



July 24, 2015

Chair Felicia Marcus and Board Members
c/o Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814



Sent via electronic mail to: commentletters@waterboards.ca.gov

RE: Comment Letter – Proposal to Develop a Storm Water Program Work Plan and Implementation Strategy

Dear Chair Marcus and Board Members:

On behalf of California Coastkeeper Alliance, which represents 12 California Waterkeeper groups spanning the coast from the Oregon border to San Diego, we appreciate the opportunity to provide comments on the State Water Resources Control Board's ("State Water Board") proposal to develop a Storm Water Program Work Plan and Implementation Strategy ("Stormwater Strategic Initiative" or "SWSI"). CCKA and our network of California Waterkeepers have been actively involved in ensuring the control of stormwater pollution for twenty years. Many of our groups have reviewed, inspected, negotiated best management practices ("BMPs") and monitored dischargers since the original stormwater permits, and have worked closely with the State Water Board to develop, adopt and implement permits that improve California's water quality.

As the stormwater program has evolved, CCKA is witnessing an exchange of enforceability, either by citizens or the Boards themselves, for the perceived trade-off of discharger participation. This trend is concerning, as we replace enforceable standards for burdensome reporting, planning, and exemptions. For example, the recently affirmed Los Angeles County MS4 Phase I Permit provides an alternative method of compliance to receiving water limitations if dischargers participate in additional stormwater capture strategies. The regulated community, the water boards, and most importantly, water quality and the public would all benefit from stormwater permits that move away from the current overreliance on processes for compliance, off-ramps and safe harbors. Such aspects of stormwater permits move away from the SWSI's Guiding Principle #3 (Efficient, Effective Regulatory Systems).

In contrast, an investment of Water Board resources on permit drafting processes to create defensible permits with objective technology and water quality based requirements would generate an "Efficient, Effective Regulatory System". There needs to be a cultural shift to consider enforcement throughout the SWSI, its projects, and with each stormwater permit. The State Water Board's Water Quality Unit should work closely with the Enforcement Unit to ensure enforcement is a guiding principle throughout the Work Plan, and more importantly, is a focus of each project undertaken in the SWSI. Furthermore, the Water Quality Unit should develop robust adaptive monitoring for each project to ensure success and accountability.

While CCKA is supportive of the SWSI, and hopes project implementation will not be delayed, we have reservations that the SWSI will largely become discharger-driven. For those reasons, we provide the following recommendations to the State Water Board in hopes that projects will be prioritized based on

improving water quality – and not based on reducing cost of compliance or providing additional safe harbors:

- The State Water Board should maximize the potential benefits of stormwater capture by developing comprehensive watershed-based analyses of the potential for stormwater capture;
- Stakeholder collaboration, monetizing stormwater, and funding for stormwater projects should remain a high priority for the State Water Board given the drought crisis;
- Post-construction requirements for watershed health should remain a high priority in the Initiative;
- Technical guidance for alternative compliance for receiving water limitations should be prioritized only if reasonable assurance analyses ensure water quality standards are being met; and
- Sector-specific technology-based numeric effluent limitations for industrial and construction storm water permits should be a “high” priority for the State Water Board.

I. THE STATE WATER BOARD SHOULD MAXIMIZE THE POTENTIAL BENEFITS OF STORMWATER CAPTURE BY DEVELOPING COMPREHENSIVE WATERSHED-BASED ANALYSES OF THE POTENTIAL FOR STORMWATER CAPTURE.

A. Project 1a – Stormwater Capture and Use Goal

CCKA strongly supports the State Water Board’s SWSI Project 1 to optimize use of stormwater as a resource through stormwater capture and use. This measure, as with several of the SWSI projects discussed below, is especially important in response to the current historic drought and the increasing challenges of meeting water quality and supply goals under the growing impacts of climate change. A previous assessment by the Natural Resources Defense Council and Pacific Institute indicated that stormwater capture in urbanized Southern California and the San Francisco Bay Area could increase annual water supplies by 420,000 to 630,000 acre-feet or more each year,¹ and the State Water Board has set a goal to “[i]ncrease the use of stormwater over use in 2007 by at least one million afy by 2030.”²

In order to maximize the potential resource benefits of stormwater capture, however, a comprehensive, regional or watershed-based analysis of the potential for stormwater capture for water supply is critical and should remain a very high priority for the State Water Board. This is already being done by entities like the Central Coast Regional Water Board and the San Francisco Estuary Institute, and the State Water Board should build upon these analyses already being conducted. This analysis should examine aggressive use of existing practices such as infiltration and groundwater recharge, onsite capture for reuse, use of green streets and public space or public right of way, green infrastructure based approaches, and other strategies at both distributed or site specific and regional scales. In particular, the analysis should prioritize opportunities to increase groundwater supplies, including identifying the location, infiltration potential, and potential resulting yield of groundwater supplies from stormwater capture for groundwater basins or aquifers currently used for water supply. The analysis should additionally assess the availability and potential infiltration or capture for reuse capacity of public property and open space, or, where potential for public/private partnerships may exist, private spaces suitable for stormwater capture in urbanized environments. This assessment should be coupled with mapping and analysis of existing MS4 systems to identify potential locations where stormwater flowing in an MS4 system could be diverted for capture.

Finally, any analysis of stormwater capture potential for beneficial use should be undertaken in coordination with additional State Water Board and Regional Board efforts under SWSI Project 7, to identify watershed-specific processes that are critical to watershed health, and a broader overall analysis

¹ NRDC and Pacific Institute (2014) The Untapped Potential of California’s Water Supply: Efficiency, Reuse, and Stormwater; available at <http://www.nrdc.org/water/ca-water-supply-solutions.asp>.

² State Water Board (2009, amended 2013) Recycled Water Policy, Resolution 2009-0011 (amended by Resolution 2013-0003).

of existing or proposed methods for demonstrating compliance with water quality requirements in MS4 permits based on capture. In this regard, while CCKA strongly supports robust efforts to increase stormwater capture for beneficial use, we note that ultimate compliance with water quality requirements in MS4 permits must be based on monitoring in the receiving water. (See our comments on Project 5, below, for a full discussion of this issue.)

B. Project 1b – Barriers to Stormwater Capture and Use

Just as, if not more, critical as assessing the potential for stormwater capture and establishing goals for stormwater capture and use will be the State Water Board's effort to eliminate existing barriers to capture and beneficial use of stormwater. CCKA supports the Board's proposed approach to consider and analyze not just technical, but legal, and political or logistical barriers to stormwater capture as well. For the proposed project, any technical review of stormwater capture barriers should include a comprehensive review of groundwater quality and pollution issues for aquifers either used for water supply or with the potential to be used for water supply, or should include a methodology for prioritizing groundwater cleanup efforts to maximize potential for groundwater recharge through stormwater capture. The analysis should further consider current land use or development patterns that pose a potential threat to groundwater quality, such as from industrial and construction stormwater runoff sources. CCKA supports development of numeric limits based on BAT/BCT for these types of discharge sources as a means of addressing this barrier—Orange County Coastkeeper has previously used data from the Santa Ana Sector-Specific Permit for Scrap Facilities to develop numeric limits representing BAT/BCT.

Further, the analysis should review barriers that may exist as a result of credit systems for groundwater recharge in adjudicated basins, and engage with water rights holders to assess potential for establishing a quantitative methodology for assessing groundwater supply yield from stormwater capture. (See our comments on SWSI Project 3, below.) Finally, any technical analysis should identify urban or hydrologic regions, watersheds, sub-watersheds, or other geographic areas where availability of open space or soil and geologic conditions may serve as a limitation on the potential for infiltrating stormwater for groundwater recharge. In any area where groundwater recharge is not feasible, the State Water Board should assess the potential for use of alternate stormwater capture methods for beneficial use, including use of site-based or regional capture and onsite use projects.

C. Project 1c – Increase Storm Water Capture and Use through Regulatory Approaches

CCKA strongly support efforts to increase water supply through stormwater capture, including through regulatory and permitting approaches. Given the lengthy process of Project 1a and 1b, a regulatory approach, coupled with available Prop 1 funding, is the best near-term solution for increasing stormwater capture. However, where the Board may propose permitting approaches that allow compliance to be determined through watershed-based capture programs, we note that, among a number of considerations, ultimate compliance with water quality requirements must be remain the paramount consideration and be determined in the receiving water. Further, any permitting scheme based on watershed planning must require dischargers to consider and prioritize potential for meeting water supply goals, where feasible, when identifying potential projects. As Los Angeles Waterkeeper has commented with regard to implementation of the 2012 Los Angeles County MS4 permit, many dischargers have failed to adhere to capture and water supply based permit provisions, and for many other municipalities performing alternative compliance the Permit never actually placed a requirement on them to consider water supply or even use of stormwater capture at all. Finally, the State Water Board should consider establishing regulatory requirements for retrofit of the existing built environment, for both public and private space, as a means of increasing stormwater capture in our urban and suburban areas.

Overall, Project 1 is a laudable objective and should be pursued as a high priority by the State Water Board. However, the Work Plan itself – particularly Appendix A – needs more detail to the product outcomes. Just saying we should treat stormwater as a resource does not capture the opportunity before

us. Therefore, as described above, CCKA offers the following “product outcomes” to be included in the SWSI’s Appendix A:

- (1) A comprehensive, regional or watershed-based analysis of the potential for stormwater capture for water supply;
- (2) A technical review of stormwater capture barriers that includes a comprehensive review of groundwater quality and pollution issues for aquifers;
- (3) A methodology for prioritizing groundwater cleanup efforts to maximize potential for groundwater recharge through stormwater capture;
- (4) A review of barriers that may exist as a result of credit systems for groundwater recharge in adjudicated basins;
- (5) Identification of urban or hydrologic regions, watersheds, sub-watersheds, or other geographic areas where availability of open space or soil and geologic conditions may serve as a limitation on the potential for infiltrating stormwater for groundwater recharge;
- (6) An assessment of the potential for use of alternate stormwater capture methods for beneficial use, including use of site-based or regional capture and onsite use projects;
- (7) Regulatory requirements for retrofit of the existing built environment, for both public and private space.

II. STAKEHOLDER COLLABORATION (PROJECT 2), MONETIZING STORMWATER (PROJECT 3), AND FUNDING FOR STORMWATER PROJECTS (PROJECT 4) SHOULD REMAIN A HIGH PRIORITY FOR THE STATE WATER BOARD GIVEN THE DROUGHT CRISIS.

Project 2 (Stakeholder Collaboration to Promote Stormwater as a Resource), Project 3 (Monetary Value of Stormwater), and Project 8 (Funding for Stormwater Programs), are all critical independent efforts for the State Water Board to undertake, as well as critical to the success of any efforts that may follow from the successful completion of Project 1. These projects should all be considered a high priority by the Board and are extremely timely given the drought crisis and the accelerating pace in which key water resource decisions are being made.

A. Project 2 – Stakeholder Collaboration

SWSI Project 2 should be considered a higher priority by the State Water Board than currently indicated. As California makes increasingly complex and challenging decisions regarding water supply and resource allocation, it is important that the State Water Board engage not only with stakeholders in the water quality sphere, but with water supply, open space and park, public health, and other agencies and stakeholder groups. Many of the approaches and strategies that may be developed by the State Water Board will require multi-agency, multi-stakeholder coordination to maximize benefits and available funding, and these opportunities should be considered from the outset.

B. Project 3 – Monetary Value of Stormwater

The success of any long-term effort to increase stormwater capture for use will require development of accurate methodologies for assessing the monetary value of stormwater capture—too often the alleged costs of stormwater control practices are raised or taken into account by the State Water Board and other parties without proper consideration of the monetary *benefits* presented by, among other aspects, increased water supply, decreased pollution, improved or increased open space, habitat, and recreation opportunities, and improved air quality that may attend stormwater projects. Proper assessment of the monetary value of stormwater capture for this wide range of potential benefits will ultimately allow for greater development of multi-agency or stakeholder projects. Critically, to engage with water supply stakeholders, any effort to assess the monetary value of stormwater for groundwater recharge purposes must address not only cost and volume of infiltration, but include development of a methodology for assessing the potential production yield of captured stormwater for water supply.

C. Project 8 – Funding for Stormwater Projects

CCKA fully supports the State Water Board’s effort to eliminate barriers to funding local storm water programs and to increase availability of grant and loan funding of storm water capture and use projects. In addition to the potential approaches identified by the State Water Board, we encourage the Board to assess opportunities for obtaining or managing funding through multi-agency partnerships, where such an approach might leverage the resources of multiple partners and funding sources, and to explore the potential for developing or promoting public/private partnerships for stormwater capture or leveraging investment of private capital in stormwater projects.

III. PROJECT 7 (POST-CONSTRUCTION REQUIREMENTS FOR WATERSHED HEALTH) SHOULD REMAIN A HIGH PRIORITY IN THE STORMWATER INITIATIVE.

The objective of Project 7 is to develop technical guidance and permitting tools to promote implementation of post-construction requirements based on watershed processes, statewide. Post-construction stormwater management in areas undergoing new development or redevelopment is critical because runoff from these areas has been shown to significantly affect receiving waterbodies.³ Many studies indicate that prior planning and design for the minimization of pollutants in post-construction stormwater discharges is the most *cost-effective approach* to stormwater quality management.⁴ We strongly support Project 7, and request that it remain a high priority project.

A. *The State Water Board should uphold its commitment to develop Watershed Management Zones statewide.*

Throughout the development of the Phase II MS4, State Water Board staff intended on developing Watershed Management Zones (WMZs) as a key tool to improve post-construction standards. However, before the Phase II Permit was adopted, the State Water Board determined WMZs were not ripe for adoption. Instead, the State Water Board stated in the Phase II Permit that it “will incorporate runoff retention and hydromodification control criteria in the next permit term that will be keyed to specific watershed processes as identified by the State Water Board within specific WMZs.”⁵ The State Water Board goes on to find that “WMZs will be used to identify applicable areas and appropriate criteria for runoff retention and hydromodification control.”⁶

While CCKA regretted seeing the WMZs removed, we supported the State Water Board’s decision and worked with staff to craft language to ensure the Central Coast Regional Water Board could move forward with its WMZs as a “pilot-project” for the rest of the state. CCKA and its Central Coast Waterkeepers, along with the Natural Resources Defense Council, spent additional resources to ensure the Central Coast Regional Water Board re-adopted its WMZs without any weakening or delay. We now expect the State Water Board to hold to its Phase II promise that WMZs will be developed statewide, and *we applaud the State Water Board for making Project 7 a high priority.*

B. *The State Water Board should work closely with the Central Coast Regional Water Board’s staff to develop statewide WMZs.*

The Central Coast Regional Board’s Runoff Retention requirements are critical to the State Water Board effort to develop similar requirements statewide. Regional Board staff, in fact, coordinated with the State Water Board to develop hydromodification control methodology, criteria, policy, and other permit requirements contained in the Phase II Permit. The Regional Board’s methodology to determine

³ <http://www.epa.gov/npdes/pubs/fact2-7.pdf>

⁴ <http://www.epa.gov/npdes/pubs/fact2-7.pdf>

⁵ State Water Resources Control Board, MS4 Phase II Fact Sheet, pg. 19; available at http://www.waterboards.ca.gov/water_issues/programs/stormwater/docs/phsii2012_5th/fs_final_sidenote.pdf.

⁶ *Id.*

hydromodification control criteria overall will assist the State and Regional Boards in directing permittees to successfully develop scientifically sound and understandable criteria elsewhere. Like the Regional Board, the State Board believes that “[t]hrough the development of hydromodification measures based on watershed management zones, key watershed processes will be protected, and where degraded, restored. As a result of restored and maintained watersheds, key relationships between hydrology, channel geomorphology and biological health will be created and maintained and water quality/beneficial uses protected.”⁷

Over the past ten years, the Central Coast Regional Board collaborated with regional stakeholders to identify 10 WMZs that reflect the variations in watershed processes in the region. In certain WMZs, the Post-Construction Requirements would require municipalities to meet Runoff Retention requirements at new development and redevelopment projects, where feasible, to retain the 95th percentile storm event. This Runoff Retention volume must be infiltrated, evaporated/transpired, and/or harvested for later use. Retention objectives are now recognized as a superior way to address both the treatment of polluted runoff, as required by the Clean Water Act, and the recharge of groundwater basins critical to California’s water supply portfolio.⁸ Requiring that this volume of runoff be retained will advance these critical goals.

Under Section 438 of the Energy Independence Security Act of 2007 (“EISA”), all new and redeveloped United States federal facilities over 5,000 square feet are directed to meet stormwater runoff requirements that, under guidance developed by the U.S. EPA, include as the default compliance option retention of the 95th percentile storm event onsite.⁹ In setting this default 95th percentile standard, EPA relied on a detailed technical analysis, including assessment of multiple case studies, to demonstrate that retention of the 95th percentile storm event is technically feasible for a range of site conditions and building designs throughout the country.¹⁰

Similarly, through analyzing geology, landforms, hydrologic features, and vegetation in the region, the Central Coast Regional Board determined that retention of the 95th percentile storm is technically feasible in certain WMZs, and as a result determined to require this standard—in part “because ‘it employs natural treatment and flow attenuation methods that are presumed to have existed on the site before construction of infrastructure (e.g., building, roads, parking lots, driveways,).’”¹¹ Notably, this strategy correlates the Runoff Retention standard with local hydrology; retention of the 95th percentile storm is not required in all areas covered by the Post-Construction Requirements, only in areas where infiltration is highly dominant and will facilitate retention. Since the retention of the 95th percentile storm has been demonstrated to be achievable in these areas, the Regional Board’s decision to include them in the Post-Construction Requirements properly meets the requirements of the Clean Water Act’s “maximum extent practicable” standard under 33 U.S.C. 1342(p)(3)(B)(iii), rather than exceeding it.

The Central Coast’s Runoff Retention requirements¹² are designed to address the full suite of watershed processes affected by urban stormwater, including surface runoff, groundwater recharge, and the chemical

⁷ State Water Resources Control Board, Fact Sheet for NPDES General Permit and Waste Discharge Requirements for Storm Water Discharges from Small Municipal Separate Storm Sewer Systems; pg. 35 (Feb. 2013), available at http://www.waterboards.ca.gov/water_issues/programs/stormwater/docs/phsii2012_5th/fs_final_sidenote.pdf.

⁸ National Research Council, Urban Stormwater Management in the United States, pg. 376 (Oct. 2008), available at <http://www.cacoastkeeper.org/document/urban-stormwater-management-in-the-united-states.pdf>.

⁹ See United States Environmental Protection Agency, Technical Guidance on Implementing the Stormwater Runoff Requirements for Federal Projects under Section 438 of the Energy Independence and Security Act, pg. 12 (Dec. 2009), available at <http://water.epa.gov/polwaste/nps/upload/eisa-438.pdf>.

¹⁰ See *Id.* at 25-54.

¹¹ Central Coast Regional Water Quality Control Board, Staff Report for Resolution No. R3-2012-0025, pg. 6 (Sept. 2012); citing United States Environmental Protection Agency, Technical Guidance on Implementing the Stormwater Runoff Requirements for Federal Projects under Section 438 of the Energy Independence and Security Act, pg. 12 – 13 (Dec. 2009).

¹² We note that the Post-Construction Requirements overall emphasize protection of areas that are less disturbed over urban areas with existing impacts, and apply requirements more rigorously to new development as compared with redevelopment in existing urban areas. While we support rigorous post-construction requirements for new development, redevelopment and even retrofits to existing buildings could and should be required to meet the 95th percentile standard.

and biological role of soil and vegetation in filtering runoff. Moreover, the requirement to retain the 95th percentile standard will help promote continued positive watershed processes—thereby advancing water quality and supply goals for the region. The Central Coast’s WMZs are considered the model for post-construction standards, and the State Water Board should work closely with the Central Coast Water Board staff to ensure a similar effort is developed statewide – including a 95th percentile storm retention standard where feasible.

IV. PROJECT 5 (TECHNICAL GUIDANCE FOR ALTERNATIVE COMPLIANCE FOR RECEIVING WATER LIMITATIONS) SHOULD BE PRIORITIZED ONLY IF REASONABLE ASSURANCE ANALYSES ENSURE WATER QUALITY STANDARDS ARE BEING MET.

The State Water Board’s SWSI Project 5 is to assess alternatives compliance approaches for MS4 Permit Receiving Water Limitations. As stated above, CCKA supports the State Water Board’s desire to promote stormwater capture to augment local water supplies and address water quality concerns in response to the current historic drought and the increasing challenges of climate change. However, current efforts to-date have failed to properly implement a true multi-benefit approach to stormwater management that achieves compliance with water quality standards (“WQSs”). While CCKA believes current attempts to implement alternative compliance approaches for MS4 receiving water limitations has been illegal, we support the SWSI’s Project 5 as an important tool for providing guidance to assure Reasonable Assurance Analysis (“RAA”) are properly implemented and WQSs are being met.

As discussed in detail in our written and oral comments on the October 10, 2012 Issue Paper regarding Municipal Storm Water Permit Receiving Water Limitations, we feel that the current receiving water limitation (“RWL”) provisions contain clear, appropriate, and enforceable language that complies with the Clean Water Act and has stood the test of administrative, judicial, and enforcement challenges.¹³ Municipal dischargers, however, repeatedly raised concerns about the alleged uncertainty of compliance with water quality-based RWLs in NPDES permits and have argued for unenforceable vague permit limits and/or “safe harbors.” Proposals to incorporate “safe harbor” provisions or otherwise weaken the RWL language of MS4 Permits in California would fail to meet minimum federal requirements, and would constitute a violation of the Clean Water Act’s anti-backsliding provisions for any permit previously incorporating the required language of State Water Board Order 99-05. Any attempt to shield permittees from enforceable requirements meant to ensure water quality standard compliance would move the state backwards in terms of water quality and discharger accountability and thus represents poor public policy. Furthermore, alternative compliance approaches are resource intensive due to the complicated nature of watershed management plans. By encouraging alternative compliance approaches to move forward, the State Water Board is only further draining its already limited staff resources.

To avoid this result, the State Water Board must provide statewide guidance as part of Project 5 that all purported “safe harbors” should be removed from alternative compliance approaches, and instead require implementation of watershed management programs as one way to achieve, rather than demonstrate, compliance with RWLs and WQSs.

Furthermore, Project 5 is found under the SWSI’s Guiding Principle 2, which states that Water Boards’ “Storm Water Programs Preserve Watershed Processes to *Achieve* Desired Water Quality Outcomes.”¹⁴ To-date, however, CCKA does not know of an existing alternative compliance approach that *achieves desired water quality outcomes in actual outcome*. Rather than require MS4 Permittees to efficiently and effectively achieve the multiple benefits desired by the State Board, alternative compliance approaches provide so-called “safe harbors” for Permittees that in Los Angeles have already demonstrated a departure

¹³ “[T]he plain meaning of these provisions is clear: they prohibit discharges that cause or contribute to a ‘violation of Water Quality Standards’ [or water quality objectives].” Brief of Amicus Curiae California Regional Water Quality Control Board, Los Angeles Region, in *Santa Monica Baykeeper v. City of Malibu* No. CV 08 - 1465 - AHM (PLAx) (C.D. Cal.) (filed Feb. 5, 2010), at 4. See also, *In re L.A. County Mun. Storm Water Permit Litigation*, No. BS 080548 at 4 -7 (L.A. Super. Ct. Mar. 24, 2005).

¹⁴ State Water Resources Control Board, Storm Water Program Work Plan and Implementation Strategy, pg. 9.

from meaningful stormwater capture and water quality standard compliance. For example, Los Angeles's Phase I MS4 Permit condones a process mired in delay and uncertainties that fail to ensure the protection and restoration of Los Angeles waterways.

The SWSI goes on to lay out the underlying issue for Principle 2 as “storm water permits should provide accountability and support water quality outcomes.” As currently being implemented in permits like the LA MS4 Permit, we do not agree that alternative compliance approaches are providing accountability, nor are they meeting WQSs. In fact, the recent “conditional” approvals of nine deficient Watershed Management Programs (“WMPs”), which were illegally issued by the Regional Board’s Executive Officer, demonstrate that the Permit’s alternative compliance approach is already failing to ensure compliance with Receiving Water Limitations (“RWLs”). Moreover, the LA MS4 Permit further weakens the alternative compliance approach by extending the deadline to update the RAAs to eight and a half years. If the State Water Board wants to ensure accountability to meet WQSs, then it is critical that Project 5 be prioritized in the SWSI to ensure RAAs are being developed timely and properly to ensure WQSs are being met.

The purpose of Project 5 is to establish technical guidance and supporting documentation for Water Board staff to incorporate alternative compliance approaches into storm water permits, while ensuring water quality outcomes are achieved. While we do not support alternative compliance approaches that provide safe harbors, we do support prioritization of Project 5 – if the technical guidance truly ensures water quality outcomes are achieved. Importantly, Project 5 should focus on how permittees will develop RAAs that require verification and recalibration of relied upon models. However, guidance can often favor those with the most money and resources to lobby the State Water Board and offer their own “expertise”. Therefore, we request that the State Water Board develop an expert panel of unbiased technical expertise to help develop the technical guidance on how RAAs will ensure WQSs are being met.

V. PROJECT 18 (SECTOR-SPECIFIC TECHNOLOGY-BASED NUMERIC EFFLUENT LIMITATIONS FOR INDUSTRIAL AND CONSTRUCTION STORM WATER PERMITS) SHOULD BE A “HIGH” PRIORITY WITHIN THE STORMWATER INITIATIVE.

The SWSI’s Project 18 is to adopt sector-specific technology-based numeric effluent limitations (NELs), as appropriate, for industrial and construction storm water permits that provide for the greatest pollutant reductions that are economically achievable for the industry. Project 18 fits perfectly under Guiding Principle 3, to implement efficient and effective regulatory programs. CCKA strongly supports the prioritization of developing NELs, and requests that the State Water Board revise the Workplan to change Project 18 from a low priority to high. NELs are not only the most efficient and effective tool the State Water Board can use in its stormwater program, but State Water Board staff now acknowledges that there is sufficient data – for certain sector-specific technologies – to develop legally sound NELs.

The California Waterkeepers have been pressing the State and Regional Boards to include NELs in stormwater permits for over a decade. Current permits include only narrative limits, usually linked to subjective determinations relating to Best Management Practices implementation, or whether the discharge is “contributing” to exceedances of Water Quality Standards in receiving waters. This scheme is opaque at best, requires intensive investigation by either Regional Board staff or citizen enforcers, and therefore undermines enforcement efforts. The vast majority of enforcement undertaken by the Regional Boards relates only to failures to file documents.

NELs are a critical step towards providing clarity and certainty that the impacts of industrial and construction activities on water quality are controlled. NELs provide a simple and transparent regulatory scheme that dischargers can readily comply with and that State and Regional Board staff and the public can easily enforce.

A. *The 2006 Blue Ribbon Panel concluded that NELs are feasible for some industrial categories.*

In 2003, the State Water Board undertook work to renew the Industrial General Permit (IGP) consistent with the five-year cycle; however, permittee concerns regarding the incorporation of NELs in the permit halted the effort. In 2006, the State Board convened a panel of stormwater experts to evaluate the feasibility of NELs, resulting in an NEL feasibility report concluding that “Numeric Limits are feasible for some industrial categories.”¹⁵ Regardless of the panel’s conclusion that NELs are feasible for certain industrial sectors, the Board subsequently removed the NELs from the IGP and released subsequent weaker draft permits in July 2012 and July 2013.

The Final Draft Permit states that “the State Water Board expects that this [Permit’s data collection] and assessment process will provide information necessary to determine the feasibility of numeric effluent limitations for industrial dischargers in the next reissuance of this General Permit, consistent with the State Water Board Storm Water Panel of Experts’ June 2006 Recommendations.” During the timeframe between the adoption of the Final Draft Permit and the implementation date of July 2015, we believe that the Board should develop a framework for assessing industrial data to ensure the Board will achieve the ability to determine the feasibility of numeric limits. Unfortunately, the Response to Comments does not provide a timeframe for assessing data, and only states that the Board “anticipates developing a plan to assess the sampling data at *some point*.” We again assert that during this time, the Board should make it a priority that data collection informs future numeric limits, and put in place a framework for assessing the adequacy of data collection and monitoring parallel to permit implementation. This should include consideration of using the Permit’s reopener clause to make revisions to the monitoring and reporting requirements as deemed necessary.

B. *The State Water Board recognized the utility of Numeric Effluent Limitation in the Construction Stormwater Permit.*

The Construction Stormwater Permit, coupled with the Water Board’s expressed intent to move away from NELs, reflects a huge missed opportunity to strengthen statewide and regional stormwater permits and regulations. The State Water Board’s removal of NELs, following the *BIA* decision, was a step in the wrong direction for stormwater program efficiency. In Response to Comments to the re-adoption of the Construction Permit, the State Water Board recognized the utility of NELs, but deferred their adoption to a *future permit process* because a “lack of data and staff resources”. Instead of committing to undertake the analysis required to support numeric limits, the Board decided that numeric limits should be stricken from the permit.

The old system used in the 1999 Construction Stormwater Permit wasn’t working. The Blue Ribbon Panel concluded that the existing system for managing construction stormwater pollution is not working, “specifically recognizing in the construction context that “...traditional erosion and sediment controls are highly variable in performance, resulting in highly variable turbidity levels in the site discharge.”¹⁶ It is critical to recognize that the BMP solution to storm water problems has been inadequate, based on 15+ years of experience with construction, industrial, and Phase 1 MS4 storm water permits. Along with finding NELs feasible for industrial stormwater, the Panel of stormwater experts also reached a consensus that “active treatment technologies make Numeric Limits technically feasible for pollutants commonly associated with stormwater discharges from construction sites for larger construction sites.”¹⁷

¹⁵ Stormwater Panel on Numeric Limits, *The Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial and Construction Activities*, Report to the State Water Resources Control Board, pg. 19 (June 2006), available at http://www.waterboards.ca.gov/water_issues/programs/stormwater/numeric.shtml.

¹⁶ Report on the Feasibility of Numeric Effluent Limitations Applicable to Discharges of Storm Water Associated with Municipal, Industrial and Construction Activities (“Blue Ribbon Panel Report”).

¹⁷ Report on the Feasibility of Numeric Effluent Limitations Applicable to Discharges of Storm Water Associated with Municipal, Industrial and Construction Activities (“Blue Ribbon Panel Report”).

- C. *State Water Board staff now acknowledges that it can develop NELs for some specific sectors, and that doing so will improve efficiency and water quality.*

Previously, the State Water Board believed that data to support the development of technology based NELs for the majority of sectors permitted and pollutants of concerns did not exist. However, the State Water Board now acknowledges in the SWSI Workplan that “the Water Boards likely can identify some specific sectors and pollutants for which to develop NEL.”¹⁸ The SWSI goes on to acknowledge that “Water Boards can improve efficiency and water quality by evaluating opportunities where the NELs also address TMDL requirements.” We strongly agree, and since NELs are the best way to improve efficiency and water quality – as intended by Principle 3 – we strongly recommend the State Water Board revise Project 18’s priority to “high”.

Since the Storm Water Panel on Numeric Limits was convened in 2006, California’s Storm Water Multiple Application and Report Tracking System (SMARTS) database has matured into a robust dataset and a number of stormwater control manufacturers have released numeric performance data to the public. Information available from the database may be used to inform determinations of feasibility, regarding inclusion of numeric effluent limits in California’s industrial permit, as well as evaluations of BAT/BCT technology(ies). However, the Board decided to refer to the IGP as a “bridge permit” meant to collect quality storm water discharge data. With the IGP adopted and being implemented, the time is now for the State Water Board to begin assessing NELs as a high priority in the SWSI.

NELs can facilitate more effective permit implementation for both dischargers and Board staff. NELs provide a clear and simple method for evaluating compliance with the permit. Rather than having to spend countless hours reviewing SWPPPs and conducting site visits to assess whether the BMPs chosen will in fact achieve the pollutant reductions required, NELs set a pollutant concentration level and leave it up to the discharger to determine how it will meet these limits.

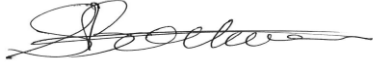
Generally, NELs are necessary to effectively reduce stormwater pollution. Numeric effluent limitations are the most effective method available to the State Board to ensure that the permits will meet the dual requirements of the Clean Water Act to force technology-based solutions to reduce pollutants and to ensure that water quality standards are met. The level of restriction and degree of water quality protection afforded by narrative effluent limitations and numeric effluent limitations is intended to be the same under the Clean Water Act. Yet the precision, clarity, and enforceability of a numeric effluent limitation is greater than that of a narrative effluent limitation. NELs provide a simple and transparent regulatory scheme that dischargers can readily comply with and that regulators can easily enforce when necessary. With NELs, determining compliance will be simple, and dischargers will still have the quantitative information to help determine what additional steps are necessary to achieve compliance.

Simply put, NELs are a tool for the State Water Board to work smarter, not harder. It has been almost a decade since the Blue Ribbon Panel found NELs are feasible for certain industrial and construction sectors. Now, the State Water Board staff acknowledges they are similarly feasible. The data has been, and is being currently, collected to make NELs legally defensible. And NELs are the best tool the State Water Board has to improve efficiency and water quality within the stormwater program. We request the State Water Board *set Project 18 as a “high” priority within the SWSI.*

¹⁸ Supra note 14, at 25.

Our organization looks forward to working with you to ensure the SWSI is implemented in an equitable and balanced manner. Our hope is that the focus of the Initiative will be to improve water quality – and not reduce the cost of compliance in a manner that shields dischargers from their Clean Water Act obligations.

Sincerely,

A handwritten signature in black ink, appearing to read "Sean Bothwell", with a stylized flourish at the end.

Sean Bothwell
Staff Attorney
California Coastkeeper Alliance