiction. CCKA requests that Staff reinsert the language "that at a minimum, removal of trash and debris from open channels and other drainage structures shall occur annually. Removal of trash and debris from high priority areas shall occur at least three times per year."⁷⁴

Finally, the Draft Permit provides a good opportunity to present Permittees with a voluntary option to implement a trash source reduction program. The proposed Trash Policy is considering providing additional time compliance credits, if within three years, an MS4 voluntarily adopts local ordinances to ban single use plastic bags, or implement other source reduction programs. Adopting local ordinances takes time and effort to accomplish. Providing Permittees with advanced notice that a source control ordinance will deliver compliance credit later will promote source control ordinances.

⁷⁰ http://www.waterboards.ca.gov/water_issues/programs/trash/docs/notice_ceqa_trashpolicy_rev.pdf.

⁷¹ Permit II, at 5.

⁷² Response to Comments, 24, 46, 56.

⁷³ Response to Comments, 93.

⁷⁴ Permit I, 50.

VII. THE REVISED DRAFT PERMIT SHOULD INCLUDE AIRPORTS AS NON-TRADITIONAL MS4s.

While the Draft Permit designates numerous non-traditional MS4s including, but not limited to: universities, prisons, large hospitals, military bases, and State parks, the State Water Board has improperly omitted airports from the list of newly covered permittees. The CWA requires discharges composed entirely of stormwater, which are not required to obtain a permit, to obtain a NPDES permit if the State Water Board “determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.”⁷⁵ Given the degree to which the impervious surfaces associated with airports are actually or potentially significant sources of stormwater pollution to California waters, this omission seems illogical at best.⁷⁶

State Water Board Staff have determined that airports should not be considered a non-traditional MS4 under the Draft Permit, because of overlap with the IGP. Airports are currently permitted under the IGP only if they implement de-icing practices and/or operate maintenance and cleaning facilities on site. The IGP does not take into account the large areas of impervious surfaces used as runways or pollutants such as oils and grease that accumulate at all airports. The current IGP is insufficient to protect natural water quality in California due to its lack of regulation for airport facilities. In order to best manage the polluted runoff generated by all airport facilities, the State Water Board should designate all public-use airports as a non-traditional MS4. See Attachment A (Map of California Airports) for distribution of airports statewide.

There is a considerable and unwarranted gap between the protections afforded by the IGP and the impact on the state’s receiving waters. The IGP, as it applies to California’s airports, covers airports that exceed threshold levels of flight departure activity, and includes requirements to address stormwater discharges associated with aircraft servicing, repair and maintenance; equipment cleaning and maintenance; and de-icing/anti-icing operations.⁷⁷ However, in addition to these operations, which may discharge harmful chemical pollutants to the state’s waters, an airport’s runways, taxiways, parking lots, rooftops and other impervious areas are exactly the types of impervious surfaces that discharge the excessive volumes of runoff and runoff-borne pollutants associated with other MS4 structures. It is illogical, if not unlawful, to allow these discharges to remain unregulated, particularly where they are collected and conveyed to waters of the state through a system of stormwater management practices.

The IGP does not provide sufficient coverage to ensure that airports do not degrade the water quality of California’s waterways. In some cases, certain Non-traditional MS4s will be subject to both this Permit and the IGP. The Draft Permit requires Non-traditional MS4 operators to address stormwater program elements, while the IGP requires the development and implementation of a SWPPP for certain “industrial” activities as well as requiring specific visual and chemical monitoring.⁷⁸ In the Preamble to the Phase II regulations, U.S. EPA notes that for a combination permit to be acceptable, it must contain all of the requirements for each permit.⁷⁹ Further, “when viewed in its entirety, a combination permit, which by necessity would need to contain all elements of otherwise separate industrial and MS4 permit

⁷⁵ See CWA sec. 402(p)(2)(E); 40 C.F.R. §122.26 (a) (9)(i)(D).

⁷⁶ Fact Sheet II, 17.

⁷⁷ See, US EPA, Ofc. of Water, Industrial Stormwater Fact Sheet Series: Sector S, Vehicle Maintenance Areas, Equipment Cleaning Areas, or Deicing Areas Located at Air Transportation Facilities, Dec. 2006.; SWRCB, 2011 Draft NPDES Permit for Storm Water Discharges Associated with Industrial Activity, Order No. NPDES No. CAS000001 at I.A.25 and Attachment A.8.

⁷⁸ Fact Sheet II, 46.

⁷⁹ State Water Resource Control Board, Waste Discharge Requirements for Small MS4s, 13, *available at* http://www.swrcb.ca.gov/water_issues/programs/stormwater/docs/final_ms4_permit.pdf.

requirements, and require NOI information for each separate industrial activity, may have few advantages when compared to obtaining separate MS4 and industrial general permit coverage.”⁸⁰ Where permits do overlap, one program may reference the other.

The IGP currently fails to prevent transportation yards from meeting water quality standards. Tetra Tech’s audits of industrial Permittees concluded that maintenance yards, specifically transportation yards, have inadequate measures to prevent the degradation of water quality.⁸¹ The audit found numerous IGPs lacked the appropriate BMPs at municipally owned transportation yards.⁸² Problems consisted of “unprotected storm drains, lack of containment for potentially polluting materials, lack of spill-control measures, and generally poor housekeeping. Often evidence was found of spills that had entered storm drains.”⁸³ To help the IGP meet its goal of preventing the degradation of water quality, the Draft Permit should provide coverage to all transportation yards, thereby addressing the inadequacy of stormwater controls within the current IGP.

As with other transportation, non-traditional MS4s, the Minimum Measures associated with municipal stormwater permit programs may require tailoring to the unique circumstances of airports. However, like these facilities, airports across the state should be required to comply with the new and redevelopment, monitoring, illicit discharge, and good housekeeping provisions of the municipal permit program.

VIII. THE REVISED DRAFT PERMIT SHOULD INCLUDE GUIDANCE TO DEFINE A THRESHOLD FOR A PERMITTEE’S ABILITY TO SEEK A WAIVER.

The Draft Permit provides an unclear threshold for Permittees to seek a waiver from the Permit. The Draft Permit allows “[r]egulated Small MS4s [to] seek a waiver from the General Permit requirements if they meet criteria specified in 40 CFR §122.32(c)-(e).”⁸⁴ Federal Regulations allow a Permittee to obtain a Permit waiver if the MS4 “is not contributing substantially to the pollutant loadings of a physically interconnected regulated MS4.” While we understand that §122.32(d)(2) is a federally mandated standard, the State Water Board can and should provide guidance regarding what threshold constitutes “not contributing substantially.” The State Water Board provides additional criteria for seeking a waiver;⁸⁵ therefore there is no excuse to not add additional criteria explaining the threshold to “contributing substantially.”

The State Water Board needs to establish clear standards. The U.S. EPA audits of MS4s have repeatedly shown the need for clear, measurable requirements in MS4 permits to ensure an effective and enforceable program.⁸⁶ In fact, Staff explains that it “aimed to write permit language clear enough to set *appropriate standards* and establish required outcomes.”⁸⁷ We believe providing guidance on the threshold of “contributing substantially” is a necessary and appropriate standard to define. We therefore request that Staff revisit the waiver requirements section, and insert guidance language to provide thresholds and a definition for “contributing substantially.”

⁸⁰ *Id.*

⁸¹ *Supra* note 12, at 16.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Permit II, at 14.

⁸⁵ *See* Permit II, at 14.

⁸⁶ Fact Sheet II, 5.

⁸⁷ Fact Sheet II, 5.

IX. BMP IMPLEMENTATION STRATEGIES SHOULD BE STRENGTHENED TO MEET THE MAXIMUM EXTENT PRACTICABLE STANDARD.

One of the most significant shortcomings in previous stormwater permits is the lack of performance-based criteria for BMPs. As a result, BMPs are added as part of permit requirements or pollution abatement efforts without any focus on the quality of the water exiting the BMPs. An effective way to ensure the success of stormwater programs and the attainment of water quality standards is to assess BMPs based on performance. Flow-based design criteria are simply not adequate to ensure that water quality standards are consistently met because flow, and corresponding BMP size, is but one factor determining BMP effectiveness.

Where waterbodies have been determined to be impaired for pollutants that are commonly found in urban stormwater, TMDLs are developed and wasteload allocations assigned to dischargers of those pollutants, including MS4 stormwater programs. Therefore, it is helpful to identify and assess the effectiveness of the activities and BMPs of each MS4 stormwater program in the watershed. This assessment can assist the Water Board in assigning wasteload allocations that are appropriate for each stormwater discharger.⁸⁸

All Phase I MS4 programs are required to assess the effectiveness of the SWMP components; however, many permits in California do not specify that official measurable goals be developed and assessed as is required of Phase II MS4s. Some permittees audited, however, have established stormwater management plans with appropriate goals or standards and regularly assess progress toward meeting those goals. These types of goals are essential in assessing the effectiveness of individual program components and the program in general. Being able to quantify progress is important not only to the permitting authority, but to the permittee itself to justify budget requests, and staffing requirements.⁸⁹

The Tetra Tech audits determined that one common problem with MS4 programs was the lack of clear methods to evaluate program effectiveness.⁹⁰ In many cases, permittees implement their programs and individual BMPs without developing measurable goals, monitoring programs, or other methods to track progress over time. The Tetra Tech report noted that one of the ways in which permittees can show progress is to demonstrate effectiveness, for example, “that increased frequency of inspection yielded fewer violations or that field screening results showed fewer *hits* for bacteria the year after a focused effort to eliminate improper connections to the storm drain.”⁹¹ Without these measures, permittees cannot know whether their activities are having a positive effect on stormwater quality, nor can they gauge which activities provide the most benefit.⁹²

Permittees can also measure program progress by comparing a current year’s activities to past years’ activities. Tracking and evaluating program data can provide insights into where improvements have been and still need to be made. For example, if “after 5 years of program implementation there has been no change in the number or type of violations found at site, a new approach might be needed that focuses on education or that includes increased penalties for noncompliance.”⁹³ If, on the other hand, repeated inspections at a sector of commercial businesses never or rarely yield a violation, the

⁸⁸ *Supra* note 12, at 12.

⁸⁹ *Id* at 12-13.

⁹⁰ *Id* at 17.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

permittee might consider using those resources to target a different business type that is more likely to contribute to stormwater pollution.⁹⁴

We believe that the “Program Effectiveness Assessment and Improvement” requirements⁹⁵ section should be further strengthened. In order to ensure that Permittees’ discharges meets water quality standards, we recommend that the draft Permit require a performance evaluation for all structural BMPs used by the discharger to comply with the Permit, including retrofits and iterative requirements. Specifically, at least once per permit cycle, the Permittee should submit a report to the State Board or regional board that includes a BMP performance evaluation. The report should identify three selected structural BMPs for each targeted pollutant of concern, and then detail an analysis on the efficacy of those BMPs for removing the identified pollutants of concern, in terms of pollutant removal efficiency and effluent water quality. The Permittee would then select the best performing BMP of the three for each targeted pollutant. This evaluation will help determine the structural management practices that are truly the “best” management practices. This type of evaluation is also necessary for discharges into impaired waters and ASBSs, for which BMP effectiveness is particularly critical. Finally, all BMPs installed should be designed to handle the 85th percentile storm, which is currently the mandate in SUSMP requirements.

X. THE DRAFT PERMIT SHOULD RETAIN PROFESSIONAL LICENSING WITH THE STATE WATER BOARD.

We commend State Water Board Staff for defending the State Water Board’s professional licensing requirements during its MS4 Phase II Workshops. Currently, state, county or city government agencies have the ability to require professionals to take training courses or require certification or licensing to ensure that they are qualified to perform duties necessary to protect public health and safety. For example, current law requires that any person employed to operate a wastewater treatment plant must pass a written examination administered by the State Water Board. This certification ensures that plant operators are qualified and that they are educated on the latest technology and requirements for safely treating wastewater. We believe that the authority to provide this type of professional licensing and education should remain within the government agencies that have the knowledge and experience with services that these agencies provide. We thank Staff for continuing to defend this requirement.

For the aforementioned reasons, the Revised Draft Permit does not meet the legal standard of controlling pollutants to the MEP. We look forward to working with you and your staff to ensure the Final Permit will meet these requirements and serve to protect California’s water resources.

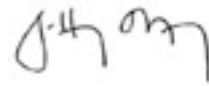
Sincerely,



Sean Bothwell
Staff Attorney
California Coastkeeper Alliance



Sara Aminzadeh
Acting Executive Director
California Coastkeeper Alliance



Jeffrey Odefey
Stormwater Programs Director
American Rivers

⁹⁴ *Id.*

⁹⁵ Draft Permit at ¶ E.14.



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