Public Comment
Draft Phase II Small MS4 General Permit
Deadline: 7/23/12 by 12 noon

COUNTY OF SONOMA
PERMIT AND RESOURCE MANAGEMENT DEPARTMENT
2550 Ventura Avenue, Santa Rosa, CA 95403-2829
(707) 565-1900 FAX (707) 565-1103

Jeanine Townsend, Clerk to the CA State Water Resources Control Board 19 July 2012
POB 100 Sacramento, CA 95812-0100
sent via e-mail prior to 12 noon on Monday 23 July 2012

SUBJECT: County of Sonoma comment on the Phase II Small MS4 permit, 2nd draft ver. 18 May 2012

Dear Ms. Townsend and members of the Board:

Thank you for allowing the County of Sonoma to comment on the second draft Phase II storm water permit. My comments in this letter will be brief and general as the reader is directed to more detailed comments in the attached letters from the Russian River Watershed Association and the Statewide Stormwater Coalition; and also direct the reader to the comment letter from the California Stormwater Quality Association.

My six points below describe generally why the County of Sonoma is not supportive of the second edition Phase II permit. The County has significant concerns regarding:

- the State Water Board is overreaching of state authority and lacks the legal authority to require certain provisions within the permit.
- lack of water quality nexus with most of the required tasks
- cost of implementation and lack of cost-effectiveness assessment
- exposure of permittee to third-party challenges
- technical infeasibility
- burdensome reporting, analysis and assessment requirements

Asking the County to do watershed studies where the land area extends beyond the NPDES permit boundary and where there are no MS4s is entirely inappropriate and likely illegal. Another example of overreaching state authority occurs on pg. 67 of the permit which requires the County to establish a receiving water monitoring program. The local jurisdiction occurs within the MS4 and does not extend into receiving waters which is state jurisdiction. Until clarity is given I must oppose asking the County to provide storm water education to “school-age” children (pg. 25). Will the County be in compliance if it only send out the URL for the SurfRider program to schools? However, providing extensive education programs for all K-12 students within the County where a given school may be outside the NPDES boundary and not drain to a County MS4 is beyond the scope of the MS4 requirements.

Asking the County which is agriculturally based to conform to regulations aimed at urban city areas is excessive regulation. You may refer to the City of Santa Rosa letter which states even their program, which has the parcel funding our County program does not have, will be strained and unable to be in compliance should they be a Phase II entity.

The original estimated line item cost for new programs was expected to triple the County Phase II costs. Asking the County of Sonoma to find an additional $1,000,000 for the storm water program essentially translates into laying off 10 staff.

Reader directed to detailed comments from three other agencies

The County of Sonoma is a member of the Russian River Watershed Association (RRWA) and the Statewide Stormwater Coalition (SSC). These two agencies prepared exhaustive technical, financial, conceptual, and legal comments (see attached from Best, Best, and Krieger for SSC legal review) on the second edition of the draft Phase II permit. The County of Sonoma supports the comments from RRWA and the SSC and both letters are attached to this e-mail.

The County of Sonoma has reviewed the comment letter from the California Stormwater Quality Association (CASQA) on the second edition of the draft Phase II permit. The County of Sonoma supports the comments from CASQA and that letter is on file with the SWRCB.

Improving Performance and Outcomes at the State Water Boards by the Little Hoover Report (2009)

In this section I will try to summarize the 130-pg. Little Hoover Commission Report on "Improving Performance and Outcomes at the State Water Boards" dated January 2009. This report is prefaced with "Clearer Structure, Cleaner Water."

The first action item from the report is "the governor and Legislature must exercise their leadership to reform the current system " of water quality protection into one that "demonstrates that it is improving water quality." I do not know if these reforms have happened but I think they have not happened.

The report summary letter concludes "Reforming those boards is a first step, and one that is urgently needed." Please take a look at the section titled "An outdated system" (pg. 27); where some of the headings critical of past practices read: inconsistencies and inefficiencies, little focus on outcomes or accountability, boards unable to prioritize, lack of data, state has difficulty addressing modern water problems and lack of science! About lack of science (pg. 42) "Countless water users, environmentalists and water experts noted that the water boards do not engage in sufficient scientific research to support new regulation." Is this still true with regards to the draft Phase II permit before us in that there is a lack of scientific basis for all the requirements?

The summary of Little Hoover report states California "… does not rank the biggest threats to water quality and systematically match its finite resources to address the most serious of them using the tools of scientific and economic analysis." I strongly promote and would applaud such an economic and scientific approach to improving water quality.

The first paragraph of the Exec. summary from the Little Hoover report states "California is attempting to solve modern water pollution problems with an antiquated system." In these difficult economic times we really need to generate and support water quality programs that are frugal, easy, efficient, and hit the mark of biggest "bang for the buck." This gets my support over the shotgun approach to storm water management.

The report also states "Urban stormwater is one of the biggest challenges the state faces…caused by modern city life." However, the County of Sonoma has jurisdiction over what is basically an agricultural county of vineyards, pastures, and upland forests. I ask you is it acceptable to require the County to comply with a Phase II permit that in many ways is more prescriptive and onerous than the Phase I permit held by many cities with populations in the hundreds of thousands?

The report states the "boards have lost the confidence of a diverse array of stakeholders." and that the Regional Boards do not have sufficient data "to make decisions, determine whether programs are effective, or analyze whether the costs of regulation are worth the incremental benefits to our water supplies." Urban storm water is a "vexing problem with costly solutions, yet the state has not developed an adequate system for assessing and prioritizing this problem and other non-point source pollution problems."

Further statements from the Little Hoover report include 1) because of the autonomy given each regional board "there is little focus on clean water outcomes…", 2) the boards "also acknowledge they have difficulty prioritizing water quality problems", 3) the boards fail to use any type of cost-benefit analysis to help determine priorities, and 4) that the regional boards "admit they have difficulty in analyzing watersheds to determine whether their programs are protecting and improving water quality."Why then add additional regulatory requirements now in these depressed economic times when there is no guarantee any creek will be the better for it? Especially when third party law suits are possible outcomes from the added regulatory burden I must oppose the draft permit as written.

So, I ask you to please ask yourself and your staff: how do you know that the costs and burdens of the details of this draft Phase II permit will achieve our collective goals of improving water quality? I ask you to please take this opportunity to take the time to adequately and thoroughly review the written comments you shall receive in the light of the Little Hoover Commission and do not rush adoption of this Phase II permit.

Pg. xi of the Little Hoover report states: "Finally, the water boards should incorporate cost-effectiveness tests into their analysis of programs to help them prioritize and find the most cost-effective solutions to water quality problems. **The goal is …to help the regulated and regulators find ways to improve water quality in the most cost-efficient manner possible and meet statutory requirements to balance water quality needs with other factors, such as economics."** (emphasis added)

Conclusion

I feel our current Phase II program is robust yet could use further internal development to better achieve water quality improvements in an effective, efficient, and paced manner. I also feel the County of Sonoma does not need a new set of permitting requirements such as many that are contained within the second draft Phase II permit. As presented and if adopted these new Phase II programs are going to be difficult to implement and complicated by the uncertainty on the part of the state to enforce those requirements. We also object to the estimated triple increase in cost of the County Phase II storm water program due to new requirements of the draft Phase II permit.

The County of Sonoma asks you to take these comments, the comments of CASQA, the Russian River Watershed Association, and the Statewide Stormwater Coalition; and the comments from all Phase II counties or cities and seriously review those comments for improvement, clarification, and edits in the next daft of the Phase II permit.

The reality is the County of Sonoma will continue to be dedicated to improving storm water quality via various programs independent of the content of the final Phase II permit. I hope the SWRCB truly understands that the scope, cost, and timeline of these new storm water requirements will make it extremely difficult for the County of Sonoma to comply with all the new requirements of the reviewed draft Phase II thus making the County liable to third party law suits. The permit will make it difficult for the County to balance its budget, will necessitate further slashing of other County programs, or make certain additional layoffs of County staff even after the past three years of severe budget reductions.

When the Little Hoover report and we both tell you county governments are struggling to balance their budgets that is true. When we tell you the County of Sonoma is dedicated to improving water quality via local Sonoma County programs that is also true. When we tell you the last thing the County of Sonoma needs is paper programs that do not result in on-the-ground improvements or have little basis in improving water quality that is also true.

Sincerely,

/signed original by/
Reg Cullen

County of Sonoma
Senior Engineer
Permit and Resource Management Department

Attachments: RRWA and draft SSC comment letters plus legal review by Best, Best, and Krieger

City of Arroyo Grande
City of Atascadero
City of Auburn
City of Carmel by the Sea
City of Ceres
City of Commerce
City of Davis
City of Del Rey Oaks
City of Goleta
City of Kingsburg
City of Lodi
City of Lompoc
City of Manhattan Beach
City of Marina
City of Monterey
City of Morro Bay
City of Napa
City of Newman
City of Pacific Grove
City of Paso Robles
City of Patterson
City of Pismo Beach
City of Riverbank
City of Rocklin
City of Roseville
City of San Luis Obispo
City of Sand City
City of Santa Maria
City of Seaside
City of Signal Hill
City of Soledad
City of Sonoma
City of Tracy
City of Turlock
City of Watsonville
City of Woodland
City of Yreka
City of Yuba City
Town of Loomis
Town of Truckee
County of Placer
County of San Bernardino
County of San Luis Obispo
County of Santa Cruz
County of Shasta
County of Sonoma
County of Stanislaus
County of Yolo
California Chapters of the American Public Works Association
California State Association of Counties
League of California Cities
Regional Council of Rural Counties
San Luis Obispo Chamber of Commerce
Shasta County Water Agency

STATEWIDE STORMWATER COALITION

July 23, 2012

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

RE: COMMENT LETTER – 2nd DRAFT PHASE II SMALL MS4 GENERAL PERMIT

Dear Ms. Townsend:

On behalf of [insert number that sign] statewide entities and public agencies ("Statewide Stormwater Coalition" or "Coalition"), we hereby submit comments to the second draft of the Phase II Permit for small Municipal Separate Storm Sewer Systems ("MS4s").

The Coalition supports efforts to maintain and improve water quality in California. We appreciate that the State Board redrafted the Phase II permit and responded to some of our concerns. However, major concerns remain.

Best Best & Krieger has submitted a separate letter (**Attachment A)** detailing legal problems with the second draft. The California Stormwater Quality Association (CASQA) has commented separately. The Coalition joins with these comments as well as the joint letter from the California League of Cities, California State Association of Counties and the Regional Council of Rural Counties, and adds the following:

- The permit imposes compliance at a cost which is not feasible;
- The permit's receiving water limitations leave permittees uncertain about how to comply and vulnerable to legal challenge;
- The process for implementing the permit is unclear, and leaves permittees vulnerable to legal challenge;

- Several parts of the permit are over-specific and are redundant with other State regulations; which hampers permittees' legal ability to effectively protect water quality, and (again) makes them vulnerable to legal challenge;

- The State Board lacks the legal authority to require certain provisions within the permit.

The Coalition's number one concern: COST OF COMPLIANCE.

The second draft Permit imposes unacceptable costs on permittees at a time of widespread economic distress.

The second draft permit includes approximately 46 major task elements and 131 tasks for traditional MS4s. Of these 131 tasks, 116 or 89% are required to be implemented or completed by the end of the third year of the permit term. A chart of these task elements, tasks and time frames is included as **Attachment B.**

If these requirements stand, individual permittees will have to hire staff or consultants to perform them. Although the State Board concludes, based on a *statewide* study from 7 years ago, the cost of the draft permit is acceptable and the public is "willing to pay" for clean water, this study was completed prior to the recent economic downturn; an economic downturn that has created severe cutbacks in public services. In fact, local public entities continue to lose sources of revenue to the State. The abolishment of redevelopment agencies is the most devastating recent example. The State's economy remains stagnant. Proposition 218, court decisions and political realities continue to erode public entities' real-life ability to enact fees or taxes to pay for regulatory programs. What matters, is the true fiscal ability for MS4s to comply with the stringent permit requirements. Further, these greatly expanded requirements have not been proven to have a clear nexus to improved water quality.

All of these constraints are magnified for **small** MS4s. The cost for a small MS4 to retool for the proposed Phase II permit is daunting in real and political terms. Every budgetary decision is subject to intense public scrutiny and criticism. Each required task forces cities to make a direct choice between public safety and less immediate public needs.

The State Board in Order WQ 2000-11 has acknowledged that the cost of compliance is a relevant factor in determining MEP. As the State Board's Office of Chief Counsel has stated, "BMPs should have a cost that bears a reasonable relationship to the pollution control benefits to be achieved." The Coalition believes that the costs of the BMPs in the draft permit do not bear a reasonable relationship to the pollution control benefits to be achieved and thus exceed the MEP standard.

The Coalition's number two concern: RECEIVING WATER LIMITATION LANGUAGE.

Language in the second draft permit does not clearly allow permittees to comply with water quality standards over time by using best management practices supplemented by the iterative process.

The current permit language exposes Permittees to enforcement actions and lawsuits even if the discharger is fully implementing its stormwater program. If the water into which a Permittee discharges is not meeting water quality criteria, the discharger could be liable, regardless of all its other costly efforts to reduce pollutants in its discharges. It is generally acknowledged that there is no feasible way at this time to meet water quality criteria for certain pollutants such as copper and zinc. Nevertheless, the State Board has not used its discretion to allow dischargers to comply with water quality criteria over time through the iterative process. By failing to use its discretion to draft permits based upon achieving compliance through the iterative process, the State Board has left local governments vulnerable not only to enforcement, but also to third party lawsuits that will cost millions of dollars to resolve, over and above the millions already being spent on the stormwater program.

To correct this problem, the State Board should substitute receiving water limitations language proposed by CASQA, as emphasized in the Best, Best & Krieger letter:

"Except as provided in this Section D, discharges from the MS4 for which a Permittee is responsible shall not cause or contribute to an exceedence of water quality standards contained in a Statewide Water Quality Control Plan, the California Toxics Rule (CTR), or in the applicable Regional Water Board Basin Plan."

"If a Permittee is found to have discharges from its MS4 causing or contributing to an exceedance of an applicable water quality standard or causing a condition of nuisance in the receiving water, the Permittee shall be deemed in compliance with this Section D and this Order, unless it fails to implement the requirements of this Section D or as otherwise covered by a provision of this Order specifically addressing the constituent in question, as applicable."

The Coalition's number three concern: UNCERTAIN PERMIT TERMS.

The second draft permit allows Regional Board discretion in permit requirements creating uncertainty for permittees regulated by the Order.

Although the second draft permit claims to be prescriptive and clear, it contains open-ended terms and provisions for interpretation by the Executive Officer of Regional Boards.

For example, the second draft permit contains open-ended terms related to public outreach, post construction standards and water quality monitoring:

- Permittees could be required to implement costly Community Based Social Marketing education and outreach strategies if required by their local Regional Board's Executive Officer. However, no criteria are provided to determine how or when this determination would be made.

- Permittees which discharge to an Area of Special Biological Significance, have a Total Maximum Daily Load or have been identified with a water body that is impaired and is 303(d) listed are required to meet with their local Regional Board after permit adoption to determine water quality monitoring requirements.

The true impact of these programs cannot be known until after the permit is adopted.

Along these same lines, the Central Coast MS4s have been "carved-out" and are required to implement post-construction standards that exceed those required for other permittees. This "carve-out" is inappropriate given the nature of a general permit which is to be one permit of general application. The uncertainty is further magnified by the fact the Central Coast Regional Board has not yet acted upon the post-construction standards. Comments from CASQA to the Central Coast Regional Water Quality Control Board concerning the Central Coast specific post-construction standards indicate the requirements are unreasonable, infeasible for many projects, have no demonstrated additional environmental benefit and are not cost-effective. Even more importantly, the more restrictive numeric standards have not been shown to have a water quality benefit.

The extreme nature of the proposed Central Coast post construction numeric standards further compounds the difficulty for Central Coast MS4s to comply with the full terms of this permit. Central Coast MS4s should be subject to the same post-construction standards as all other Phase II MS4s under the Phase II Permit. Especially since the more restrictive numeric standard has not been shown to provide water quality benefit for its more onerous and costly burden.

Another area of uncertainty in the second draft permit is the intent and purpose of the Guidance Document that is to be submitted at the time a Permittee files its Notice of Intent. Coalition members spent years and tens of thousands of dollars each to prepare and begin implementing storm water management plans. The second draft permit, in particular findings 30-33 and Section E.1.b, says permittees won't submit these plans to Regional Boards anymore; however, a Guidance Document that identifies overall planning and all permit requirements along with the responsible implementing parties is required. This raises several questions for permittees.

First, what is the nature and legal status of a "storm water program guidance document?" Second, will interested members of the public accept that they have no legal opportunity for comment on these "guidance documents?" Third, exactly what is the Regional Board Executive Officer's authority regarding review and modification of

these documents? Finally, what process would a permittee use to question a Regional Board Executive Officer's determination in the event of a disagreement?

Unless these questions are resolved through changes to the second draft permit now, they will recur again and again for permittees in the political process and in expensive court challenges. Consequently, the State Board should revise the second draft permit as proposed in the letter from Best, Best & Krieger.

Specifically, permittees should be able to request that the Regional Board Executive Officer allow continuation of existing best management practices in lieu of the requirements of the second draft permit. If the State Board intends to allow the Regional Board Executive Officer to unilaterally decide whether to continue a current program, permittees should be allowed to petition (afforded an appeal process for) these decisions to the State Board.

The Coalition's number four concern: OVER-SPECIFICITY.

Over-specific requirements in the second draft permit will hamper permittees in achieving water quality improvement.

The Best Best & Krieger letter demonstrates that several portions of the second draft permit have no legal basis or constitute State mandates over and above Federal Clean Water Act requirements. As stated above, the Coalition joins in these comments. The Coalition has an additional, practical concern; these provisions are so specific that the strict compliance required of permittees will sacrifice real-world water quality gains.

Here are some examples:

- The Program Management Element requires that permittees have available all of a large menu of enforcement tools. These tools must be used and their use documented in a specified manner—without regard to whether it is effective to do so in the particular jurisdiction or circumstance.

- More specifically, task Element E.6.c requires permittees to develop and implement an Enforcement Response Plan by year 3. However, task element E.6.a requires permittees to have adequate legal authority to address over 10 specific elements in controlling pollutant discharges by year 2. Because implementing task E.6.a is likely to require Permittees to update their ordinances or other regulatory mechanisms, it seems redundant to require an Enforcement Response Plan to reiterate the regulatory mechanisms develop in E.6.a. Further, the purpose of the Enforcement Response Plan is unclear given that it is never required as a submittal in a Permittee's annual report. Instead, task E.6.c requires a report summarizing all enforcement activities.

- If required by the Executive Officer of a Regional Board, the permittee will be required to implement detailed Community-Based Social Marketing requirements—without regard to whether these strategies work in the particular community. Further, it is unclear the basis on which an Executive Officer will make that determination.

- All permittees are required, at a minimum, to provide storm water education to school-age children, with a suggested curriculum named. However, permittees have no legal authority to impose curriculum on schools. Further, the curriculum suggested has limited if any direct stormwater quality educational pieces.

- The staff of all permittees must be repeatedly trained and certified to detailed standards; interestingly, third-party plan reviewers need only be "trained." Specifically, requiring all plan reviewers and inspectors to be QSD/QSP qualified is excessive.

- Section E.12.j, which requires permitees to update their general plan and specific plans, does not align with California local land use authorities. Unless state law is amended to require the inclusion of certain considerations in planning, zoning and building laws, the State Board lacks legal authority to compel dischargers to amend their general plan or other planning documents in any particular way.

Whether or not over-specific permit requirements make water-quality improvement sense, permittees will be obligated to strictly comply with them on pain of enforcement action by a Regional Board or litigation by interested members of the public.

For all of the reasons detailed in the Best, Best & Krieger letter, as well as these additional practical considerations, the Board should:

- Revise the receiving water language;

- Revise language to align with the federal Clean Water Act;

- Eliminate over-specific requirements;

- Allow Central Coast MS4s to comply with the general order post-construction standards;

- Provide clear guidance to Regional Board Executive Officers for direction to Permittees and enforcement of the Order.

Sincerely,

Attachment A – Letter from Best Best & Krieger
Attachment B – Task Matrix

cc:
Governor Jerry Brown
Matt Rodriguez, Cal EPA Secretary

Senator Thomas Berryhill
State Senator Sam Blakeslee
Senator Anthony Cannella
State Senator Noreen Evans
Senator Tony Strickland
State Senator Doug LaMalfa
State Senator Rod Wright
State Senator Lois Wolk

Assembly Member Katcho Achadjian
Assembly Member Luis Alejo
Assembly Member Michael Allen
Assembly Member Bill Berryhill
Assembly Member Joan Buchanan
Assembly Member Wes Chesbro
Assembly Member Beth Gaines
Assembly Member Ted Gaines
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July 19, 2012

VIA E-MAIL [COMMENTLETTERS@WATERBOARDS.CA.GOV]

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

Re: Comment Letter - 2nd Draft Phase II Small MS4 General Permit

Dear Ms. Townsend:

Best Best & Krieger LLP ("BBK") has been retained by the City of Roseville ("City") to provide legal comments on the 2nd Draft Phase II Small MS4 General Permit ("Draft Permit") and the Draft Fact Sheet for the Draft Permit ("Draft Fact Sheet"). These comments support and supplement other comments submitted by the City as well as the comments of the Statewide Stormwater Coalition ("SSC"), a group in which the City is an active member. For ease of reference, these comments follow the sequential order of the Draft Permit and the Draft Fact Sheet; they are not organized in order of importance.

I.
Comments on the Draft Permit

The Draft Permit imposes significant legal obligations on dischargers that will create major direct and indirect costs and potential legal exposure. In finalizing the Draft Permit, the City asks the State Board to keep two key legal principles in mind. First, to decipher the meaning and enforceability of National Pollutant Discharge Elimination System ("NPDES") permit terms, a court will review a permit's provisions and meaning as it would any contract or legal document. (Russian River Watershed Protection Comm. V. City of Santa Rosa (9th Cir. 1998) 142 F.3d 1136, 1141.) For this reason, the final Permit must be drafted with the legal precision of a contract, and all ambiguous language must be eliminated. Vague language could lead to the imposition of legal liability that may not be consistent with the policy decisions of the State Board.

Second, courts have stated that all permit conditions are legally enforceable. (Nw. Envtl. Advocates v. City of Portland (9th Cir. 1995) 56 F.3d 979, 986.) Therefore, the State Board should only include in the final Permit conditions that the State Board intends to be legally

enforceable. Statements in the Draft Permit that provide guidance or direction on how to implement enforceable conditions must be removed from the Draft Permit and placed in the Draft Fact Sheet or other document that is not legally enforceable. If the State Board follows this approach, the Draft Permit could be shortened significantly and dischargers would have a much clearer understanding of the enforceable conditions. Future disputes would thereby be limited or avoided.

With these two key legal principles in mind, the City submits the legal comments set forth below.

A. Findings

Under current law, the State Board's issuance of the Small MS4 Permit is a quasi-judicial decision. (City of Rancho Cucamonga v. Regional Water Quality Control Board (2006) 135 Cal.App.4th 1377, 1385.) As a quasi-judicial decision, the State Board's action must be supported by legally adequate findings, and those findings must be supported by evidence in the record. (Topanga Association for a Scenic Community v. County of Los Angeles (1974) 11 Cal.3d 506.) The following findings in the Draft Permit are not legally adequate or are not supported by evidence in the record.

1. Finding 10. This finding discusses the role that urban storm water plays in the quality of water in California. This finding should be revised to acknowledge that MS4 dischargers do not have control over the sources of many of the pollutants in urban storm water. Many of the pollutants of concern in urban storm water come from sources that can only be regulated at the federal or state level, such as copper in break pads or legally available pesticides or fertilizers. Further, many contributors to urban storm water pollution – such as agricultural and federal or state facilities – are not, in many cases, subject to direct control by MS4 dischargers. MS4 dischargers should only be held accountable for pollutant sources over which they have control. This finding should be revised to reflect these undisputed facts.

2. Finding 28. This finding asserts that the Draft Permit contains numerous compliance options for the public outreach and monitoring and water quality monitoring requirements in order to account for the variable levels of resources available to dischargers. However, the Draft Permit allows Regional Board executive officers ("EOs") to compel that certain options be used. (See, e.g., E.7.) Therefore, this finding does not accurately reflect the true nature of the Draft Permit and implies that there is more flexibility in the Draft Permit than actually exists. To the extent that flexibility is provided in the Draft Permit, it is generally

provided to the Regional Board, rather than to the dischargers. This is not flexibility; it is additional regulation. This finding should be deleted or revised to conform to the actual language of the Draft Permit.

3. Finding 29. This finding summarizes how the Draft Permit purports to address compliance requirements that are beyond the effective date of the Draft Permit. 40 C.F.R. § 122.46 provides that MS4 permits "shall be effective for a fixed term not to exceed 5 years." The State Board lacks legal authority to include compliance requirements that exceed the fixed term of the Draft Permit. This finding should be deleted or revised to reflect applicable legal requirements.

4. Finding 30. This finding merely repeats the requirements of Section E.1.b of the Draft Permit. Because the finding contains no facts or explanation in addition to the requirements of Section E.1.b, it should be deleted or, at a minimum, revised as suggested in the City's comments to Section E.1.b as set forth in this letter.

5. Finding 37. This finding purports to summarize the maximum extent practicable ("MEP") standard set forth in Section 402(p)(3)(B)(iii) of the Clean Water Act ("CWA") and to link the Draft Permit's conditions to that standard. The finding misstates the requirements of CWA section 402(p)(3)(B)(iii) and fails to provide evidentiary support for the assertion that the Draft Permit is consistent with the MEP standard.

   CWA section 402(p)(3)(B)(iii) creates a unique standard for municipal storm sewer discharge permits. It provides that permits "for discharges from municipal storm sewers . . . shall require controls to reduce the discharge of pollutants to the maximum extent practicable . . . ." Courts have held that this language "creates a lesser standard" that "replaces" the more stringent standards applicable to other NPDES dischargers. (Defenders of Wildlife v. Browner (9th Cir. 1999) 191 F.3d 1153, 1165.) The focus of this unique statutory language is on the "controls" that are designed to reduce the discharge of pollutants to the MEP. To be consistent with the statutory language, therefore, the first sentence of this finding should be revised as follows: "*Consistent with Clean Water Act section 402(p)(3)(B)(iii), this Order requires controls to reduce the discharge of pollutants from the MS4 to the maximum extent practicable (MEP).*" The appropriate legal reference is to CWA section 402(p)(3)(B)(iii) rather than to 40 C.F.R. § 122.34(a), since the express language of the CWA governs over the regulations that implement the CWA.

The finding should also acknowledge that dischargers achieve compliance with the MEP standard by implementing the required controls. Due to the variable nature of stormwater discharges through the MS4 system, Congress imposed on MS4s a less stringent, control-based standard that is lower than the standards applicable to industrial discharges. In the Phase II regulations, EPA expressly states that effective implementation of the six minimum measures "will reduce pollutants to the maximum extent practicable (MEP)." (64 Fed. Regs. 68722, 68752-78754.) In reviewing the Phase II regulations, the Ninth Circuit noted that "[a]ccording to the Phase II Rule, the operator of a Small MS4 has complied with the requirement of reducing discharges to the 'maximum extent practicable' when it implements its stormwater management program, i.e. when it implements its Minimum Measures." (Environmental Defense Center v. United States Environmental Protection Agency (9th Cir. 2003) 344 F.3d 832, 855.) This finding should be revised to reflect the unique nature of the MEP standard applicable to MS4s.

This finding also lacks factual support. The State Board, as the permitting authority, must, in the first instance, provide factual support for the assertion that the controls required by the Draft Permit are necessary to reduce the discharge of pollutants to the MEP. (See City of Rancho Cucamonga v. Regional Water Quality Control Board, 135 Cal.App.4th at 1386-1387; State Water Board Order WQ 2000-11.) The State Board must provide factual support sufficient to demonstrate that it has considered whether the required controls will: (1) address a pollutant of concern; (2) comply with applicable regulations, (3) have public support; (4) have a cost that bears a reasonable relationship to the pollution benefits to be achieved; and (5) be technically feasible considering soils, geography, water resources, etc. To satisfy its legal obligations, the State Board – not the dischargers on whom the Permit is imposed – must provide such evidence as part of the record.

6. Finding 38. This finding asserts that the Draft Permit's receiving water limitations language is consistent with State Water Board Order WQ 99-05. Unless reversed by the United States Supreme Court, which just recently decided to review the case, the decision of the Ninth Circuit in Natural Resources Defense Council, Inc. v. County of Los Angeles (9th Cir. 2011) 673 F.3d 880 stands for the proposition that the Draft Permit's receiving water limitations language is no longer consistent with the purpose and intent of the State Board's prior

precedential orders.[1] The State Board should revise the receiving water limitations language to make it consistent with the prior orders. Specific language that would achieve that goal is set forth in the City's comment below on the receiving water limitations language found in Section D of the Draft Permit and in the City's comments on the Draft Fact Sheet.

7. Finding 39. This finding addresses Total Maximum Daily Loads ("TMDLs") and describes how the Draft Permit attempts to include the waste load allocations ("WLA") from applicable TMDLs into the Draft Permit as enforceable conditions. 40 C.F.R. § 122.44(d)(1)(vii)(B) states that when developing water quality based effluent limits, the permitting authority shall ensure that effluent limits developed to protect a narrative water quality criterion, a numeric water quality criterion, or both, are consistent with the assumptions and requirements of any available WLA for the discharge. Rather than include requirements in the Draft Permit that are "consistent with the assumptions and requirements" of applicable WLAs, the Draft Permit expands TMDL requirements. Although the applicable legal authority provides the State Board with some flexibility to incorporate WLAs into permits in ways that recognize fact-specific conditions such as load trading or offset programs, it does not give authority for the wholesale expansion or amendment of WLAs. This finding and the approach taken in the Draft Permit is not consistent with legal authority.

8. Finding 51. This finding addresses the cost of complying with the Draft Permit and whether the required BMPs meet the MEP standard. The finding is not supported by evidence and the State Board must provide such evidence to support the finding. In addition, from an unfunded state mandates perspective, the Commission on State Mandates, not the State Board, will have the final say on whether the BMPs in the Draft Permit are consistent with the MEP standard or exceed that standard. (Redevelopment Agency v. Commission on State Mandates (1996) 43 Cal.App.4th 1188, 1193; County of Los Angeles v. Commission on State Mandates (2007) 150 Cal.App.4th 898, 908.) A more expansive discussion of cost and unfunded state mandates is set forth below in connection with the Draft Fact Sheet.

[1] Because the United States Supreme Court will be reviewing the validity of the NRDC decision, the State Board should not rely upon the holding of that decision for support for the issuance of the Draft Permit.

B. Section B – Discharge Prohibitions

1. Section B.1. This provision prohibits discharges of waste that are already prohibited by the applicable Basin Plan(s). Since the Draft Permit is a point-source discharge permit, the phrase "*from the MS4 for which a Permittee is responsible*" should be inserted after the word "waste." Dischargers may only be held accountable for discharges "from the MS4." (40 C.F.R. § 122.26(a)(3)(vi) (stating that dischargers "need only comply with permit conditions relating to discharges from the municipal separate storm sewers for which they operate.").) If the Draft Permit is intended to address nonpoint sources, please set forth the State Board's legal authority to include such a requirement in a point-source discharge permit.

2. Section B.2. See comment to Section B.1 above.

3. Section B.3. See comment to Section B.1 above. Also, please delete the phrase "or another permitted MS4" or explain the legal authority for including this provision. Specifically, what legal authority allows the State Board to regulate through an NPDES permit the movement of water within an interconnected MS4 system? It is recommended that the State Board simply follow CWA section 402(p)(3)(B)(ii) and include in the Draft Permit a requirement that the Permittees "effectively prohibit non-stormwater discharges into the storm sewers." Such a condition is all that CWA section 402(p)(3)(B)(ii) requires. Finally 40 C.F.R. § 122.26(d)(2) allows for certain categories of nonstormwater discharges into the MS4, unless the discharger makes a finding that such categories are a cause of pollutants to waters of the United States. Please explain the legal basis for the State Board – rather than the dischargers – to make this decision unilaterally for all dischargers subject to this statewide permit. 40 C.F.R. § 122.26(d)(2) contemplates a more local, fact-specific determination made by the discharger.

C. Section C – Effluent Limitations

1. Section C.1. Consistent with CWA section 402(p)(3)(B)(iii), please rewrite the MEP limitation to read that: "*Permittees shall implement the controls required by this Order to reduce the discharge of pollutants from their MS4s to waters of the United States to the MEP.*" Also, please move the provisions regarding TMDLs and discharges to ASBSs into separate provisions at the appropriate locations of the Draft Permit. As currently written, the State Board has jumbled together the unique concept of MEP, the TMDL/water quality based concept of WLAs and a unique discharge prohibition. Combining such different concepts into one

effluent limitation is not appropriate. This is a good example of the type of vague language that must be eliminated from the Draft Permit.

D. Section D – Receiving Water Limitations

1. "The Cause or Contribute" Paragraph. In light of the Ninth Circuit's decision in NRDC v. County of LA, the State Board should revisit the receiving water limitations language of the Draft Permit. Although the United States Supreme Court has decided to review this decision, the result reached by the Ninth Circuit should compel the State Board to align the language in the Draft Permit with the State Board's previous policy statements regarding the manner in which compliance with water quality standards is to be achieved.

The importance of this issue cannot be overstated. To maintain a viable MS4 permitting system that is consistent with the unique requirements of Section 402(p)(3)(B)(iii) of the CWA, it is imperative that the State Board revise the receiving water limitations language.

The starting point for the State Board's consideration of the receiving water limitations language should be the plain language of CWA section 402(p)(3)(B)(iii) as confirmed by Defenders of Wildlife v. Browner, 191 F.3d 1159. As the Browner decision illustrates, CWA section 402(p)(3)(B)(iii) is an unambiguous statement of Congress' intent to replace the requirements of CWA section 301(b)(1)(c), which requires strict compliance with water quality standards, with the MEP standard. As the Browner court explained, CWA section 402(p)(3)(B)(iii) "creates a lesser standard" that does not require strict compliance with water quality standards. Instead, CWA section 402(p)(3)(B)(iii) gives the permitting authority the discretion to determine what pollution controls are appropriate.

In its prior precedential decisions, the State Board has expressly stated that the mandatory receiving water limitations language found in State Board Order WQ 99-05 "does not require strict compliance with water quality standards." (State Water Board Order WQ 2001-15.) Rather, using the discretion found in CWA section 402(p)(3)(B)(iii), the State Board has stated that compliance with water quality standards is "to be achieved over time, through an iterative approach requiring improved BMPs." (Id.) The unequivocal policy statements found in State Board Order WQ 2001-15 are expressly linked to the receiving water limitations language in State Board Order WQ 99-05, and represent the State Board's own interpretation of its mandatory language.

Contrary to the State Board's interpretation of its own receiving water limitations language, the Ninth Circuit has held that the State Board's mandatory receiving water limitations language does, in fact, require strict compliance with water quality standards. (NRDC v. County of LA, 673 F.3d at 897.) In a case interpreting the receiving water limitations language of the 2001 Los Angeles County MS4 Permit, which followed the State Board's required language, the Ninth Circuit held that the plain language of the receiving water limitations language "countenances enforcement of the water-quality standards when exceedances are detected by the various compliance mechanisms . . . ." Under the Ninth Circuit's interpretation, compliance is not achieved over time through the iterative process as the State Board has previously stated. Rather, as interpreted by the Ninth Circuit, strict and immediate compliance with water quality standards is required by the State's receiving water limitations language. As noted above, the United States Supreme Court has recently decided to review the decision reached by the Ninth Circuit in the NRDC case. Although the United States Supreme Court might reverse the decision, and although the decision should not be relied upon until the Supreme Court issues its opinion, the Ninth Circuit's analysis is still instructive about how courts might misinterpret the State Board's receiving water limitations language.

To remain consistent with its expressed policy as reflected in State Water Board Order WQ 2001-15, the State Board must revise the language of Section D. The key change to this first paragraph is to express the "cause or contribute" limitation as follows: *"Except as provided in this Section D, discharges from the MS4 for which a Permittee is responsible shall not cause or contribute to an exceedance of water quality standards contained in a Statewide Water Quality Control Plan, the California Toxics Rule (CTR), or in the applicable Regional Water Board Basin Plan."*

This comment is written with the assumption that the State Board has not, without public notice and an opportunity to comment, somehow changed the policy position expressed in State Water Board Order WQ 2001-15. It is well documented that immediate compliance with many water quality standards like copper and zinc are impossible for dischargers to achieve at this time. That is why the policy to achieve compliance over time through improved BMPs is appropriate. If the State Board has changed its policy and now requires strict compliance with numeric water quality standards, the State Board should expressly reverse its prior policy statements in an open and public way so that there can be a full policy discussion of the wisdom and costs of such a policy change. Staff has suggested in the Draft Fact Sheet that the result in NRDC v.

County of LA reflects the current policy position of the State Board. If this is accurate, the State Board should confirm this through an open and public process.

2. "The Iterative Process" Provisions. The State Board should also clarify the iterative process and its relationship to achieving water quality standards over time. The California Stormwater Quality Association ("CASQA") has prepared the enclosed proposed language to strengthen the iterative process which the State Board should consider in connection with the Draft Permit. Two revisions are crucial. First, the State Board should amend the language to provide that for receiving waters that are subject to an adopted TMDL, compliance with the implementation plan for that TMDL is compliance with the receiving water limitations. Second, the State Board should include a provision as follows: *"If a Permittee is found to have discharges from its MS4 causing or contributing to an exceedance of an applicable water quality standard or causing a condition of nuisance in the receiving water, the Permittee shall be deemed in compliance with this Section D and this Order, unless it fails to implement the requirements of this Section D or as otherwise covered by a provision of this Order specifically addressing the constituent in question, as applicable."*

E. Section E – Provisions for all Traditional Small MS4 Permittees

1. Section E.1.a. This provision states that where "the requirements of a certain subsection provide a compliance date that is past the effective date of this Order, the Renewal Traditional Small MS4 shall implement its existing program until that date." 40 C.F.R. § 122.46 provides that MS4 permits "shall be effective for a fixed term not to exceed 5 years." The State Board lacks legal authority to include compliance requirements that exceed the fixed term of the Draft Permit.

2. Section E.1.b. This provision allows a Regional Board EO to require continued implementation of current BMPs in lieu of the Draft Permit's requirements (other than post-construction and monitoring). This provision also allows a Permittee to submit a request to the State Board EO to review the Regional Board EO's decision. This provision should be changed in two ways. First, Permittees should be able to request that the Regional Board EO allow continuation of existing BMPs in lieu of the requirements of the Draft Permit. Continuance of a current program should only be required when requested by the discharger and approved by the Regional Board EO. Second, if the decision remains a unilateral one made by the Regional Board EO (which is not recommended), Permittees should be permitted – as allowed by Water Code section 13320 – to petition the Regional

Board's decision to the State Board, not just to request review by the State Board EO.

3. Section E.6. A program management element is not one of the six minimum control measures required by the Phase II regulations. The requirements of this element therefore exceed the mandate of the CWA and implementing regulations.

4. Section E.6.a.(i). CWA sections 402(p)(3)(B)(ii) and (iii) create two separate legal requirements. Section 402(p)(3)(B)(ii) requires that permits for discharges from MS4s must include a "requirement to effectively prohibit non-stormwater discharges into the storm sewer." To comply with such a condition, dischargers need to establish legal authority – through ordinance or other methods – to "effectively prohibit" discharges "into" the MS4. (See 40 C.F.R. § 122.26(d)(2)(i).) In contrast, Section 402(p)(3)(B)(iii) requires that MS4 permits must "require controls to reduce the discharge of pollutants to the maximum extent practicable . . . ." To comply with such a condition, dischargers need to implement the required controls to reduce discharges "from" the MS4 to the MEP. The Draft Permit inappropriately combines these two separate and distinct standards for discharges "into" and for discharges "from" the MS4 into one "into and from" standard. The State Board has previously recognized that such a combined "into and from" standard is not appropriate. (State Board Order WQ 2001-15.) Therefore, the Draft Permit must be revised to eliminate all "into and from" language as used here. The Draft Permit must respect the legal distinctions contained in CWA section 402(p)(3)(B)(ii) and (iii).

5. Section E.6.a.(ii). CWA section 402(p)(3)(B)(ii) requires MS4 permits to contain a requirement to "effectively prohibit" non-stormwater discharges into the MS4. The CWA requirement is not to "prohibit and eliminate." All references to "prohibit and eliminate" or similar statements that exceed the "effectively prohibit" requirement must be deleted because they are not the requirement contained in the CWA.

6. Section E.6.a.(ii).(f). The reference to "industrial and commercial facilities" should be deleted because the Draft Permit no longer covers such facilities. At a minimum, please clarify that this provision does not create an obligation to require retrofits of existing industrial and commercial facilities. Such retrofits are not a current requirement of the Phase II program and would be cost prohibitive. In fact, EPA is currently undergoing a rulemaking to consider whether including a retrofit component in the storm water program is appropriate. Until EPA

completes its process, retrofits should not be required, especially as they relate to private industrial and commercial facilities.

7. Section E.6.a.(ii).(h). This section requires Permittees to have adequate legal authority to "[e]nter private property for the purpose of inspecting, at reasonable times, any facilities, equipment, practices, or operations for active or potential storm water discharges, or non-compliance with local ordinances/standards or requirements in this Order." Both the United States and California Constitutions limit the ability of Permittees to enter private property for purposes of inspection. These fundamental Constitutional limitations must be honored and honoring them makes compliance with this section, as written, impossible. Permittees simply lack the legal authority to unilaterally enter private property. Rather, Permittees must obtain consent to enter private property or, absent consent, must obtain an inspection warrant. Therefore, this section must be revised to acknowledge the limitations placed on Permittees by the United States and California Constitutions. At a minimum, this section should be preceded by the following clause: "*After obtaining legally valid consent or an inspection warrant issued by a court of competent jurisdiction, ...*" The Draft Permit cannot compel a Permittee to violate the individual liberties of its residents.

8. Section E.6.b.(i) and (iii). Please explain the need and legal basis for the duplicative certification requirements of both legal counsel and the authorized signatory. Such dual certification requirements are not mandated by the CWA or the implementing regulations. Only one certification should be required.

9. Section E.6.c.(i). Please explain the need and legal basis for the requirement to develop and implement an Enforcement Response Plan. For municipal dischargers, enforcement options are already set forth in the enforcement provisions of their municipal codes. This provision should be deleted or, at a minimum, amended to acknowledge that the procedures called for in municipal codes satisfy this requirement. It is redundant to require an Enforcement Response Plan when municipal codes already set forth available response options.

10. Section E.6.c.(ii).(d).(2). The State Board is responsible for enforcing the Industrial and Construction Permit. The State Board cannot shift this obligation to local dischargers without providing applicable funding. Therefore, please delete the limitations on referrals related to the Industrial and Construction Permit. Dischargers will enforce their own requirements; the State must enforce its requirements and cannot require dischargers to do the State's job without

funding. At a minimum, the references to industrial facilities should be deleted because the Permittees will not conduct regular inspections of such facilities.

11. Section E.6.c.(ii).(f). For municipal dischargers, existing municipal codes provide the necessary tools to address repeat offenders. This provision regarding recidivism should be deleted or, at a minimum, amended to permit existing municipal codes to constitute compliance.

12. Section E.7. The discretion provided to Regional Board EOs to require community-based social marketing ("CBSM") should be deleted. At a minimum, clear criteria should be added to establish the conditions under which Regional Board EOs may require Permittees to comply with the CBSM provisions. There is no legal requirement to use a particular type of public outreach, and the decision on how best to satisfy the requirement to develop an education and outreach program must be left to dischargers. Please set forth any legal authority for this requirement and explain the conditions under which the State Board believes that Regional Board EOs should use their discretion under this provision.

13. Section E.7.b.2.a. The requirement that plan reviewers, permitting staff and inspectors be certified as QSDs or QSPs is excessive and beyond the requirements of the Phase II regulations. It should be deleted. If not eliminated, the requirement should be revised to specify that only one QSD or QSP certified person is required. There should also be an exception for smaller cities that do not have the specialized staff contemplated by this provision.

14. Section E.7.b.3.(i). The last sentence of this provision should be revised to require that *"all new hires whose jobs include implementation of pollution prevention and good housekeeping practices"* should receive the required training. As written, the sentence could be interpreted as requiring training of any new hire.

15. Section E.8. The public involvement and participation program requirements exceed the mandates of the Phase II regulations. As the Phase II regulations state, the "public participation program must only comply with applicable state and local public notice requirements." The Draft Permit should only require such compliance. If the State Board wishes to encourage greater public involvement and participation, it should provide guidance to that effect through the Draft Fact Sheet or similar document.

16. Section E.8.(i) and (ii).(e). The State Board lacks legal authority to require dischargers to "actively engage in the Permittee's IRWMP or other watershed-level planning effort." Such a requirement would compel dischargers to spend funds outside their jurisdictional boundaries, an action that the State Board cannot compel.

17. Section E.9. CWA section 402(p)(3)(B)(ii) requires that MS4 permits include a requirement to effectively prohibit non-stormwater discharges into the MS4. As the Phase II regulations make clear, this requires dischargers to, "to the extent allowable under state, tribal, or local law, effectively prohibit through ordinance, or other regulatory mechanism, illicit dischargers into the [MS4]" and to "develop and implement a plan to detect and address illicit discharges . . . ." As more fully explained in this comment letter at comment E.5 above, the statements in this Section E.9 to "eliminate" such discharges should be deleted. Also, these requirements should all be modified by the phrase: *"To the extent allowable under law, ..."* The Draft Permit must recognize that there are legal, physical and funding constraints to "eliminating" non-stormwater discharges. For example, there are constitutional constraints on the ability of dischargers to enter private property to inspect and control illicit discharges. Such legal constraints must be embedded in the Draft Permit in order to make compliance obtainable.

18. Section E.9.c.(ii).(b). Please explain the legal and factual basis for the action level concentrations. Nothing in the Draft Permit or Draft Fact Sheet appears to explain the derivation of these concentrations. Absent this information, it is impossible to determine whether the concentrations are factually or legally valid. To the extent these are intended to serve as numeric effluent limitations, they are legally deficient because they have not been developed in accordance with CWA requirements.

19. Section E.9.d.(ii). The requirement to "conduct an investigation(s) to identify and locate the source of any prohibited non-storm water discharge within 72 hours" is not feasible in most cases. This provision should be revised to provide additional time to commence such an investigation. Also, the language should be revised to clarify that the obligation is only to "commence" the investigation within the required time frame, not to "eliminate" the source within the time frame. Often, investigations into the source and responsibility for such discharges take a significant amount of time, and obtaining ultimate control of the discharge may require court action. Therefore, the Draft Permit should make clear that compliance is achieved through the timely implementation of the investigation.

20. Section E.11.i.(i). The requirements of Section E.11.i could have an adverse impact on flood control and thereby could exceed the authority of CWA section 101(g), which reserves to the states the authority to regulate the movement of water. At most, this provision should simply require dischargers to consider incorporating water quality and habitat enhancement features into new flood management facilities, where feasible. Federal regulations at 40 C.F.R. § 122.26 merely contemplate the creation of a plan to retrofit portions of the flood control system. As noted above, EPA is currently considering a rulemaking that will provide guidance on retrofitting requirements. The State Board should wait until EPA completes its rulemaking process before including retrofitting requirements in the Draft Permit. At a minimum, the Draft Permit should require nothing more than what the regulations require.

21. Section E.12.d.1.(d).(1)(i). The legal concept of vested rights is governed by California court cases and statutes. Whether a municipal discharger could legally impose a new condition on a project always involves a fact-specific legal determination. Therefore, this paragraph must be modified by the phrase: "*To the extent allowable by applicable law . . . .*" Dischargers should not be placed in a position where they may be exposed to litigation for imposing a condition on a discretionary project that may already be vested under California law. It is not for the State Board to define when vesting occurs.

22. Section E.12.d.1.(d).(1)(ii). The ability of dischargers to impose low impact development runoff standards on ministerial projects may be subject to limits under California law. First, such standards could not in any case be imposed until municipal codes are updated through appropriate procedures to make such standards a regulatory requirement of all permits in question. Ministerial projects are exempt from processes such as the California Environmental Quality Act ("CEQA") that might otherwise provide a legal basis for imposing LID conditions. Second, even after municipal codes are updated, serious constitutional "nexus" and "rough proportionality" questions may exist regarding the application of LID standards to individual ministerial projects. For this reason, this paragraph should be modified by the phrase: "*To the extent allowable by applicable law . . . .*"

23. Section E.12.d.2.(i). This paragraph uses the term "effectively reduce." This is not a legal standard in the CWA. It is recommended that, to avoid confusion, the word "effectively" be deleted. Instead, the State Board might consider the using the following phrase derived from 40 C.F.R § 122.34(b)(4)(i): "*reduce pollutants in storm water runoff from Regulated Projects into the MS4.*"

24. Section E.12.d.2.(ii). This section uses a standard that is not found in the CWA as applicable to MS4 dischargers. This section purports to require Permittees to implement source controls and site design measures "to the extent technically feasible to reduce the amount of runoff . . . ." CWA section 402(p)(3)(B)(iii) requires controls to reduce discharges from the MS4 to the MEP. The "to the extent technically feasible" language must be deleted from this and all other provisions of the Draft Permit. It is not a legal standard found in the CWA and appears to imply a stricter standard than the MEP standard Congress created for MS4s.

25. Section E.12.f. There is no requirement in federal law to develop and implement the watershed-based approach called for in this Section E.12.f. A watershed-based approach would require dischargers to expend resources across jurisdictions in a manner that will require contributions for discharges not attributable to each discharger. This exceeds the authority granted to the State and Regional Boards under CWA section 402(p) and Water Code section 13260. Both statutes hold dischargers responsible for only those pollutants that discharge from their point sources. The CWA is not a contribution statute; dischargers are not jointly and severably liable for any and all water quality conditions in a watershed. (See 40 C.F.R. § 122.26(a)(3).) Conditions that impose responsibility for discharges that do not originate from the point sources owned, operated or controlled by the discharger exceed the State Board's legal authority.

26. Section E.12.h. Dischargers should not be held responsible for the condition and assessment of structural post-construction BMPs that the State Board requires to be imposed on private development. At most, dischargers should be permitted to use their existing enforcement authorities to enforce their land use conditions, as appropriate.

27. Section E.12.j. Local land use decisions are properly left within the discretion of local decision makers. Unless state law is amended to require the inclusion of certain considerations in general plans or other local zoning laws, the State Board lacks legal authority to compel dischargers to amend their general plan or other planning documents in any particular way. At most, the State Board may only require dischargers to consider water quality issues as they use their independent discretion, subject only to state law or local charter, to amend or revise their planning documents. This section must be revised to recognize and honor the local land use process in California.

28. Section E.13.b.1.(ii).(d). This provision requires dischargers to establish a monitoring fund into which all new development contributes on a proportional basis. The ability of dischargers to establish such a fund is governed by limitations under state law, including, without imitation, California Constitution Article XIII B. The State Board cannot compel dischargers to establish such a fund.

29. Section E.14.a.(ii).(c). Dischargers should not be required to identify assessment methods for privately owned BMPs. Nothing in the CWA requires such an assessment.

30. Section E.14.b. Nothing in the CWA requires municipal dischargers to quantify municipal watershed pollutant loads. The water quality improvements to be gained by conducting such load quantifications are also unclear. Therefore, this provision should be deleted.

31. Section E.15.a. and b. 40 C.F.R. § 122.44(d)(1)(vii)(B) provides that when developing water quality based effluent limits, the permitting authority shall ensure that effluent limits developed to protect a narrative water quality criterion, a numeric water quality criterion, or both, are consistent with the assumptions and requirements of any available WLA for the discharge. Section E.15 exceeds this legal authority by including requirements that expand existing WLAs. Such an expansion may only occur through amendments to the applicable Basin Plans.

F. Section G – Regional Water Board Authorities

The Draft Permit should provide greater clarity regarding when a Regional Board may require modifications to storm water programs that are not required by the Draft Permit. The Draft Permit should establish the parameters under which the Regional Boards may exercise the discretion set forth in Section G. In addition, a mechanism by which dischargers initiate requests for Regional Board action should be included in the Draft Permit. That is, the dischargers should, in the first instance, have the flexibility to decide between implementing the conditions of the Draft Permit or requesting the authority to continue certain aspects of their existing programs.

II.
Comments on the Draft Fact Sheet

40 C.F.R. section 124.8(a) requires that all NPDES general permits be accompanied by a fact sheet that meets the requirements of that section as well as the requirements of 40 C.F.R.

section 124.56. Among other things, the two sections require that the fact sheet include a summary of the basis for the draft permit conditions, references to applicable statutory or regulatory provisions, an explanation and calculation of effluent limitations and conditions, specific explanations of case-by-case requirements and other pertinent information.

The Draft Fact Sheet[2] does not meet these requirements, for the reasons set forth below.

A. Section III – Economic Considerations

Inherent in the unique MEP standard Congress established in CWA section 402(p)(3)(B)(iii) is an assessment of whether the controls imposed to reduce the discharge of pollutants to the MEP bear a reasonable relationship to the pollution control benefits to be achieved. As the Draft Fact Sheet properly recognizes, the State Board in Order WQ 2000-11 has acknowledged that the cost of compliance is a relevant factor in determining MEP. In fact, the Office of Chief Counsel has issued a memorandum that states that whether a particular BMP will achieve the MEP standard depends on, in part, whether the BMP will "have a cost that bears a reasonable relationship to the pollution control benefits to be achieved."

The analysis of costs contained in the Draft Fact Sheet is deficient in three main ways. First, the approach to compliance costs is fundamentally deficient because it tells the public nothing at all about the relationship between the cost of any particular control and the pollution control benefits to be achieved by implementing that control. Under this "generalized" approach, extremely costly requirements that bear little or even no relationship (or even a negative relationship) to the pollution control benefits to be achieved could be "justified" as long as the "overall" program costs are within what the State Board deems to be an acceptable range. This is not a proper way to determine whether a control reduces the discharge of pollutants from the MS4 to the MEP. A more individualized assessment of cost is required. Otherwise, dischargers may be required to implement very costly controls that have no relationship to pollution control benefits, a result inconsistent with MEP.

This analytical flaw in the Draft Fact Sheet is compounded by the approach taken to assess the benefits of the Draft Permit. Here again, the assessment approach misses the mark because it tells the public nothing about the pollution control benefits to be achieved by implementation of the controls in the Draft Permit. All the Draft Fact Sheet says, in essence, is that people like clean water and in theory may be willing to pay for it, that urban storm water may contribute to beach closures and that such beach closures have an economic impact. This analysis sheds no light on the relationship between a BMP's costs and the pollution control benefits to be achieved by implementing that BMP.

[2] It is also recommended that the Draft Fact Sheet be revised to include page numbers.

Second, the Draft Fact Sheet contains faulty assumptions and relies upon outdated or inapplicable data. It is not reasonable to assume that the true costs resulting from the Draft Permit's requirements are only some fraction of the total storm water program costs. Although some program activities may occur even if the Draft Permit did not require them, once they become conditions of the MS4 Permit, they no longer are discretionary decisions of local agencies; they become mandatory costs that cannot be deferred or eliminated, even when local agencies are reducing fire fighter staffing, closing parks and cutting other basic services. Thus, the full costs of implementing the entire program required by the Draft Permit must be assessed.

It is also faulty to assume anything other than the worst-case scenario of the Draft Permit's conditions when assessing costs. The receiving water limitations language provides a good example of this point. As interpreted by the Ninth Circuit, the Draft Permit's receiving water limitations language has been held to require strict and immediate compliance with numeric water quality standards (the United States Supreme Court will be reviewing this decision). In addition to all the other program costs, the Draft Fact Sheet must include a separate estimate of the costs necessary to achieve strict and immediate compliance with all water quality standards of all applicable Basin Plans as of the effective date of the final Permit. Unless this is done, there is not a true estimate of the Draft Permit's costs.

Further, the data relied upon in the Draft Fact Sheet is not applicable and is outdated. The CSUS Cost Survey assessed program costs for Phase I cities. Nothing in the Draft Fact Sheet links any of the actual conditions of the Phase I permits of the Phase I cities studied by CSUS with any of the requirements of the Draft Permit. Therefore, the study tells the public nothing about the costs to implement the Draft Permit. The data included in the Draft Fact Sheet is also from seven years to more than a decade old. In short, the Draft Fact Sheet uses old data from Phase I programs that have no linkage to any conditions of the Draft Permit.

Third, the Draft Fact Sheet fails to assess and provide a response to the data submitted by the dischargers in this process, including data submitted in connection with the comments on the Draft Permit. The State Board must assess and respond to this cost information.

B. Section IV – Unfunded State Mandates

The Draft Fact Sheet's discussion of unfunded state mandates is not consistent with applicable legal authority or the Draft Permit, as discussed below.

Article XIII B, Section 6(a) of the California Constitution ("Section 6") provides that whenever "any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service . . . ." Section 6 applies to storm water

permits issued by the State Board and the Regional Boards. (County of Los Angeles v. Commission on State Mandates (2007) 150 Cal.App.4th 898, 920.) Thus, Section 6 applies to the Draft Permit.

Section 6 was added to the California Constitution by voter approval in 1979, as part of a larger effort that had as its goal both limiting state and local spending and restricting the ability of local entities to raise revenue. Section 6 must be viewed as a "safety valve" designed to protect local governments from being placed in the untenable position of being required by the state, on the one hand, to implement certain state mandated programs while also, on the other hand, being prohibited from raising the money needed to pay for those state mandated programs. (Department of Finance v. Commission on State Mandates (2003) 30 Cal.4th 727, 735; County of San Diego v. State of California (1997) 15 Cal.4th 68, 81.) Recognizing that such a situation was neither a fair nor a wise approach to governing, the voters enacted Section 6 to prevent state government from shifting financial responsibility for carrying out governmental functions to local agencies without the state paying for them.

To implement Section 6, the Legislature created the Commission on State Mandates ("Commission"). The Commission has sole and exclusive jurisdiction to determine whether a state law or order of a state agency is an unfunded state mandate. (Government Code §§ 17551 and 17552; Kinlaw v. State of California (1991) 54 Cal.3d 326, 331-334.) In accordance with Section 6, Government Code section 17500 et seq., and case law, the Commission has determined that an unfunded state mandate exists when: (a) the state imposes a new program or higher level of service that is; (b) mandated by state law, not federal law; and (c) when the local government lacks adequate fee authority to pay for the new program or higher level of service.

Whether and how individual storm water permit conditions constitute unfunded state mandates is currently the subject of pending litigation. In 2009 and 2010, the Commission determined that parts of the Los Angeles Phase I Permit and major components of the San Diego Phase I Permit constituted unfunded state mandates. The State challenged these two decisions in court, and, in the San Diego matter, the court confirmed that only the Commission could make the ultimate determination of whether a permit condition constituted an unfunded state mandate. Specifically, the court in the San Diego case held that the "Commission has exclusive authority to determine whether the Regional Board has imposed a state mandate." The court in the San Diego case further concluded that the Commission should reconsider its decision to assess whether each of the *individual* permit conditions were required to achieve the MEP standard. Specifically, the court held that "the Commission must determine whether *any* of the permit conditions exceed the 'maximum extent practicable' standard." (Emphasis added.) Therefore, contrary to the discussion in the Draft Fact Sheet, each permit condition (control) must be assessed to determine whether it is consistent with MEP.

The San Diego Co-Permittees have appealed the trial court's decision that the Commission revisit its decision. Regardless of the outcome of that appeal, however, the Commission is the entity that must determine whether a condition in the Draft Permit constitutes an unfunded state mandate, and will do so using the framework discussed below.

1. New Program or Higher Level of Service.

The unfunded state mandates law applies when a state agency imposes a new program or higher level of service on a local agency. To determine if a program is new or imposes a higher level of service, the Commission will compare the challenged program with the legal requirements in effect immediately before the enactment of the challenged program. If the program did not exist under previous law, it is a new program. A "higher level of service" occurs when the new requirements are intended to provide an enhanced level of service to the public that is more specific than the prior law. (San Diego Unified School District v. Commission on State Mandates (2004) 33 Cal.4th 859, 878.)

Whether the Draft Permit imposes new programs or higher levels of service therefore requires a comparison of the Draft Permit with State Board Order No. 2003-0005-DWQ, the existing Small MS4 Permit ("Existing Permit"). Without attachments, the Existing Permit is only 19 pages long and tracks precisely the 6 minimum measures that EPA determined in the Phase II regulations to be sufficient to reduce the discharge of pollutants from MS4s to the MEP. In contrast, the Draft Permit is, without attachments, 108 pages long and includes multiple programs and requirements that either are not addressed in the Phase II regulations at all or greatly enhance the requirements of the 6 minimum measures.

A comparison between the Draft Permit and the Existing Permit reveals that the Draft Permit contains many new programs. Among others, the following program elements contained in the Draft Permit are not required by the Existing Permit and represent new programs under the state mandates law.

- The requirement to regulate Incidental Runoff. (Draft Permit, Section B.4). The regulation of these categories of non-storm water is not required by the Existing Permit. (See Existing Permit, Section D.2.c.(6).)

- The development of an Enforcement Response Plan. (Draft Permit, Section E.6.c). Nothing in the Existing Permit requires an Enforcement Response Plan, particularly one that contains the

detail reflected in the Draft Permit and that expressly requires the dischargers to assume responsibility for "front-line" enforcement of the Construction General Permit and the Industrial General Permit.

- The development of a receiving water monitoring program. (Draft Permit, Section E.13). The Existing Permit does not require such a program.

- The development of an effectiveness assessment program, including pollutant loading quantification. (Draft Permit, Section E.14). The Existing Permit does not require such a program.

- The incorporation of TMDLs and implementation plans. (Draft Permit, Section E.15). The Existing Permit does not address how TMDLs apply to the Existing Permit.

A comparison between the Draft Permit and the Existing Permit also reveals that the Draft Permit contains many higher levels of service. Among others, the following program elements contained in the Draft Permit are enhanced program requirements that represent higher levels of service under the state mandates law:

- Major components of the Public Outreach and Education Program. (Draft Permit, Section E.7.) Under the Existing Permit, dischargers "must implement a public education program to distribute educational materials to the community or conduct equivalent outreach activities about the impacts of storm water discharges on water bodies and the steps that the public can take to reduce pollutants in storm water runoff." In contrast to this one sentence requirement of the Existing Permit, Section E.7 of the Draft Permit contains a host of very specific and enhanced education and outreach requirements that must be targeted to many different groups, including, subject to Regional Board EO discretion, the use of very involved Community-Based Social Marketing ("CBSM") strategies or a CBSM equivalent.

- Major components of the Public Involvement and Participation Program. (Draft Permit, Section E.8.) The Existing Permit provides that the dischargers "must at a minimum comply with State and local public notice requirements when implementing a

public involvement/participation program." (Existing Permit, Section D.2.b.) In contrast to this one sentence requirement, Section E.8 of the Draft Permit requires very detailed programs not found in the Existing Permit.

- Major components of the Illicit Discharge Detection and Elimination ("IDDE") Program. (Draft Permit, Section E.9.) The Existing Permit requires the development and implementation of an IDDE program, but provides flexibility in the development of such a program. (Existing Permit, Section D.2.c.) In contrast, Section E.9 of the Draft Permit contains very specific and enhanced requirements.

- Major components of the Construction Site Storm Water Runoff Control Program. (Draft Permit, Section E.10.) The Existing Permit requires the development of a program to reduce pollutants in any storm water runoff to the MS4 from construction sites. (Existing Permit, Section D.2.d.) The program focuses on the development of erosion and sediment control measures, requirements to implement those erosion and sediment control measures and enforcement of those measures. In contrast, Section E.10 contains very specific measures well beyond the Existing Permit.

- Major components of the Pollution Prevention/Good Housekeeping Program. (Draft Permit, Section E.11.) The Existing Permit requires the development and implementation of an operation and maintenance program that includes a training component designed to prevent or reduce pollutant runoff from municipal operations. (Existing Permit, Section D.2.f.) In contrast, Section E.11 of the Draft Permit contains very extensive new requirements for such a program.

- Major components of the Post-Construction Storm Water Management Program. (Draft Permit, Section E.12.) The Existing Permit requires the development, implementation and enforcement of a program to address storm water runoff from new development and redevelopment projects, but provides flexibility in the development of such a program. (Existing Permit, Section D.2.e.) While certain larger communities (generally over 50,000) had to

follow more detailed rules for program development, these more detailed requirements still maintained program flexibility, as evidenced by the different ways different Regional Boards handled enrollment for entities subject to these rules. In contrast to both of these requirements of the Existing Permit, Section E.12 of the Draft Permit contains enhanced and very detailed program requirements.

2. The Draft Permit Exceeds the Requirements of Federal Law.

The Small MS4 Permit issued by the State Board is a state permit, not a federal permit, that is issued under state law. (Shell Oil Company v. Train (9th Cir. 1978) 585 F.2d 408, 410-412.) The State's NPDES program, including the Small MS4 Permit, is administered "in lieu of the federal program under state law . . . ." 33 U.S.C. §§ 1342(b) and 1342(c)(i); 40 C.F.R. § 123.22. The State's NPDES program is not a delegation of federal authority, but instead is a state program which functions in lieu of the federal program. (State of California v. U.S. Department of Navy (9th Cir. 1988) 845 F.2d 222, 225-226 (noting that "state permit programs are not a delegation of federal authority, but instead are state programs which function in lieu of the federal program.").)

Both Congress and the courts have resolved this question in a way that leaves no room for legal dispute. Congress has made clear that: "such a state program is one which is established under state law and which functions in lieu of the federal program. It is not a delegation of federal authority. This is a point which has been widely misunderstood with regard to the permit program under Section 402 of the Act. That Section . . . provides for state programs which function in lieu of the federal program and does not involve a delegation of federal authority." (H.R. Conf. Rep. No. 95-830, 95th Cong., 1st Sess., p. 104.) Myriad cases have confirmed this point. (District of Columbia v. Schramm (D.C. Cir. 1980) 631 F.2d 854, 861; American Paper Institute, Inc. v. U.S. E. P.A. (7th Cir. 1989) 890 F.2d 869, 874; Chesapeake Bay Foundation, Inc. v Virginia State Water Control Bd. (E.D. VA 1978) 453 F.Supp. 122, 126; Chesapeake Bay Foundation, Inc. v. United States (E.D. VA 1978) 445 F.Supp. 1349, 1353.) Therefore, the only question under the unfunded states mandates law is what elements of the state program are required by the federal law and regulations. Anything not required by the federal law and regulations is imposed under state law.

To determine what elements of the State's NPDES program are required by the federal regulations, the Commission would look to the express requirements of

the Clean Water Act and the federal regulations. As explained below, the Draft Permit exceeds the requirements of the CWA and Phase II Regulations.

Section 402(p)(3)(B) of the CWA requires that an NPDES permit be obtained for discharges from municipal storm sewers, and further requires that those permits meet the requirements of Section 402(p)(3)(B)(i) to (iii). Section 402(p)(3)(B)(4) and (6) required U.S. EPA to adopt regulations for such permits in two phase—Phase I, applicable to larger MS4s and Phase II, applicable to small MS4s. Specific to small MS4s, Section 402(p)(3)(B)(6) required EPA to adopt regulations which, among other things, establish a "comprehensive program" for small MS4s and create, at a minimum, requirements for state storm water management programs.

In 1999, EPA issued its Phase II regulations, generally contained in 40 CFR § 122.30 et seq. The full Phase II regulations, with an important Preamble, are contained in 64 FR 68722. The Phase II regulations establish six minimum control measures that must be implemented through NPDES permits. These six minimum control measures are (1) public education and outreach; (2) public involvement; (3) illicit discharge detection and elimination; (4) construction site runoff control; (5) post-construction storm water management in new development and redevelopment; and (6) pollution prevention and good housekeeping of municipal operations. In the Phase II regulations, EPA was very clear that implementation of these six minimum measures through an NPDES permit would achieve the MEP standard and, absent evidence to the contrary, would also be sufficient to achieve state water quality standards. In fact, EPA stated in guidance to the Phase II regulations that it "strongly recommends that until the evaluation of the storm water program in § 122.37, no additional requirements beyond the minimum control measures be imposed on regulated small MS4s without the agreement of the operator of the affected small MS4," except in limited cases. (40 C.F.R §122.34(e)(2).) The Ninth Circuit has confirmed that the Phase II regulations stand for the proposition that implementation of the 6 minimum measures is compliance with MEP. (Environmental Defense Central v. United States Environmental Protection Agency (9th Cir. 2003) 344 F.3d 832, 855.)

The six minimum control measures contained in the Phase II regulations therefore represent the federal mandates under the CWA. To the extent the requirements of the Draft Permit exceed the six minimum control measures, they represent state mandates, not federal mandates. As noted above, the Existing Permit incorporates the six minimum measures verbatim from the Phase II regulations. Therefore, the

analysis above regarding the comparison between the Existing Permit and the Draft Permit also serves to illustrate the components of the Draft Permit that exceed the federal mandates. In other words, the new programs identified above exceed the federal mandates because they are not one of the six minimum control measures. The higher levels of service identified above exceed the federal mandates because they go beyond the requirements of the six minimum measures as set forth in the Phase II regulations. Together the new programs and higher levels of service exceed the federal requirements.

Program requirements that are not mandated by the federal regulations do not become a federal mandate simply because the State Board says the requirements are necessary to achieve the MEP standard found in Section 402(p)(3)(B)(iii) of the CWA. There are at least two reasons why this is true.

First, in the Phase II regulations, U.S. EPA made clear that the six minimum measures, when properly implemented, "will reduce pollutants to the maximum extent practicable." Of course, Congress and U.S. EPA, not the state, define the requirements of federal law. Here, U.S. EPA has found that the six minimum measures reduce discharges to the MEP. While the State Board is authorized to exceed these requirements under state law, it cannot convert those state mandates into federal mandates by reference to MEP.

Second, for the reasons set forth in this comment letter, the State Board has not established a factual basis to demonstrate that controls not called for in the Phase II regulations are necessary to achieve the reduction of pollutant discharges to the MEP. Absent such evidence, the State Board has not established that the additional controls are required to achieve MEP.

3. Dischargers Lack Adequate Fee Authority.

To qualify as a reimbursable state mandate, the local agency subject to the mandate must lack adequate fee authority to pay for the mandate. (Gov. Code § 17556(d).) A local agency will have adequate fee authority if it "has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service."

The ability of dischargers to enact fees to pay for the new programs or higher levels of service in the Draft Permit is highly constrained by constitutional limits. In most cases, dischargers cannot enact such fees unilaterally; voter approval is required. The Commission has determined that in most cases, dischargers lack

adequate fee authority to fund the types of new programs and higher levels of services called for in the Draft Permit.

4. State Funding.

The unfunded state mandates law is about funding of state programs. It is a constitutional requirement imposed upon the state to fund programs that it requires local agencies to implement. It is well recognized that the current storm water programs are not fully funded at all levels, federal, state and local. In its report on Urban Stormwater Management in the United States, the National Research Council concluded that state and local governments do not have adequate financial support to implement the storm water program in a rigorous ways. The State Board should not impose new programs or higher levels of service on dischargers without providing the funding to implement such programs.

C. Section V – Role of the Regional Boards

The Draft Fact Sheet does not cite to applicable legal authority regarding the role of the Regional Boards. Water Code section 13140 provides the State Board with ultimate control over state policy for water quality control. As relevant to NPDES permits, Water Code section 13160 designates the State Board as the state water pollution control agency for the CWA. Although Water Code sections 13225 et seq. provide the Regional Boards with an important role to play in day-to-day water quality regulations, Water Code section 13320(a) makes it clear that actions of the Regional Boards are subject to State Board review.

The Draft Permit provides Regional Board EOs with significant discretion, but provides little guidance regarding how and when that discretion should be used. Consistent with the legal authority cited above, the State Board should provide parameters so that all parties know the conditions under which the Regional Boards may exercise their discretion. This will avoid future disputes and promote consistency and fairness across the Regions.

D. Section IX – Discharge Prohibitions

The Draft Fact Sheet does not explain the legal authority for the discharge prohibitions in the Draft Permit. The only legal authority cited is CWA section 402 (p)(3)(ii). That section provides that permits "for discharges from the municipal storm sewers shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers." Discharge Prohibition B.3 is not consistent with this authority because it goes well beyond the "effectively prohibit into" standard of the CWA and requires that all "discharges of material" "shall be

effectively prohibited." Discharge Prohibition B.3 should simply mirror the required language of CWA section 402(p)(3)(B)(ii).

Similarly, 40 C.F.R. § 122.26(d)(2) allows certain categories of non-stormwater discharges, but allows dischargers to prohibit those discharges if findings are made. This authority is left with the discharger and not with the permitting authority.

With regard to Discharge Prohibitions B.1 and B.2, NPDES permits only apply to point source discharges. (33 U.S.C. § 1362(12).) Therefore, these prohibitions should be modified to apply only to discharges "from the MS4." This change is consistent with the requirements of Water Code section 13260.

E. Section XI – Receiving Water Limitations

The Draft Fact Sheet does not fully and accurately describe the legal authority related to the receiving water limitations language. There are three major deficiencies in the analysis.

First, the Draft Fact Sheet does not explain the State Board's discretionary authority to require compliance with water quality standards as established by Defenders of Wildlife v. Browner, 191 F.3d 1159. In that case, the Ninth Circuit confirmed that CWA section 402(p)(3)(B)(iii) does not require strict compliance with water quality standards. As the court explained, Congress intended municipal NPDES permits to be subject to a "lesser standard" that replaced the more stringent standards applicable to other NPDES permits. At the same time, the Ninth Circuit explained that permitting authorities could require compliance with water quality standards through the "and such other provisions" language of CWA section 402(p)(3)(B)(iii). Thus, nothing requires the State Board to require compliance with water quality standards; the State Board can therefore define the manner in which compliance with water quality standards is to be achieved, as appropriate, within the overarching structure applicable to MS4 discharges.

Second, the Draft Fact Sheet does not set forth the key components of the State Board's prior decisions, particularly State Board Order WQ 2001-15, which interprets the State Board's receiving water limitations language found in State Board Order WQ 99-05. In WQ 2001-15, the State Board expressly concluded that "our language . . . does not require strict compliance with water quality standards." Rather, "[c]ompliance is to be achieved over time, through an iterative approach requiring improved BMPs."

Third, the Draft Fact Sheet does not address the relationship between NRDC v. County of LA, 673 F.3d 880 and State Board Order WQ 2001-15. Contrary to WQ 2001-15, the NRDC case interprets the State Board's language as requiring strict compliance with water quality standards. The Draft Fact Sheet must confront this fundamental conflict. The statement in the

Draft Fact Sheet that the decision in NRDC is consistent with State Board policy does not withstand scrutiny when compared with the express language of WQ 2001-15. If the State Board intends to reverse the policy expressed in WQ 2001-15, it should do so openly and publicly so that the merits of such a policy change may be fully vetted.

As noted throughout this comment letter, the United States Supreme Court has recently decided to review the decision in the NRDC case. Therefore, the State Board should not rely upon the holding in that case for legal authority, pending final decision by the Supreme Court.

F. Section XII – Stormwater Management Program for Traditional MS4s

1. Adequate Legal Authority.

The citations to the Phase I[3] and Phase II regulations set forth as the justification for the Draft Permit's adequate legal authority do not supply the legal authority for the conditions imposed. The cited provisions merely require dischargers to establish legal authority to meet the specified requirements (i.e., illicit discharges, erosion and sediment control, post-construction BMPs). The cited provisions do not provide the legal authority to support the broad requirements of the Draft Permit. Further, the Phase II regulations contain an important caveat that must, at a minimum, be included in the final Permit. That is, any obligation to establish legal authority to perform a requirement must be subject to the phrase: "*To the extent allowable under state or local law.*"

2. Program Management/Enforcement Response Plan.

The only legal authority cited for these provisions is the Phase I regulations at 40 C.F.R. § 122.26(d)(2)(i). This section does not require a program management element or an enforcement response plan. All that this section requires is for the Phase I applicant to demonstrate that it can operate pursuant to legal authority. Notably, nothing in the Phase II regulations – the applicable EPA regulations here – require a program management element and certainly not an enforcement response plan.

3. Education and Outreach.

The only legal authority cited for these provisions are the Phase II regulations set forth at 40 C.F.R. § 122.34(b)(1) and (2). Section 122.34(b)(1) merely requires

[3] The Draft Fact Sheet refers to the Clean Water Act but cites to EPA's Phase I and Phase II regulations.

dischargers to implement a public education program to distribute educational materials to the community or conduct equivalent outreach activities about the impacts of stormwater and ways to reduce those impacts. Section 122.34(b)(2) has no application here. Nothing in the cited authority supports the detailed conditions imposed in the Draft Permit.

4. Public Involvement/Participation.

The only legal authority cited for these provisions are the Phase II regulations set forth at 40 C.F.R. § 122.34(b)(1) and (2). Section 122.34(b)(1) relates to public education and has no application here. Section 122.34(b)(2) simply requires that dischargers must comply with state and local public notice requirements when implementing a public involvement/participation program. This legal authority does not require the conditions imposed in the Draft Permit.

5. Illicit Discharge Detection and Elimination.

The only authority cited is to the Phase I regulations at 40 C.F.R. § 122.26(d)(2)(iv)(B). This section outlines the description of its illicit discharge program that a Phase I discharger must set forth in its permit application. This authority applies to Phase I programs and even this Phase I authority does not support the requirements of the Draft Permit.

Notably, the Draft Fact Sheet fails to address the applicable Phase II regulations at 40 C.F.R. § 122.34(b)(i) – (iii). These provisions merely require that, to the extent allowable under state or local law, dischargers must develop a program to effectively prohibit non-stormwater discharges into the MS4. It does not require the specific conditions of the Draft Permit.

6. Construction Site Stormwater Runoff Control.

The only authority cited for these provisions are the Phase II regulations found at 40 C.F.R. § 122.34(b)(4). This section requires the development, implementation and enforcement of a construction site runoff program that focuses on sites that disturb one acre or more. The required program must address erosion and sediment controls, waste, site plan review, public participation and inspection/enforcement. This authority does not support the broad requirements of the Draft Permit.

7. Pollution Prevention/Good Housekeeping.

The only legal authority cited for these provisions are the Phase II regulations found at 40 C.F.R. § 122.34(b)(4). This section merely requires dischargers to develop and implement an operation and maintenance program that includes a training component and has the ultimate goal of preventing or reducing pollutant runoff from municipal operations. These minimal requirements do not justify the broad conditions in the Draft Permit.

8. Post Construction.

The only legal authority cited for these provisions are the Phase II regulation found at 40 C.F.R. § 122.34(b)(5). This section requires the development, implementation and enforcement of a program to address new development and redevelopment projects that disturb greater than one acre. The program should include BMPs appropriate for the discharger's community and should include a regulatory mechanism to the extent allowable under state or local law. The conditions in the Draft Permit exceed these requirements.

9. Monitoring.

The Draft Fact Sheet does not cite any legal authority of the Draft Permit's monitoring requirements. Presumably, this is because the Phase II regulations do not require monitoring. Unless appropriate legal authority is provided, the Draft Fact Sheet and the related conditions are not supportable.

10. Program Effectiveness Assessment.

The only legal authority cited for these provisions are the Phase II regulations at 40 C.F.R. § 122.34(g). This section requires dischargers to evaluate program compliance, the appropriateness of BMPs and progress toward achieving measurable goals. This section does not provide legal authority for the broad conditions of the Draft Permit.

G. Section XIII – TMDLs

The Draft Fact Sheet does not cite or discuss the relevant legal authority regarding the incorporation of WLAs from TMDLs into NPDES permits. 40 C.F.R. § 122.44(d)(1)(vii) provides that when developing water quality based effluent limits, the permitting authority shall ensure that effluent limits developed to protect a narrative water quality criterion, a numeric

water quality criterion, or both, are "consistent with the assumptions and requirements of any available waste load allocation for the discharge prepared by the State and approved by the EPA pursuant to 40 C.F.R. 130.7." This legal authority gives the permitting authority some flexibility to tailor WLAs to the fact-specific circumstances of the discharger. Examples of such flexibility provided by the Office of Chief Counsel include load trading among dischargers or performance of an offset program. (See June 12, 2002 memo from Michael Levy to Ken Harris).

This legal authority does not, however, provide the permitting authority with the power to amend or expand the WLAs beyond the scope of the TMDL as reflected in the Basin Plan. The approach taken in the Draft Permit appears to do just that in a manner inconsistent with applicable legal authority.

III.
Conclusion

These legal comments on the Draft Permit and Draft Fact Sheet are submitted on behalf of the City of Roseville, including in support of the City's active involvement with the SSC. It is requested that the State Board address each of these comments and amend the Draft Permit and Draft Fact Sheet accordingly prior to final adoption.

Very truly yours,

Shawn Hagerty
of BEST BEST & KRIEGER LLP

CASQA Proposal for Receiving Water Limitation Provision

D. RECEIVING WATER LIMITATIONS

1. Except as provided in Parts D.3, D.4, and D.5 below, discharges from the MS4 for which a Permittee is responsible shall not cause or contribute to an exceedance of any applicable water quality standard.

2. Except as provided in Parts D.3, D.4 and D.5, discharges from the MS4 of storm water, or non-storm water, for which a Permittee is responsible, shall not cause a condition of nuisance.

3. In instances where discharges from the MS4 for which the permittee is responsible (1) causes or contributes to an exceedance of any applicable water quality standard or causes a condition of nuisance in the receiving water; (2) the receiving water is not subject to an approved TMDL that is in effect for the constituent(s) involved; and (3) the constituent(s) associated with the discharge is otherwise not specifically addressed by a provision of this Order, the Permittee shall comply with the following iterative procedure:

    a. Submit a report to the State or Regional Water Board (as applicable) that:

        i. Summarizes and evaluates water quality data associated with the pollutant of concern in the context of applicable water quality objectives including the magnitude and frequency of the exceedances.

        ii. Includes a work plan to identify the sources of the constituents of concern (including those not associated with the MS4to help inform Regional or State Water Board efforts to address such sources).

        iii. Describes the strategy and schedule for implementing best management practices (BMPs) and other controls (including those that are currently being implemented) that will address the Permittee's sources of constituents that are causing or contributing to the exceedances of an applicable water quality standard or causing a condition of nuisance, and are reflective of the severity of the exceedances. The strategy shall demonstrate that the selection of BMPs will address the Permittee's sources of constituents and include a mechanism for tracking BMP implementation. The strategy shall provide for future refinement pending the results of the source identification work plan noted in D.3. ii above.

        iv. Outlines, if necessary, additional monitoring to evaluate improvement in water quality and, if appropriate, special studies that will be undertaken to support future management decisions.

        v. Includes a methodology (ies) that will assess the effectiveness of the BMPs to address the exceedances.

        vi. This report may be submitted in conjunction with the Annual Report unless the State or Regional Water Board directs an earlier submittal.

b. Submit any modifications to the report required by the State of Regional Water Board within 60 days of notification. The report is deemed approved within 60 days of its submission if no response is received from the State or Regional Water Board.

c. Implement the actions specified in the report in accordance with the acceptance or approval, including the implementation schedule and any modifications to this Order.

d. As long as the Permittee has complied with the procedure set forth above and is implementing the actions, the Permittee does not have to repeat the same procedure for continuing or recurring exceedances of the same receiving water limitations unless directed by the State Water Board or the Regional Water Board to develop additional BMPs.

4. For Receiving Water Limitations associated with waterbody-pollutant combinations addressed in an adopted TMDL that is in effect and that has been incorporated in this Order, the Permittees shall achieve compliance as outlined in Part XX (Total Maximum Daily Load Provisions) of this Order. For Receiving Water Limitations associated with waterbody-pollutant combinations on the CWA 303(d) list, which are not otherwise addressed by Part XX or other applicable pollutant-specific provision of this Order, the Permittees shall achieve compliance as outlined in Part D.3 of this Order.

5. If a Permittee is found to have discharges from its MS4 causing or contributing to an exceedance of an applicable water quality standard or causing a condition of nuisance in the receiving water, the Permittee shall be deemed in compliance with Parts D.1 and D.2 above, unless it fails to implement the requirements provided in Parts D.3 and D.4 or as otherwise covered by a provision of this order specifically addressing the constituent in question, as applicable.

RUSSIAN RIVER WATERSHED ASSOCIATION

MEMBER AGENCIES

- City of Cloverdale
- City of Cotati
- City of Healdsburg
- City of Rohnert Park
- City of Santa Rosa
- City of Ukiah
- County of Sonoma
- Sonoma County Water Agency
- Town of Windsor

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July 23, 2012

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

Subject: Comment Letter – Second draft of Phase II Small MS4 General Permit

Dear Ms. Townsend and Members of the State Water Board:

Thank you for the opportunity to respond to the second draft of the Phase II Small MS4 General Permit. This letter is the formal comment from the Russian River Watershed Association (RRWA) to the State Water Resources Control Board on the second draft of the NPDES General Permit and Waste Discharge Requirements for Storm Water Discharges from Small Municipal Separate Storm Sewer Systems (Draft Permit).

RRWA's nine member agencies are all affected by this permit - either as regulated Phase II agencies, or Phase I agencies with a well established and effective program which would be enhanced by regional consistency among all regulated storm water agencies in the Russian River watershed. We are invested in the outcome of this process.

RRWA provided comment on the first draft of this permit last September. While we are encouraged about some changes in this second draft, we still have significant concern about the Draft Permit regarding:

- lack of water quality nexus with most of the required tasks
- cost of implementation and lack of cost-effectiveness assessment
- exposure of permittee to third-party challenges
- technical infeasibility
- burdensome reporting, analysis and assessment requirements with no apparent water quality nexus

After the first draft received numerous and substantive comments in September 2011, we expected to see a second draft with a demonstrated water quality nexus for all tasks. After the October 6, 2011 Senate Select Committee on California Job Creation and Retention hearing on this permit, we expected to see a Draft Permit with requirements that take into consideration, and gives priority to cost effective, well proven management practices. Unfortunately this Draft Permit does not reflect these priorities advocated by the Senate Select Committee.

Fiscal Analysis

As a preface to our comments on the Draft Permit, RRWA asks the State Board to take initiative to work with the California Legislature to create opportunities for public agencies regulated by the MS4 NPDES program to raise funds to carry out the permit requirements. For most storm water programs in California, due to the constraints of Proposition 218 (constitutional initiative -1996), the city, county or district's General Fund is the only funding source for ongoing stormwater program requirements, let alone the

ability to fund the increased compliance activities required under the proposed regulations – which in our view creates an unfunded State mandate.

This Draft Permit is estimated to increase the cost of Phase II stormwater programs many fold. The City of Sonoma estimates a nearly 7 fold increase; the City of Roseville estimates a 4 fold increase in costs. The State Board suggested last September that Proposition 84 monies, or funds from Integrated Regional Water Management Plans (IRWMP) would be available to implement this permit. RRWA and its member agencies all participate in the North Coast IRWMP and have multiple projects in this Plan. Proposition 84 funds are not available for ongoing program operations, only for specific "shovel ready" projects. In addition, the odds of successfully receiving funding are low - in the North Coast IRWMP in the first round of Proposition 84 funding, only one in three projects received any funding. Proposition 84 and IRWMPs are not a realistic source for this enormous ongoing financial need.

In the Russian River watershed our Phase II agencies are small communities with limited resources coping with substantially decreased revenues, personnel layoffs, reduced hours of operation and work furloughs. Regardless of the outcome of this permit review process, the need to have dedicated storm water funds is tremendous. We need the State Board's initiative to prompt legislative action that will create mechanism to raise revenues for our storm water programs.

Comments

RRWA member agencies have collectively reviewed the Draft Permit and our comments follow below. RRWA continues to be committed to a healthy watershed and to implementing effective programs with demonstrated water quality benefits and improvement. We offer these comments in the hopes that the permit will be substantially revised to effectively achieve the water quality goals that bring about watershed health.

1. While the Draft Permit is significantly different from and inconsistent with the Phase I Permit in our region (Santa Rosa/Sonoma County Water Agency/County of Sonoma - Copermittees), it now explicitly recognizes that Phase II agencies can be issued individual permits (such as the regional Phase I permit) in lieu of this General Permit.

RRWA's comments on the first draft of this permit regarding Phase I/Phase II consistency in our region (Region 1) have been partially addressed in the Draft Permit. We appreciate the explicit language in Provision G (page 107) which confirms the Regional Water Boards authority to issue individual permits to Phase II agencies in lieu of this General Permit.

In the Russian River watershed most of the Phase I and Phase II agencies are geographically contiguous. In close coordination with the Region I Water Quality Control Board, our Phase I Copermittees have taken a regional lead in establishing stormwater resources, regulatory protocols, and outreach tools. Our Phase II agencies have worked to align with the Phase I Copermittees with regard to sharing resources and using common tools. RRWA expects that in Region 1, some of the Phase II agencies may choose to be issued individual permits consistent with the regional Phase I permit, thereby assuring regional consistency, building on existing effective programs, and maximizing resources for water quality benefits.

We ask that the authorities of Provision G be also referenced in Provision A (page 13) with clear direction as to how the permittee carries out the application process when the intent of the permittee is to be issued an individual permit (in our case consistent with our regional Phase I permit).

2. The Draft Permit requires the permittee to adopt authorities that are beyond the scope of the MS4 program, which create exposure to third party challenges, and which may not be legally viable.

The Draft Permit requires the permittee to adopt regulatory mechanisms to meet all the permit requirements (p.19). The Draft Permit has numerous areas of broad and open-ended language which would result in exposure to the permittee for third-party challenges when coupled with a requirement to have authority to meet all permit requirements. In some cases these broad authorities relate to enforcement responsibilities that belong to other State agencies or regulatory functions.

The following Draft Permit provisions illustrate a few of the numerous areas of concern related to the obligation to adopt authorities to meet all requirements of the permit:

- Section E.6.a (ii) (a) and (b) require the permittee to *"prohibit and eliminate"* all non-stormwater discharges and all illicit discharges/illegal connections. While a permittee can prohibit, elimination is likely not possible regardless of authority. This is an exposure to the permittee.
- Section E.6.a (ii) (g) requires the permittee to have the authority *to "require information pursuant to local development policy or public health regulations, and other information deemed necessary to assess compliance with this Order."* This language is very broad and open to interpretation, which is both unclear to the permittee and an exposure to the permittee. A permittee cannot assume authority to regulate the actions of State and local public agencies as implied by this provision.
- Section E.6.a (ii) (h) requires the permittee to have the authority to *"enter private property for the purpose of inspecting, at reasonable times, any facilities, equipment, practices or operations for active or potential stormwater discharges, or non-compliance with local ordinances/standards or requirements of this Order."* This language essentially expands the permittee's obligation to have authorities to have right of entry to inspect for non-compliance with local ordinances/standards beyond those required by this Order. The exposure to permittee is tremendous with this language. It is questionable whether the permittee can legally adopt right-of-entry authority for any inspection.
- Section E.11.j.(ii)(b)(2)(h) requires authority to prohibit application of pesticides, herbicides and fertilizers within a certain distance from a storm drain or water body. The California Department of Pesticide Regulations is the appropriate authority to regulate pesticide application.
- Section E.12.j (i) requires the permittee to modify general plans, specific plans, zoning, codes, standards, etc to ensure watershed protection. These land use authorities are beyond the scope of the permittee. While land use policy is key in assuring water quality, asking the stormwater entity to adopt this broad authority is not the appropriate mechanism to carry this out.

3. The Draft Permit requires excessive and burdensome reporting and documentation without an apparent water quality nexus.

The Draft Permit has reporting requirements throughout that require a level of detail and data gathering that is burdensome and excessive, with no direct benefit to water quality. There are 39 specific "Reporting" sections within the body of the permit as it applies to traditional Phase II permittees. The amount of time and resources that would be necessary to comply with the reporting and documentation requirements would drain resources from tasks that have demonstrable water quality benefits in our current programs and in proposed expanded programs. The following examples are provided for illustration only; they are a small fraction of the reporting and documentation requirements.

- On page 31 of the Draft Permit, the permittee is required to create an inventory which is reported annually of five data fields for each commercial/industrial facility within the permittee's jurisdiction that could conceivably discharge pollutants into stormwater.
- On pages 54-55 of the Draft Permit, the permittee is required to report annually on at least 14 different data fields for each project that is regulated by the Low Impact Development standards.
- On page 60 of the Draft Permit, the permittee is required to report annually on 7 data fields for each project with Low Impact Development measures installed - this is a cumulative inventory so the report grows annually.

While some of the data required in this reporting section may be available on projects, the burden of creating a report record for compliance with the Draft Permit is excessive and without demonstrable water quality benefits. This is particularly problematic given the limited resources available to implement stormwater programs in California.

RRWA asks the State Board to look carefully at these time consuming tasks with no water quality nexus throughout the permit and to minimize or eliminate reporting provisions so resources can be focused on activities that have known water quality benefits.

4. The Draft Permit requires excessive monitoring, inspection and assessment without demonstrated water quality benefit.

The Draft Permit requires monitoring, inspection, assessment and other oversight functions at a level that is excessive and has no demonstrated water quality benefit. The following examples are provided for illustration only; they are a small fraction of the monitoring, inspection and assessment requirements in the Draft Permit.

- Section E.9.c (i) requires the permittee to sample any outfalls that are flowing more than 72 hours after the last rain event. It is questionable whether this is physically possible due to the number and location of outfalls; access and safety issues; and instantaneous staffing resources. In addition, many outfalls run year round due to groundwater infiltration and would need to be monitored continuously. In addition to being impractical, there is no demonstrated water quality benefit to this resource intensive requirement.
- Section E.11.f addresses storm drain assessment and maintenance. The Draft Permit requires two years of prioritization and assessment before implementing

actual storm drain maintenance- i.e. cleaning the storm drains. Water quality will be improved with cleaning - and priorities will be developed over time as cleaning is carried out.

- Section E.14.b requires watershed pollutant load quantification for each subwatershed for each of 11 constituents, and calculation of annual runoff, pollutant loads, and BMP removal efficiency. In addition to being burdensome without clear water quality benefit, it is not clear from the permit what is meant by of the reporting requirements such as "BMP removal efficiency."

5. The Receiving Water Limitations Language requires instantaneous compliance with non-exceedance standard.

Our Executive Director participated in the review process undertaken by the California Stormwater Quality Association (CASQA), and RRWA fully supports CASQA's position related to Provision D - Receiving Water Limitations. As currently written, Phase II permittees will not be able to comply with the Receiving Water Limitations Provision. Multiple constituents in stormwater runoff on occasion may be higher than receiving water quality standards before it is discharged into the receiving waters, and may create the potential for the runoff to cause or contribute to exceedances in the receiving water itself. We ask for modification of this provision to establish an iterative management approach as a basis for compliance.

6. The Draft Permit has numerous provisions that are technically infeasible or have vague information making permit compliance unattainable.

There are numerous provisions in the Draft Permit that require the permittee to do the impossible. A few examples are provided here which illustrate this fact.

- Section E.7.a (i) requires the permittee to *"measurably increase the knowledge of targeted communities regarding the municipal storm drain system..."* While the permittee can provide varied outreach and education opportunities (events, trainings, web sites, etc), the permittee can't control a community's knowledge.
- Section E.7.a (ii) (j) requires the permittee to *"provide storm water education to school-aged children."* The permittee has no authority to enter schools to carry out this requirement. Permittees may provide information and try to get the curriculum into schools, but this requirement is not attainable as written.
- Section E.6.c (ii) (f) requires the permittee to reduce the rate of recidivism for non-compliance with NPDES and other provisions. The permittee can take many actions to attempt to reduce recidivism but actual reduction in rate is not something that is in the permittee's control.

7. Specific language in the definition of incidental runoff (Section B.4) is inconsistent with the State Board's Recycled Water Policy.

The definition of incidental runoff in Section B.4 of the draft Phase II Small MS4 General Permit includes "*runoff from potable and recycled water use areas*". Potable and recycled water are only two of many possible sources of irrigation supply with the potential to be a source of runoff. To the extent that the State Board considers regulation of runoff in the draft Phase II Small MS4 General Permit necessary to protect beneficial

uses, the water source is not relevant and reference thereto should be deleted. In addition, the definition of incidental runoff in the Recycled Water Policy is in a section entitled "Landscape Irrigation Projects" (Section 7), which clarifies that the definition applies to runoff from landscape irrigation projects. The applicability of the definition in the draft Phase II Small MS4 General Permit should be similarly defined.

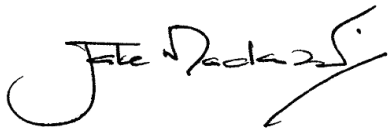
Our suggested language changes are:

- Section B. 4 - *"Incidental runoff is defined as unintended amounts (volume) of landscape irrigation runoff ~~from potable and recycled water use areas~~, such as unintended, minimal over-spray from sprinklers that escapes the area of intended use."*
- Section B.3 (n) - *"incidental runoff ~~of potable or recycled water~~ from landscaped areas (as defined and in accordance with section B.4 of this Permit)."*

Conclusion

California needs a Phase II permit that permittees can comply with and that protects water quality in a responsible and cost effective manner. We believe this is possible. The RRWA member agencies want to spend financial and human resources on implementing water quality improvement measures, not on fighting third-party challenges. We ask the State Board to substantially revise the Draft Permit by making changes to: provide a clear water quality nexus for any provisions that remain part of the final order; remove requirement for non-essential authorities; modify the receiving water limitations language to allow for an iterative management process; and eliminate excessive reporting, monitoring and assessment while retaining delivery of water quality improvement actions. We also ask the State Board to work with the legislature to create a mechanism to fund stormwater programs.

Sincerely,



Jake Mackenzie
Chair, RRWA Board of Directors

Enclosure – CASQA Receiving Water Limitations Language

C: RRWA Board of Directors
Mike Thompson, US Representative
Lynn Woolsey, US Representative
Noreen Evans, California Senator
Michael Allen, California Assembly Member
Wes Chesbro, California Assembly Member
Jared Huffman, California Assembly Member
Thomas Howard, SWRCB Executive Director
Matthew St. John, RWQCB – Region 1 Executive Officer
Rebecca Winer-Skonovd, CASQA Phase II Committee Chair

CASQA Proposal for Receiving Water Limitation Provision

D. RECEIVING WATER LIMITATIONS

1. Except as provided in Parts D.3, D.4, and D.5 below, discharges from the MS4 for which a Permittee is responsible shall not cause or contribute to an exceedance of any applicable water quality standard.

2. Except as provided in Parts D.3, D.4 and D.5, discharges from the MS4 of storm water, or non-- storm water, for which a Permittee is responsible, shall not cause a condition of nuisance.

3. In instances where discharges from the MS4 for which the permittee is responsible (1) causes or contributes to an exceedance of any applicable water quality standard or causes a condition of nuisance in the receiving water; (2) the receiving water is not subject to an approved TMDL that is in effect for the constituent(s) involved; and (3) the constituent(s) associated with the discharge is otherwise not specifically addressed by a provision of this Order, the Permittee shall comply with the following iterative procedure:

    a. Submit a report to the State or Regional Water Board (as applicable) that:

        i. Summarizes and evaluates water quality data associated with the pollutant of concern in the context of applicable water quality objectives including the magnitude and frequency of the exceedances.

        ii. Includes a work plan to identify the sources of the constituents of concern (including those not associated with the MS4to help inform Regional or State Water Board efforts to address such sources).

        iii. Describes the strategy and schedule for implementing best management practices (BMPs) and other controls (including those that are currently being implemented) that will address the Permittee's sources of constituents that are causing or contributing to the exceedances of an applicable water quality standard or causing a condition of nuisance, and are reflective of the severity of the exceedances. The strategy shall demonstrate that the selection of BMPs will address the Permittee's sources of constituents and include a mechanism for tracking BMP implementation. The strategy shall provide for future refinement pending the results of the source identification work plan noted in D.3. ii above.

        iv. Outlines, if necessary, additional monitoring to evaluate improvement in water quality and, if appropriate, special studies that will be undertaken to support future management decisions.

        v. Includes a methodology (ies) that will assess the effectiveness of the BMPs to address the exceedances.

        vi. This report may be submitted in conjunction with the Annual Report unless the State or Regional Water Board directs an earlier submittal.

b. Submit any modifications to the report required by the State of Regional Water Board within 60 days of notification. The report is deemed approved within 60 days of its submission if no response is received from the State or Regional Water Board.

c. Implement the actions specified in the report in accordance with the acceptance or approval, including the implementation schedule and any modifications to this Order.

d. As long as the Permittee has complied with the procedure set forth above and is implementing the actions, the Permittee does not have to repeat the same procedure for continuing or recurring exceedances of the same receiving water limitations unless directed by the State Water Board or the Regional Water Board to develop additional BMPs.

4. For Receiving Water Limitations associated with waterbody---pollutant combinations addressed in an adopted TMDL that is in effect and that has been incorporated in this Order, the Permittees shall achieve compliance as outlined in Part XX (Total Maximum Daily Load Provisions) of this Order. For Receiving Water Limitations associated with waterbody---pollutant combinations on the CWA 303(d) list, which are not otherwise addressed by Part XX or other applicable pollutant--- specific provision of this Order, the Permittees shall achieve compliance as outlined in Part D.3 of this Order.

5. If a Permittee is found to have discharges from its MS4 causing or contributing to an exceedance of an applicable water quality standard or causing a condition of nuisance in the receiving water, the Permittee shall be deemed in compliance with Parts D.1 and D.2 above, unless it fails to implement the requirements provided in Parts D.3 and D.4 or as otherwise covered by a provision of this order specifically addressing the constituent in question, as applicable.