

**Comments on: Draft National Pollutant
Discharge Elimination System
(NPDES) General Permit No. CAR000002
Waste Discharge Requirements for
Discharges of Storm Water Runoff
Associated with Construction Activity**

Submitted by

**California Building Industry Association
Building Industry Legal Defense Foundation
Construction Industry Coalition on Water Quality**

**Submitted to the
California State Water Resources Control Board
Division of Water Quality**

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Acknowledgements

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I. PRELIMINARY STATEMENT

The parties listed below, respectfully provide the following comments to the State Water Resources Control Board (“SWRCB” or “State Board”) on the March 18, 2008 Draft SWRCB Order No. 2008-XX-DWQ National Pollutant Discharge Elimination System (“NPDES”) General Permit No. CAR000002 Waste Discharge Requirements for Discharges of Storm Water Runoff Associated with Construction Activity (“DCGP”). In connection with these comments and more generally, we appreciate the opportunity to participate in the process of developing the final NPDES General Permit and Waste Discharge Requirements for Discharges of Storm Water Runoff Associated with Construction Activity (“Final CGP”).

As an industry, we are committed to working with the SWRCB to develop a Final CGP that raises the bar for construction water quality control for all sites in California, and provides the necessary regulatory flexibility to tailor approaches for different construction phases and associated technologies, variable site and climactic conditions and widely-divergent receiving water conditions across the State. Like the SWRCB and others in the state, the Commenting Parties wish to work hard to improve water quality within our industry, and we also realize that our work requires the utilization of finite technological and financial resources to achieve our goals. Our comments below are provided in light of our commitment, our shared goals, and the recognized limitations with which we all contend.

A. Commenting Parties

These comments are submitted on behalf of the following parties (collectively the “Commenting Parties”):

- The California Building Industry Association (“CBIA”). CBIA is a non-profit trade association comprised of approximately 6,500 member companies that are engaged in all aspects of planning, designing, financing, constructing and selling approximately 80% of all new homes built in California each year.
- The Building Industry Legal Defense Foundation (“BILD”). BILD is a non-profit mutual benefit corporation and wholly-controlled affiliate of the Building Industry Association of Southern California (“BIA/SC”). BIA/SC is a nonprofit trade association representing more than 2,100 member companies with more than 200,000 employees. The mission of BIA/SC is to promote and protect the building industry to ensure its members’ success in providing homes for all Southern Californians. BILD’s purposes are to monitor legal developments and to improve the business climate for the construction industry in Southern California, through defending the legal rights of current and prospective home and property owners.
- The Construction Industry Coalition on Water Quality (“CICWQ”). CICWQ is comprised of the four major construction and building industry trade associations in

Southern California: the Associated General Contractors of California (“AGC”), the BIA/SC, the Engineering Contractors Association (“ECA”) and the Southern California Contractors Association (“SCCA”). The membership of CICWQ, which is comprised of construction contractors, labor unions, landowners, developers, and homebuilders throughout Southern California, work collectively to provide the necessary infrastructure and support for the region’s business and residential needs.

B. Procedural Issues

By providing this letter, the Commenting Parties seek to assist the SWRCB in the development of an effective and enforceable Final CGP that will benefit the Board, the citizens of California and the construction industry. Toward that end, and in the interest of full participation in this process, we specifically reserve the right to comment on any and all future modifications, whether in writing or oral, made to the March 18, 2008 version of the DCGP that currently is under review.

In addition, according to the position taken by staff, the information presented to the State Board during the 2007 PCGP process will not constitute part of the official record of the Final CGP when it is adopted. Statements by Greg Gearheart, SWRCB Staff, SWRCB Workshops on DCGP, May 7 & 21, 2008 (collectively the “May Workshops”). The Commenting Parties believe this is an error and object to any decision to not consider materials from the PCGP process in the administrative record for the Final CGP. While the PCGP process was an informal information gathering step, many interested parties expended substantial effort responding to the State Board's request for information. To ignore that entire process would be unreasonable. Moreover, since all of the information presented to the SWRCB in 2007 was submitted in writing and is still available on the State Board’s website, it is still available to the State Board during the current consideration of the DCGP. Therefore, the Commenting Parties believe that the information submitted in the PCGP process will constitute a part of the ultimate administrative record for the Final CGP. *See*, Cal. Code of Civ. Proc. § 1085; *see also*, *Kahn v. East Bay Mun. Util. Dist*, 41 Cal.App.3d 397, 402 (1974).

To ensure that the SWRCB does not improperly jettison the documentation submitted by the regulated community in 2007, the Commenting Parties hereby incorporate several salient comment letters submitted by others on the PCGP that contain comments relevant to DCGP requirements. Also the Commenting Parties are resubmitting and suggest a re-review of the May 4, 2007 CBIA letter, the associated May 8, 2007, Legal and Policy Comments document, the associated May 8, 2007, Technical Issues Memorandum with all attachments and references; as well as other critical reports submitted by the Commenting Parties to the SWRCB during the time period between issuance of the PCGP and the DCGP. To facilitate the SWRCB’s review of these materials, the documents incorporated herein are listed on Attachment A and included within Attachment B. Each and every one of these comments is critical to preparation of the Final CGP and must be granted due consideration so as to ensure that the Final CGP is as legally, politically and technically sound as possible.

Also, the Commenting Parties understand that comments on the DCGP are being submitted by Dr. David Sunding, with Berkley Economic Consultants, Inc. We join in Dr. Sunding's comments and incorporate them by reference herein.

II. EXECUTIVE SUMMARY AND RECOMMENDATIONS

A. Executive Summary

1. *Overview of agency action*

The SWRCB has issued a DCGP that departs radically from the U.S. Environmental Protection Agency ("EPA") federal storm water general permit and the existing California General Construction Storm Water Permit ("Current CGP").¹ Both current permits (the EPA's permit and the current CGP) rely on preparation of a Storm Water Pollution Prevention Plan ("SWPPP"), setting forth Best Management Practices ("BMPs") tailored to the site, weather and activities, and inspection and maintenance requirements, enhanced by monitoring, sampling and analysis tailored to ensure detection of releases of non-visible pollutants, as well as protection of federal Clean Water Act § 303(d) listed waterbodies.

In sharp contrast, the DCGP reflects unprecedented control strategies that have never been included in a storm water construction general permit issued by EPA or any state administering the federally delegated program. These new provisions include a combination of: Numeric Action Levels, ("NALs"), Numeric Effluent Limits ("NELs"), extensive monitoring and analysis requirements, preference for use of Advanced Treatment Systems ("ATS") (retention ponds, pumping, chemical treatment, extensive testing, and controlled effluent release), "one-size-fits-all" provisions for post-construction runoff reduction/flow control, and an open-ended public review process that grants unprecedented discretion to the Regional Boards.

2. *Key legal and policy concerns with the DCGP*

The discussion in section III, below, provides detailed comments related to the legal and policy issues of concern for the Commenting Parties. In particular, the Commenting Parties have several key concerns with the DCGP as follows:

- NALs—While the Commenting Parties are not wholly opposed to the use of NALs as tools to improve BMPs, we believe the current NALs have not been properly developed in light of the lack of sufficient supporting data.
- NELs—The proposed NELs have not been developed in keeping with federal or state law, including consideration of certain factors required to be assessed under the respective legal regime (federal or state) before establishing NELs. Furthermore, the

¹ SWRCB, Order No. 99-08-DWQ, *National Pollutant Discharge Elimination System (NPDES) General Permit No. CAS000002 Waste Discharge Requirements (WDRs) for Discharges of Storm Water Runoff Associated with Construction Activity*.

administrative record for the DCGP contains no justification for the SWRCB to reverse its prior position concerning the infeasibility of application of NELs to construction storm water.

- Monitoring—The proposed monitoring requirements (i) stand in contrast to prior SWRCB statements on the scope of appropriate monitoring of construction site storm water, (ii) will not likely result in useful data being generated, and (iii) present extremely difficult technical challenges to proper implementation.
- Post-construction Controls—The post-construction control requirements are inappropriate for inclusion in the CGP program because there are much better regulatory alternatives already at the SWRCB’s disposal to control flow from new developments and redevelopment projects. The post-construction requirements also will hinder or preclude the development of beneficial projects such as regional water quality treatment controls and constructed wetlands.
- Public review—The proposed public review elements of the DCGP are unnecessary, are vague and undefined, are not legally required, and will wreak havoc on California’s construction industry, as individuals would be allowed to oppose any project on limitless grounds while permittees are subjected to extreme uncertainty regarding the status of permit coverage for the duration of their projects.
- Exemption from CGP Coverage—In a thinly-veiled attempt to avoid having to follow certain provisions of California State Water law, the DCGP seeks to limit its jurisdiction to only U.S. jurisdictional waters, which will completely undermine the CGP as a general permit when thousands of projects throughout the state are forced to obtain individual permits. Similarly, the DCGP elements related to risk evaluation are unduly biased in favor of finding sites as high risk and thus excluding many sites from CGP coverage.

B. Recommendations

In addition to the more detailed recommendations provided in the discussions below, we recommend the following in relation to our key concerns:

- Consider establishing a permittee-funded, scientific, third-party data collection effort during the CGP term in lieu of burdensome effluent and receiving water monitoring data proposed in the DCGP. Use the collected data to assist in the refinement of NALs.
- Replace the current turbidity NAL with a simpler statewide NAL or benchmark to use as a performance tool and revise the pH NAL to remedy technical deficiencies with the current proposal.

- Remove NELs from the CGP until data can be generated and studied such that federal and state regulations required to be followed in establishing NELs can be followed.
- Remove post-construction control requirements from the CGP, leaving control of post-construction flows from new development and redevelopment projects to the large and small public storm drain permit programs and to the environmental review process conducted under the California Environmental Quality Act (“CEQA”); establish a statewide policy for controlling runoff from new development and redevelopment which would enhance Regional Boards involvement in CEQA reviews.
- Provide for electronic filing and acceptance of documents, but the time and context for public review of the documents, properly leaving most potential concerns to the enforcement context, thus helping to limit the uncertainty of the DCGP’s proposals.
- Revise the proposed risk-based system to be more balanced, and remove the undue bias in favor of high-risk rankings for sites.
- Issue the Final CGP as a joint NPDES/waste discharge requirements as has always been the case for the CGP in order to avoid unnecessarily burdening the RWQCBs and creating a regulatory morass.

III. DISCUSSION

A. The DCGP’s Proposed Numeric Actions Levels (NALs) Are Both Premature and Improper.

As described in more detail below, the proposed NALs (as well as the Numeric Effluent Limits discussed in section III.B, below) are not appropriate at this time when considered in the context of all the relevant factors governing promulgation of industry-wide pollutant control standards. From a technological perspective, it is far too early to propose NALs until additional data is collected and analyzed to ascertain water quality benefit and regulatory feasibility. Viewed from the federal perspective, the federal Clean Water Act (“CWA”) (33 U.S.C. §§ 1251 *et seq.*) requires that an agency determine whether a regulation is economically achievable on the basis of the total cost to the industrial subcategory and the overall benefits derived. The SWRCB, however, has failed to undertake the studies that would permit such a determination. Apart from these deficiencies, if the SWRCB chooses to include NALs in the Final CGP, the numeric levels must be derived based on the available scientific evidence, and we request that there be a phase-in period for the NAL requirements. Such a suggested phase-in period was recommended for NALs by the Blue Ribbon Panel, commensurate with the capacity of the dischargers and support industry to respond to these requirements. Blue Ribbon Panel Report, at 17. We encourage the SWRCB to follow the Blue Ribbon Panel’s recommendation and work with the Commenting Parties and the regulated industry to identify the many technical and practical limitations on implementation of these requirements, and to tailor appropriate phase-in

to account for such limitations. *See also*, Technical Issues Memorandum submitted concurrently with these comments (hereinafter “Technical Memo”).

1. *The NALs as currently proposed are not appropriately developed, do not serve their intended purpose, and are infeasible.*

The DCGP proposes NALs for pH and turbidity. The Commenting Parties do not oppose the idea of establishing NALs, provided they take into account the variability of natural site conditions and receiving water quality, are properly derived to represent “upset values” and are referenced to a “design storm” event. The NALs in the DCGP cannot meet the State Board’s goal of improving implementation of BMPs at construction sites because they do not represent reliable indicators of construction BMP “failures” and have been established improperly, without relying on a sound technical methodology. Further, they do not reflect or provide for a mechanism to take into account the unpredictable and variable nature of storm water volumes and intensities, or the widely variable background soils, precipitation and receiving water conditions in different regions of the State. *See further* the Technical Memo submitted concurrently. A pollutant control measure incorporating NALs might be useful in enhancing BMP performance, but only if the NALs are appropriately derived from a methodology, formula, or guidance that takes these fundamental factors into account. In light of these issues, and in response to the question posed by Board Member Wolff at the workshop on the DCGP conducted in Los Angeles by SWRCB staff on May 7, 2008, the NAL provisions are an area of the DCGP requiring more complexity. As drafted, the NALs do not contain the needed elements such as a design storm or accounting for natural conditions, but rather present one-size-fits-all numbers, which are inappropriate for broad application.

2. *The SWRCB should follow the Blue Ribbon Panel’s recommendations with respect to NALs.*

While the Blue Ribbon Panel Report² concluded that it is technically feasible to implement NALs for construction storm water discharges, that conclusion specifically was conditioned upon the SWRCB applying NALs in accordance with the Panel’s recommendations. Those recommendations included additional data development, research, and analysis before employing NALs. *See* Blue Ribbon Panel Report, at 8–10. However, the NALs currently proposed in the DCGP do not address many of these issues and concerns raised by the Panel and, as a result, are inappropriate and infeasible from a regulatory perspective. The Blue Ribbon Panel Report concluded that NALs can be an important tool to deal with discharges associated with construction activities, if appropriately derived as true action or upset levels that take into account relevant local conditions, background water quality conditions, and flow conditions. Blue Ribbon Panel Report, at 10, 16–18. As explained in greater detail in the Technical Memo, the proposed NALs contained in the DCGP are not defined as upset levels and fail to account for local conditions.

² Storm Water Panel Recommendations to the State Water Resources Control Board, The Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm Water Associated with Municipal, Industrial and Construction Activities, June 19, 2006 (“Blue Ribbon Panel Report”).

To the extent that properly derived NALs might be included in the Final CGP to enhance the performance of an industry-wide pollutant control strategy focused on implementing comprehensive and complementary BMPs by requiring review and potentially modification of BMPs when NALs are exceeded, the approach would be consistent with the pro-active approach for controlling construction discharges recommended in the Technical Memo. Use of such NALs to better implement BMPs can be expected to achieve load reductions, which should be the primary goal of numeric permit elements according to the Blue Ribbon Panel Report. Blue Ribbon Panel Report, at 18. At this time, however, the proposed NALs fail to meet this primary goal, since dischargers across California would be forced to adhere to NALs that were not established according to the Panel's recommendations.

3. *The specific NAL values currently proposed by the DCGP are not properly supported by evidence in the record.*

As discussed in greater detail in the Technical Memo, additional analysis is needed to determine appropriate numeric values and parameters for an industry-wide pollutant control measure. The justification for the NALs in the Fact Sheet is unsupported by scientific data that would demonstrate how the NALs indicate the effectiveness of onsite BMPs or the impact of discharges on receiving water quality. *See* Fact Sheet, at 48–49; *see further*, Technical Memo. Per federal and state law, the SWRCB's decision on the Final CGP *must* be supported by substantial evidence in the administrative record. *See, e.g., Riverkeeper, Inc. v. U. S. EPA*, 475 F.3d 83, 95-96 (2d Cir. 2007) (Court affirmed aspects of a rule promulgated by EPA pursuant to CWA section 316(b) that were supported by substantial evidence, but remanded aspects that were inadequately explained or inconsistent with the statute). If, in fact, the State Board has the scientific support for the NALs, that evidence has not been produced for inspection and review by the public and the regulated community. Because the currently proposed NALs lack evidentiary support, they cannot be included in the Final CGP.

4. *The NALs do not further the SWRCB's goal of improving implementation of construction BMPs.*

The following are among the technical concerns and issues, described in greater detail in the Technical Memo, that demonstrate the proposed NAL values are ill-suited for their intended water quality control purposes³:

- The upper limit to NALs (i.e., the proposed NEL) does not account for background conditions/environmental characteristics of the various sites across the state. As recommended by the Blue Ribbon Panel Report and discussed further in the Technical Memo, NALs should take into consideration the site's climatic region,

³ *See, e.g.,* 33 U.S.C. §§1314(b)(4)(A)(consider the chemical and physical characteristics of pollutants in determining the appropriate level of reduction to be attained) and 1314(b)(4)(B) (consider the engineering aspects of the treatment control technique and the benefits of effluent reductions attained); Cal. Water Code §13241(c) (consider water quality conditions that could reasonably be achieved through controls).

typical soils conditions, slopes, and natural background conditions, including receiving water quality conditions.⁴ Blue Ribbon Panel Report, at 16–18. The calculation procedure used to derive the currently proposed NALs may not represent conditions at construction sites or the various conditions in different regions of the State as described in greater detail in the Technical Memo. The NALs should be revised to consider these factors and assure that the NALs reliably indicate where BMP corrections are needed, rather than simply reflecting typical water quality conditions for the region.

- NALs need to be set at upset values. It is unknown whether or not the proposed NALs would serve as upset values that would be reliable indicators of construction BMP “failures.” *See* Technical Memo. As recommended by the Blue Ribbon Panel, NALs should consider both average pollutant discharge levels for various pollutants and the significant natural variability in storm water pollutant levels based on local storm water quality data to assure that the NAL values chosen consistently represent upset values. Blue Ribbon Panel Report, at 17–18. Since these factors were not considered in the proposed DCGP NAL values, the NAL values should be reviewed and revised according to the Panel’s recommendations.
- NALs need to be established in reference to a design storm. Although the calculation procedures for the turbidity NAL are to be used with a 2-year, 24-hour design storm, the NALs themselves would apply under all storm conditions. There is no evidence that the proposed NALs would be a useful or reliable indicator of BMP performance under all storm water flow conditions. The Blue Ribbon Panel found that NALs should not apply to storms of unusual event size and/or pattern (*e.g.*, flood events) because they do not reliably indicate the need for BMP corrections in extreme conditions. Blue Ribbon Panel Report, at 18. The proposed NALs do not take into account the substantial variability of storm water flow conditions and resultant pollutant levels and characteristics, particularly for very large (greater than 2-year) storm conditions. *See* Technical Memo. The DCGP should be revised so that NALs are applied only for an appropriate range of flow conditions (*i.e.*, a “design storm”) to achieve the intended result of determining if BMPs are effective as implemented or if modifications are warranted.

Due to the deficiencies described above, the NALs are technically flawed and must not be included in the Final CGP. The Commenting Parties believe that, if properly designed, NALs may be a useful tool in enhancing BMP performance and quality control of storm water discharges from construction sites, and use of NALs could lead to advances in the management of construction site runoff. However, in light of the above deficiencies, the “one-size-fits-all” NALs may ultimately result in detrimental impacts to water quality. *See* Blue Ribbon Panel Report, at 17.

⁴ 33 U.S.C. § 1314(b)(4)(A) (consider physical characteristics of regulated pollutants; Cal. Water Code §§ 13263 and 13241(b) (consider environmental characteristics of hydrographic unit under consideration, including influent water quality).

5. *The proposed NALs are unnecessary to achieve the SWRCB's goals.*

The DCGP states the intended goal of the DCGP's NAL requirements is the collection of monitoring data to "provide operational information regarding the performance of the site's measures used to minimize the discharge of pollutants and to protect beneficial uses and receiving waters from construction-related storm water discharges." DCGP §I.14. Staff echoed the NALs purpose of data collection in order to determine when BMPs need to be revised to adequately protect water quality at the SWRCB workshop on the CGP held on May 7, 2008. We submit that the SWRCB can achieve this goal without forcing NALs, along with their corresponding monitoring requirements, on the regulated community.

As happened with the data collection required pursuant to the General Industrial Permit, we are concerned that the dataset that would result from discharger-only data collection would be unusable in terms of advancing the program or providing a sufficient technical basis for the development of numeric measures. If the SWRCB determines that it requires data beyond that which is collected as part of existing SWRCB and RWQCB water quality programs, the industry is willing to work with the SWRCB to collect and share such data. As suggested by Board Member Wolff, the Commenting Parties would support a State- and permittee-funded data collection program as an alternative to NALs. A third-party collected dataset would provide uniformity in collection methods and quality of data, result in better study design and allow for integration of results into a report or format that could be used to advance the State's water quality protection programs. A scientifically valid data set would better serve the intended purpose of the NALs. For additional detail on the Commenting Parties' proposed monitoring program, please see the Technical Memo.

B. Numeric Effluent Limits (NELs) Are Inappropriate for Inclusion in the DCGP and Should be Removed from the Final CGP.

The DCGP proposes prematurely to mandate construction site compliance with several numeric effluent limits (NELs). The NELs included in the DCGP comprise industry-wide control measures and, as such, are overly broad, do not take into account important technical constraints with respect to implementation, and require additional analysis to determine appropriate numeric values. As written, these NELs are improper.

In lieu of NELs, the SWRCB should include requirements in the Final CGP that refocus permit emphasis on requirements mandating that SWPPPs contain, and projects plan for, implement, and maintain a comprehensive system of BMPs to control construction site pollutants and protect water quality. *See further*, Technical Memo. If the SWRCB desires a numeric approach, then the Commenting Parties point to the recommendations of the Blue Ribbon Panel Report to set appropriate NALs to guide and enhance BMP implementation and control.

1. *The SWRCB already has determined that NELs are inappropriate and has no basis for reversing its prior determination.*

When adopting the current CGP, the SWRCB found that it was not feasible “to establish numeric effluent limitations for pollutants in storm water discharges from construction activities. Instead, the provisions of this General Permit require implementation of [BMPs] to control and abate the discharge of pollutants in storm water discharges.” *See*, Current CGP, Finding 9. Because of the infeasibility of establishing numeric limits, the associated Fact Sheet stated that “the effluent limitations contained in this General Permit are narrative and include the requirement to implement appropriate BMPs.” *See*, Current CGP Fact Sheet, as amended, at 4.

After issuing the current CGP, the SWRCB faced litigation from the environmental community challenging the validity of the permit as a violation of the CWA. *See*, *San Francisco Baykeeper, et al, v. State Water Resources Control Board* (Superior Court of California, Sacramento County Case No. 99CS01929). Specifically, in the final ruling on the *Baykeeper* case, the Superior Court held that it would be inappropriate to compare numeric results from sampling and analysis with any numeric limits since “the scientific and technical difficulties of obtaining and analyzing storm water discharge samples that accurately reflect the impact of the discharges on the water quality of receiving waters” would “preclude[] the use of sampling results as numeric water-quality-based effluent limitations.” *See*, *Baykeeper, supra*, Ruling on Submitted Matter, May 18, 2005, at 9, n.2. The Court adopted this finding based on the persuasive arguments raised by counsel for the SWRCB.

In particular, the Court agreed with the State Board’s claim that it was not feasible at the time “to establish numeric effluent limitations for pollutants in storm water discharges from construction activities. Instead, the provisions of this General Permit require implementation of [BMPs] to control and abate the discharge of pollutants in storm water discharges.” *See*, Current CGP, Finding 9. Because of the infeasibility of establishing numeric limits, the associated Fact Sheet stated that “the effluent limitations contained in this General Permit are narrative and include the requirement to implement appropriate BMPs.” *See*, Current CGP Fact Sheet, as amended, at 4.

During its defense of this statement in the *Baykeeper* action, the SWRCB correctly argued that “numeric limitations were not feasible due to the variability of storm water events and pollutant constituents and concentrations in storm water runoff.” *See*, *Baykeeper, supra*, Respondent’s Memorandum of Points and Authorities in Support of Motion for Discharge of Writ, December 9, 2004, at 3.⁵ In addition, the State Board elaborated on this argument, claiming that “storm water discharge is determined by rainfall, which is highly variable and intermittent and falls at unpredictable rates and quantities into sites that have varying geographic, geologic and vegetation characteristics.” *See*, *Baykeeper, supra*, Opposition Motion for Order Enforcing Writ of Mandate, December 17, 2004, at 5.

⁵ Although the quoted material references water quality-based NELs, the rationale presented by the SWRCB is equally applicable to the technology-based NELs currently proposed in the DCGP.

Taking this argument further, the SWRCB argued that “[t]he rate at which rain falls varies over the course of the storm, and rain that falls onto the site combines with storm water that runs onto the site. Storm water does not run off the construction site at any defined, measurable outflow point (such as a pipe), but potentially runs off in multiple directions, where it combines with runoff from other sites.” *Id.* Overall, the State Board concluded that because of “these variables,” it is difficult to calculate the precise rate and volume of storm water discharged, and consequently to calculate pollutant mass and concentration, in a scientifically valid manner.” *Id.*

These arguments remain as unassailable today as they were when the SWRCB made them in the *Baykeeper* action. Since making these highly convincing arguments in December of 2004, the SWRCB has taken no steps to dispute the position advanced in the *Baykeeper* case. In fact, the State Board has failed to offer any evidence that circumstances have changed such that it is now feasible, in 2008, to put forth the broad-based NELs proposed in the DCGP. Even the SWRCB’s own Blue Ribbon Panel of experts found that without the use of chemical treatment through Advanced Treatment Systems (ATS), the imposition of NELs to storm water flows from construction sites was not likely feasible. It seems extremely unlikely and is not presently evidenced by the information in the record that the variability explained by the State Board to the *Baykeeper* courts has been accommodated by the SWRCB in the short timeframe since the final *Baykeeper* decision was issued. Absent *specific and concrete* scientific and technical evidence in this administrative record, the State Board cannot execute a 180 degree turn from its prior, correct position, and now seek to enforce the previously unenforceable. As it stands now, the SWRCB lacks a sufficient basis for the proffered NELs, and unless or until more information is provided, these limitations cannot be applied to the regulated community.

2. *Construction storm water is fundamentally different from other discharges and is not appropriate for regulation through NELs.*

Besides being premature, NELs may not be appropriate for application to construction storm water due to fundamental feasibility concerns and are not demonstrated to be feasible in the DCGP. NELs generally are feasible and appropriately applied to process wastewater from traditional industrial processes (*e.g.*, factories) or wastewater treatment facilities, which exhibit relatively constant flows and predictable pollutant loads. Manageable flow volumes and predictable pollutant loads lend themselves to capture and treatment via various technologies which, in turn, produce a consistent treated wastewater effluent. Under such circumstances, one can have a high degree of confidence that effluent concentrations will not exceed a prescribed limit, as long as the treatment unit is designed and operated properly. Accordingly, it is feasible to calculate appropriate numeric limits and compliance with such limits is possible.

In contrast, storm water volumes and qualities are highly unpredictable and are largely dependent on weather. Extreme and highly variable storm water flow volumes, together with uncertainty regarding storm water quality during any given time period or event, make storm water treatment an inexact science, and not one generally capable of consistent, reproducible results. As the SWRCB has explained, “[t]he inherent variability of storm water discharges also

make numeric effluent limitations and end-of-pipe treatment impractical. The frequency, duration and magnitude of storm events and the constituents, concentrations, mechanisms, persistence and effects of runoff are poorly understood.” SWRCB Order No. WQ 91-03, at 52.

Absent the ability to capture vastly divergent storm water volumes and to treat highly variable storm water quality to consistent and reproducible results, strict compliance with NELs is neither feasible nor prudent. To support a claim of feasibility, such results must be established, most likely, using a representative subset of all the sites statewide and must be capable of being repeated at all regulated sites (*i.e.*, approximately 20,000 sites statewide),⁶ under dramatically divergent conditions influenced by a myriad of site-specific and climatic factors. Attempting to avoid this complexity by setting simplistic NELs is a recipe for failure given the extreme-value nature of storm water.

The SWRCB itself recognized this fact when adopting the Current CGP, stating:

In order to obtain a realistic chance of compliance with numeric effluent limitations, dischargers would have to install some kind of end-of-pipe treatment technology. However, few such technologies have been investigated or developed for discharges of storm water and urban runoff. Available treatment technologies are limited because storm waters involve high volume, intermittent flows from a large number of outfalls. Physical treatment works generally necessitate interception and transport of storm sewer flows to central locations and require extensive land area for gravitational settling basins.

SWRCB Order No. WQ 91-03, at 51. Although the SWRCB left open the possibility of applying NELs at a later time when it was “appropriate and proper” (*Id.*), storm water treatment technologies have not yet advanced to a point where NELs would now be appropriate. The SWRCB further acknowledged that it had not yet formed a consistent approach on NELs when it states in the Fact Sheet that it wishes to use the data collected in monitoring associated with the NALs to “help develop the role of numerics in our general NPDES permits for stormwater discharges.” Fact Sheet, at 14. Given its own admission that it has not yet fully formed a policy on the use of numeric limits in general storm water permits, the SWRCB would be acting arbitrarily to retain the proposed NELs in the Final CGP—NELs of which violations will subject permittees to substantial fines and penalties.

The only treatment devices that SWRCB believes may be able to consistently meet an NEL (absent an upset event) are advanced treatment systems (ATS), and these systems have numerous technical problems associated with their implementation (see further discussion regarding ATS in § III.J, below). Accordingly, it is still the case that “available treatment technologies are limited,” and that available storm water treatment techniques will “result in extremely high

⁶ Estimate of total construction sites governed by the Current CGP by Greg Gearheart, SWRCB staff, May Workshops.

costs” and “may also pose potential adverse environmental impacts.” SWRCB Order No. WQ 91-03, at 51–52. Absent a sea change in available technology, which has not been claimed or proved here, NELs cannot be included in the Final CGP.

3. *The CWA does not require NELs for storm water discharges and, in fact, EPA has consistently rejected them.*

EPA regulations provide that NPDES permits may rely on BMPs to control or abate pollutant discharge where authorized under CWA § 402(p) for storm water discharges, where NELs are infeasible, or where reasonably necessary to achieve effluent limitations and standards and carry out the purposes of the Act. *See* 40 C.F.R. § 122.44(k)(2)-(4). As the SWRCB acknowledged in the *Baykeeper* case, “a finding it is infeasible to establish numeric effluent limitations is not the *sine qua non* of use of BMPs.” *Baykeeper, supra*, Respondent’s Memorandum of Points and Authorities in Opposition to Writ of Mandate, March 31, 2000, at 9.

In light of these regulations, EPA consistently has rejected the application of NELs to storm water discharges for the vast majority of industrial sources. As a general matter, EPA has explained that it is both technically difficult and expensive to develop numeric limits for storm water because, as discussed above, such discharges “are highly variable both in terms of flow and pollutant concentrations, and the relationships between discharges and water quality can be complex.” U.S. EPA, Questions and Answers Regarding Implementation of an Interim Implementation Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits, 61 Fed. Reg. 57,425, 57,426 (November 6, 1996). In both the current and proposed Multi-Sector General Permit for Industrial Activities (“MSGP”), EPA applied NELs only to six discrete categories of runoff.⁷ For all other discharges covered by the MSGP, EPA requires BMPs that are non-numeric “flexible requirements for developing and implementing site specific plans to minimize and control pollutants in storm water discharges associated with industrial activity.” 65 Fed. Reg. 64,746, 64,759 (October 30, 2000).

Although ultimately withdrawn, EPA issued a proposed effluent limitation guideline for storm water discharges from construction activities, in which the agency specifically rejected NELs, stating:

The stochastic nature of rainfall and runoff makes verification of the design standards difficult. In some cases, the nature of local runoff characteristics make it difficult to even design BMPs to a specified performance level. In addition, site-specific soil conditions greatly influence the amount of sediment mobilized

⁷ The six NEL categories include coal pile runoff, discharges from phosphate fertilizer manufacturing, asphalt paving and roofing emulsions, cement manufacturing materials storage pile runoff, discharges resulting from the spray down of lumber and wood products storage yards, and certain mine dewatering discharges. *See* U.S. EPA, Final Reissuance of NPDES Storm Water Multi-Sector General Permit for Industrial Activities, 65 Fed. Reg. 64,746, 64,761 (October 30, 2000); *see also* Proposed 2006 Multi-Sector General Permit For Storm Water Discharges Associated With Industrial Activity (MSGP) § 1.4.1 (“Proposed 2006 MSGP”) available at http://www.epa.gov/npdes/pubs/msgp2006_all-proposed.pdf.

during runoff events, and the soil settling characteristics greatly influence the performance of sediment controls. Designing an entire suite of erosion and sediment controls for a site to perform to a specified level would likely require the use of a computer model, which could add significant costs with little assurance of increased effectiveness. Similarly, monitoring to verify attainment of numerical requirements can be very difficult... with little demonstrated results. As a result, EPA did not consider numeric pollutant control requirements a viable option.

U.S. EPA, Effluent Limitations Guidelines and New Source Performance Standards for the Construction and Development Category, 67 Fed. Reg. 42,644, 42,658 (June 24, 2002). To date, the EPA has continued to refuse to impose NELs upon the construction industry.

Likewise, in an order referencing a challenge to the SWRCB's storm water regulatory program, the SWRCB stated:

The petitioners contend that the Clean Water Act, and regulations and court decisions interpreting the Act, require the inclusion of numeric effluent limitations in NPDES permits for the discharge of storm water from a municipal separate storm sewer system. We have reviewed these authorities, and also opinions we have received from EPA, and conclude that numeric effluent limitations are *not* legally required.

SWRCB Order No. WQ 91-03, at 30 (*emphasis added*). Because NELs are not required by the CWA, and because compliance is not achievable as designed with the currently available treatment technologies, NELs are infeasible and not appropriate for inclusion in the Final CGP.

4. *The SWRCB failed to properly consider the necessary factors when drafting the proposed NELs.*

The proposed NELs are “technology-based effluent limits” (TBELs). Under both state and federal law, the SWRCB is required to collect substantial factual and technical information, and then to consider, evaluate and balance that information in light of appropriate statutory factors, to arrive at a proper determination of appropriate pollutant control guidelines. *See*, Cal. Water Code §§ 13000, 13241, and 13263; 33 U.S.C. § 1314(b)(4)(B); 33 U.S.C. § 1342(p)(5). For reasonable clarity, and to stay consistent with its grant of authority from the EPA, the SWRCB must adopt NELs following, at a minimum, the same degree of fact finding and technical analysis that EPA uses to adopt general industrial storm water permits. *See generally*, 51 Fed. Reg. 24,974 (July 9, 1986)(presents the EPA's general methodology for developing BCT effluent limitation guidelines).

- (a) Viewed through the lens of federal law, the SWRCB cannot shortcut the federal process through exercise of Best Professional Judgment to justify the NELs in the DCGP.

When the SWRCB sets pollutant control guidelines in the Final CGP, it will be establishing a general industrial storm water permit for the construction industry in California as a category of industrial activity. Under federal law, the distinction between the regulator’s promulgation of general permits (and associated development of effluent limitation guidelines contained in them) and its writing of individual permits is extremely important: different procedures and more rigorous fact finding and analysis apply to promulgation of general permits and their effluent limitation guidelines because of the broad reach and application of the general permits. Since the SWRCB is adopting industry-wide pollutant control standards in a “General Permit,” a rigorous federally prescribed process must be used to determine appropriate control strategies and guidelines. *See*, 33 U.S.C. § 1342; 33 U.S.C. § 1314. The SWRCB has thus far failed to undertake those required steps in developing and proposing the NELs contained in the DCGP.

The Fact Sheet states that SWRCB is using “Best Professional Judgment” (BPJ) to establish pollutant control measures in the General Construction Permit. *See* Fact Sheet at 50–52 (“State Water Board staff has used best professional judgment (BPJ) to set the numeric effluent limitations for pH and turbidity equivalent to BPT [Best Practicable Control Technology currently Available] and BCT [Best Conventional Pollutant Control Technology]”). Especially, given the SWRCB’s staff’s position that federal law alone dictates its actions, the SWRCB may not “short cut” the federally prescribed process, by exercise of BPJ, because BPJ does not apply when adopting pollution control standards for a general category of industrial storm water in a General Permit. BPJ is a legal term of art to describe the exercise of discretion that EPA or a state acting under federal authority may use *when writing an individual permit* under two circumstances—where the Agency has not yet adopted industry wide pollution control standards applicable to the facility and the discharge at issue, or where existing performance in an industry is inadequate. *See*, 33 U.S.C. § 1342(a)(1)(B); 40 C.F.R. § 125.3(c)(2); *see also*, *Natural Resources Defense Council, Inc. v. U.S. EPA*, 859 F.2d 156 (D.C. Cir. 1988) (“BPJ limits constitute case-specific determinations of the appropriate technology-based limitations for a particular point source. In what EPA characterizes as a “mini-guideline” process, the permit writer [exercising BPJ], after full consideration of the factors set forth in CWA § 304(b), 33 U.S.C. § 1314(b), which are the same factors used in establishing effluent guidelines, establishes the permit conditions “necessary to carry out the provisions of [the CWA].” 33 U.S.C. § 1342(a)(1).”).⁸ Under these authorities, EPA may base a BAT/BCT determination upon technology transferred from a different industrial category, using its BPJ, *but only on a permit by permit basis*—not as a short cut to promulgating industry wide pollutant control standards or guidelines. Although SWRCB enjoys considerable discretion in its review of the many factors required to establish effluent control measures in the DCGP, it may not avoid the required

⁸ *See also*, *Natural Resources Defense Council v. U.S. EPA*, 863 F.2d 1420, 1425 (9th Cir. 1988); *Natural Resources Defense Council v. U.S. EPA*, 822 F.2d 104, 111 (D.C. Cir. 1987); *American Petroleum Institute v. U.S. EPA*, 787 F.2d 965, 971 (5th Cir. 1986).

balancing and discernment process by identifying control measures adopted in other contexts and importing them into the DCGP uncritically.

- (b) The process mandated by federal statute for identifying BAT/BCT must be followed because NELs are establishing effluent limitation guidelines for an entire industry.

The BAT/BCT Effluent Limitation Development Process. The CWA classifies pollutants into two broad categories: 1) conventional pollutants (CWA § 304(a)(4), 33 U.S.C. § 1314(a)(4)), and 2) toxics and non-conventional pollutants (CWA § 307(a); 33 U.S.C. § 1317(a)(1)). Conventional pollutants include the most significant pollutants of concern from storm water runoff at construction sites, including pH, turbidity and total suspended solids (“TSS”), biological oxygen demand (“BOD”), and certain petroleum hydrocarbons, including oil and grease. 40 C.F.R. § 401.16. Toxics and non-conventional pollutants are less likely to be discharged as a consequence of construction activity and are listed at 40 C.F.R. § 401.15. Effluent standards for conventional pollutants are set using Best Conventional Pollution Control Technology (“BCT”), while standards for toxics are established using Best Available Technology Economically Achievable (“BAT”). To establish pollutant control guidelines or measures based upon either the BAT or the BCT standard requires a rigorous assessment of several factors, which are set forth in the CWA and EPA’s implementing regulations. 33 U.S.C. § 1314(b)(2)(B); 40 C.F.R. § 125.3(d); and 51 Fed. Reg. 24,974 (July 9, 1986) (explaining how EPA determines BCT).⁹

In order to properly establish effluent limitations under either BAT or BCT, EPA typically:

- (i) gathers extensive information on the industry (through questionnaires, sampling and monitoring, literature reviews, and other methods);
- (ii) performs detailed qualitative and quantitative analyses of this information;
- (iii) develops sets of proposed control options for the industry;
- (iv) estimates the effluent reductions, costs, economic impacts and environmental effects of those options;
- (v) shapes the options into a proposed set of limits;
- (vi) explains the proposed limits in a Federal Register publication and additional supporting documents;
- (vii) reviews comments on the proposed limits; and
- (viii) incorporates those comments into a final regulation (again with considerable supporting documentation).¹⁰

⁹ The requirements for setting pollutant control standards using BAT are much the same as for establishing pollutant control standards using BCT. Because pollutants from construction sites are for the most part conventional pollutants, for simplicity, we will focus our analysis on BCT requirements.

¹⁰ *The Clean Water Act Handbook* (Mark A. Ryan, ed. 2003), at 24.

This procedure is an iterative process, which (i) assures critical and in-depth assessment of available scientific and technical information regarding pollutant control technologies available *from the regulated industry*, (ii) provides the factual data necessary for EPA to determine if a potential pollutant control technology is “available,” or “feasible” from a regulatory perspective considering industrial activities and economic and technical feasibility of the control technology,¹¹ and (iii) compares the benefits of the control technologies available in light of receiving water quality conditions, cost-effectiveness to the regulated community, effects on the environment, and other applicable factors. The SWRCB must follow a similar process here because the State is creating industry pollutant control guidelines for the construction industry. Despite the clear applicability of this procedure, the SWRCB has disregarded it thus far in proposing the NELs in the DCGP. There is nothing in the administrative record to suggest that the State Board has taken any of the steps; and, in fact, since the Commenting Parties need to be contacted for just the first step, it is more than likely that the SWRCB has evaded this responsibility altogether.

BCT and BAT Standards. In the CWA, Congress specified the steps that regulators must follow and the factors they must use when issuing industry-wide pollutant control measures or “[e]ffluent limitation guidelines.” 33 U.S.C. § 1314 (b).¹² The initial task outlined in the CWA is to identify pollutants to be regulated in the industrial discharge at issue and determine if they are conventional or nonconventional. Pollutants from construction activity are primarily conventional—sediment/TSS/turbidity and pH—so BCT is the primary methodology that should be used. Moreover, the pollutants for which the DCGP sets NELs are conventional pollutants. Once the nature of the pollutants is determined, the federal statutory scheme stages the regulatory process into three steps.¹³

First, the regulator, here the SWRCB, must make findings concerning (i) the characteristics of the discharged pollutants, and (ii) the degree of pollution reduction attainable through use of BMPs. 33 U.S.C. § 1314(b)(2)(A) and (b)(4)(A).¹⁴ Second, the SWRCB must “identify control measures and practices available to eliminate the discharge of pollutants from categories and classes of point sources, taking into account the cost of achieving such elimination of the discharge of pollutants.” 33 U.S.C. § 1314(b)(3). When the EPA is proposing

¹¹ A given technology may be “unavailable” or “infeasible” for many reasons, including economic and technical viability, and non-water quality environmental impacts. *BP Exploration & Oil v. United States EPA*, 66 F.3d 784, 796 (6th Cir. 1995) (EPA’s determination of an infeasible control measure was appropriately based on “high economic and non-water quality environmental impacts”).

¹² The effluent limitation guidelines for toxics and non conventional pollutants using BAT are found at 33 U.S.C. § 1314 (b)(2), and the guidelines for conventional pollutants using BCT are found at 33 U.S.C. § 1314 (b)(4).

¹³ These steps and associated factors apply when developing both BAT and BCT standards. As a practical matter, the iterative process described in the text supported by note 10 is used to stage and fully evaluate the data pertinent to a determination of appropriate pollutant control measures for an industry.

¹⁴ “Such regulations shall identify in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best control measures and practices achievable including treatment techniques, process and procedure innovations, operating methods, and other alternatives for classes and categories of point sources.” 33 U.S.C. § 1314(b)(2)(A); 33 U.S.C. § 1314(b)(4)(A).

regulations, the agency determines economic achievability on the basis of the total cost to the industrial subcategory and the overall effect of the rule on the industry's financial health. The EPA and, thus, the SWRCB should follow the same approach when it implements NELs. Third, Congress further specified factors that the SWRCB must consider with respect to each control measure it promulgates for an industry (collectively, the "Federal Factors"):

- 1) The reasonableness of the relationship between the costs of attaining a reduction in effluents and the effluent reduction benefits derived;
- 2) The age of equipment and facilities involved;
- 3) The treatment process employed;
- 4) The engineering aspects of the application of various types of control techniques;
- 5) The industrial process changes required to implement the control measures selected;
- 6) Any non-water quality environmental impacts, including energy requirements; and
- 7) Such other factors as the Administrator or the state acting under federal authority (*i.e.*, the SWRCB) shall deem appropriate.

33 U.S.C. § 1314(b)(4)(B); 40 C.F.R. § 125.3(d); *see also*, 33 U.S.C. § 1314(b)(2)(B) for BAT.¹⁵

When adopting pollutant control standards for industrial discharge categories, including storm water discharges from construction sites, the EPA follows the above steps in order to comply with the statutory requirements. *See* 51 Fed. Reg. 24,974 (July 9, 1986); *see also*, U.S. EPA, NPDES General Permit for Storm Water Discharges from Construction Activities, effective January 2005 ("EPA Construction Permit"). As evident from a review of EPA's own storm water guidance, a regulator may base effluent standards on effluent reductions attainable through changes in a discharger's processes and operations. For instance, 40 C.F.R. § 125.3 sanctions BMPs as favored pollution control mechanisms that qualify as BAT/BCT. In addition, as evidenced by EPA's MSGP, BMPs may be promulgated as effluent control measures when authorized under CWA § 402 for control of municipal (§ 402(p)(3)(B)) or industrial (§ 402(p)(3)(A)) discharges. 40 C.F.R. § 122.44(K). As discussed in greater detail below, if the State Board does not follow federal procedures and appropriately consider the Federal Factors in adopting the proposed NELs, the NELs are invalid.

¹⁵ In addition to other factors specified in CWA § 304(b)(4)(B), the CWA requires that EPA establish BCT limitations after consideration of a two-part "cost-reasonableness" test. EPA explained its methodology for the development of BCT limitations and issued a detailed guidance document to govern the cost benefit analysis that is required to promulgate BCT effluent standards. (U.S. EPA, *Best Conventional Pollutant Technology; Effluent Limitation Guidelines, Final Rule*, 51 Fed. Reg. 24,974–25002 (July 9, 1986).

- (c) The NELs go beyond federal NPDES regulatory minimum requirements, and thus, factors found in the California Water Code must be followed.

As is discussed in greater detail in section III.C, below, the DCGP goes beyond federal minimum NPDES requirements—especially in the establishment of NELs. Therefore, under applicable case law (*See, e.g., City of Burbank v. State Water Resources Control Board* (2005) 35 Cal. 4th 613), the SWRCB must consider balancing factors contained in sections 13000, 13241, and 13263 of the California Water Code in establishing NELs or any other permit provisions beyond federal minimum requirements.¹⁶ (Hereinafter, the “State Factors.”) These State Factors require consideration of issues such as: reasonableness considering “all demands being made and to be made on those waters, and the total values involved, beneficial and detrimental, economic and social, tangible and intangible,” the impact on housing, economic consideration, and the “water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area.” Cal. Water Code §§13000, 13241. As is discussed in section III.C, below, these State Factors do not appear to have been followed based upon evidence currently in the DCGP and its Fact Sheet with regard to the NEL proposals.

5. *NELs would be deemed invalid if all Balancing Factors (federal and state) are not considered and/or supported by evidence in the administrative record.*

Although the SWRCB retains considerable discretion in assigning the weight to be accorded to the issues set forth in 33 U.S.C. §1314(b) (“Federal Factors”) and California Water Code State Factors (collectively, the “Balancing Factors”), the agency’s decision must be supported by substantial evidence in the administrative record. *See, e.g., Riverkeeper, Inc. v. U.S. EPA*, 475 F.3d 83, 95–96 (2d Cir. 2007) (“we measure the regulation against the record developed ...”). Full consideration of each of the Balancing Factors is mandatory. *Waterkeeper Alliance, Inc. v. U.S. EPA*, 399 F.3d 486, 498 (2d Cir. 2005) (“we must deem arbitrary and capricious an agency rule where ‘the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.’”). Before implementing NELs, the SWRCB must proactively identify any technical and factual data that it needs to consider to ensure a proper review of all of the Balancing Factors that Congress and the California Legislature have mandated. After full and careful consideration of all evidence submitted and available, the SWRCB must evaluate specific pollutant control measures and balance them against one another to determine which are appropriate to regulate pollutants and to establish prescriptive effluent discharge limits in construction industry storm water permits. In the absence of such a review, the resulting regulations are contrary to the law and unenforceable.

¹⁶ Cal. Water Code § 13263 requires that the factors from § 13241, which are considered in establishing water quality objectives, also be considered when establishing requirements for permits.

- (a) Technical, scientific and industry data, which are crucial to following federal and state statutory mandates, have yet to be developed.

Among other things, technical, scientific and industry data must provide support for the NELs mandated in a general industrial storm water permit such as the CGP, in order to assure that the proposed pollutant control requirements are both “feasible” or “available,” and have a demonstrable and direct link to water quality benefit. As described more fully in the Technical Memo, we assert that adequate data have not yet been gathered or reviewed by the SWRCB in setting the NELs. Throughout the CGP process, the SWRCB must evaluate and balance all the Balancing Factors. Since the SWRCB has failed to consider any of the Balancing Factors, the DCGP cannot be approved.

- (b) Additional fact finding and analysis are needed.

Additional fundamental investigation and data collection groundwork is needed to support advancement of many of the proposed pollutant control measures set forth in the DCGP. Under the BAT/BCT process explained above, the SWRCB must:

1. Engage in additional fact finding before implementing new control measures;
2. Critically consider expert and technical information, including that submitted by the Commenting Parties, pertaining to a number of the control technologies proposed by the DCGP, as well as control technologies emphasized by the existing EPA Construction Permit and the Current CGP (source control BMPs, emphasis erosion and sediment control); and
3. Compare available construction discharge water quality control technologies, and make a final determination as to the efficacy of the DCGP’s proposed control measures in light of available and technical information and the Balancing Factors, including comparative water quality benefits, costs of implementation, and environmental effects.

Only after these steps are completed can a final determination be made as to the propriety of the DCGP’s control measures in light of available scientific and technical information and the Balancing Factors. By following this robust and rigorous process, SWRCB can ensure that the proposed control strategies are appropriate to impose under federal and/or state law. Failure to engage in this required process subjects the Final CGP to substantial uncertainty and potential litigation.

- (c) Unless substantial data gaps are filled, the Final CGP may not include the NELs proposed in the DCGP.

There are several categories of information that currently suffer from critical data gaps and demonstrate that the Balancing Factors have not been appropriately considered:

- 1) No information is provided regarding the impacts that the NELs proposed in the DCGP may have on the construction industry as a whole and on the provision of housing in particular.
- 2) No technical information or other specific factual data is provided showing a nexus between the NELs and the effect, positive or negative, on receiving water quality. (*See further, Technical Memo.*)
- 3) The DCGP does not provide or analyze any technical assessment of treatment control alternatives that may obtain the same or similar water quality benefit as the management intensive measures that SWRCB is suggesting in the DCGP. (*See further, Technical Memo.*)
- 4) As is detailed in comments prepared by Berkeley Economic Consultants (both in April of 2008 on the PCGP and submitted to the SWRCB during this current comment effort on the DCGP), there has been a lack of full consideration of economic impacts of the proposed DCGP terms, not the least of which are the NELs. The sole reference to economic considerations in the DCGP is a \$1000-figure referenced in the DCGP Fact Sheet as representative of the cost of implementing the NELs. This cost is only the SWRCB's staff estimate of the cost of monitoring equipment and the fact that this figure is the only economic information provided demonstrates an utter failure to consider the real costs of implementing NELs in terms of application of BMPS or other associated costs necessary to meet the NELs .
- 5) No information is provided regarding the reasonableness of the NELs either in light of the economic and social demands placed upon waterways in the state or on the water quality that could be achieved through the coordinated control of all factors affecting the water quality.

In addition to these areas where evidence justifying the NELs is lacking, the SWRCB must develop additional facts and data concerning the NELs in order to make well-reasoned decisions about their propriety. For the reasons expressed above, the Commenting Parties believe that NELs are not appropriate for controlling storm water discharges from the

construction sites statewide as the CGP program would do, that the NELs proposed have not been appropriately developed, and that there is currently insufficient information and data available to support a decision to include them in the Final CGP.

C. The DCGP Must be Revised to Consider the Balancing Factors Codified In the California Water Code

The current CGP is a joint federal NPDES permit and state waste discharge requirements (“WDRs”). The DCGP identifies itself as a NPDES General Permit and WDRs. *See*, DCGP, title page and § V.1 (identifying the DCGP as WDRs and applying the DCGP receiving water limitations to groundwater—a water not within federal jurisdiction and thus not governed by the NPDES program). Because the permit functions as WDRs, the California Porter-Cologne Water Quality Control Act (Cal. Water Code §§ 13000 *et seq.*) requires the SWRCB to consider a number of carefully prescribed balancing factors from sections 13000, 13241 and 13263 of the California Water Code when fashioning WDRs.¹⁷ Rather than address these factors, the State Board has sought an end run around them, hiding behind semantics and claiming inapplicability.

It is our understanding, based on comments made by SWRCB staff at the May 21, 2008 workshop, that the SWRCB intends, for the first time, that the DCGP is to be read and applied solely in the context of a NPDES permit.¹⁸ In effect, staff claims that the term “WDR” is just another name given to NPDES permits in California, and nothing independent is required by application of the name. Such an argument is untenable in the face of applicable law and does not withstand the barest scrutiny when the actual provisions of the DCGP are reviewed.

Because the Commenting Parties believe that the DCGP is both a federal NPDES permit and a State WDRs, and in light of the fact that the DCGP does exceed non-discretionary, federally prescribed minimum requirements, the SWRCB is required to consider the State Factors in preparing the Final CGP. *See* Cal. Water Code §§ 13000, 13241, and 13263.

1. *The California Water Code requires the SWRCB consider certain factors in setting permit requirements.*

On May 14, 1973, the EPA expressly recognized the Porter-Cologne legislative scheme (as then amended) as sufficient to protect waters of the U.S. under the intervening federal CWA. *Environmental Protection Agency v. California ex rel. State Water Resources Control Board*, 426 U.S. 200, 209 (1976). In September 1989, EPA completed an exhaustive review of the

¹⁷ *See, City of Burbank v. State Water Resources Control Board* (2005) 35 Cal. 4th 613, 624–28 (confirming that the California Water Code section 13241 and 13000 factors must be applied when WDRs are established pursuant to California Water Code section 13263, except where the agency is merely meeting and not exceeding non-discretionary, federally-prescribed minimum requirements). Section 13000 of the Cal. Water Code sets for the basic goals of the water quality regulations in the context of balancing the demands on waters and the values to be protected. Section 13263 requires that other factors contained in section 13241 be considered when adopting state water quality permits (see further discussion below). Collectively, the factors contained in these sections are referenced herein as the “State Factors.”

¹⁸ Statement by G. Gearhart, Chief of the Industrial/Construction Unit, at DCGP Workshop, May 21, 2008.

Porter-Cologne regulatory framework and restated the authority of the State to administer the federal NPDES program to the extent that it does so in a manner that ensures that effluent limits established under the state program are not “less stringent” than those imposed by EPA under federal law. *See*, EPA Memorandum of Understanding dated September 20, 1989; *see also*, Cal. Water Code § 13377. Based upon these conditions, EPA left the administration of the NPDES program in the hands of the SWRCB, the RWQCBs and the respective staffs of each – subject to EPA reactive oversight and potential re-involvement. *See, Mianus River Preservation Committee v. Administrator, Environmental Protection Agency*, 541 F.2d 899, 906-907, n.21 (2d Cir. 1976).

As part of this grant of authority, EPA has recognized that effluent limits would be imposed in California using the California Water Code section 13241 balancing factors. Specifically, the CWA states that “such other factors as [the Administrator’s authorized representative]¹⁹ deems appropriate,” including the State Factors, should be considered when effluent standards are established. 33 U.S.C. § 1314(b)(4)(B); 40 C.F.R. § 122.2.

In adopting Porter-Cologne, the Legislature expressly stated that the Act’s goal was “to attain the highest water quality which is *reasonable, considering all demands being made and to be made on those waters, and the total values involved, beneficial and detrimental, economic and social, tangible and intangible.*” (*Emphasis added.*) Cal. Water Code § 13000. Inherent in this fundamental goal is the concept of weighing pollutant control standards and measures in light of the many competing factors to arrive at a reasonable balance.

Sections 13241 and 13263 of the California Water Code explain in more detail how that reasonable balance can be achieved. Specifically, these sections require the SWRCB to consider the following balancing factors when developing WDRs:

- a) Past, present, and probable future beneficial uses of water.
- b) Environmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto.
- c) Water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area.
- d) Economic considerations.
- e) The need for developing housing within the region.
- f) The need to develop and use recycled water.

Importantly, the State Factors reflect the California Legislature’s most substantive instructions to the water boards concerning the means by which effluent limits or pollutant control measures should be adopted. These State Factors also reflect the Legislature’s insistence upon water quality regulation and policymaking that considers and evaluates local and regional differences in physical, water quality, anthropogenic and societal characteristics. We note

¹⁹ Here, the SWRCB acting as the EPA Administrator’s surrogate.

especially that the need for housing within each region was specifically identified as an important consideration. This factor is particularly important to establishing pollutant control standards in the construction industry general storm water permit. Despite the clear instruction of the Legislature, the State Board has gone out of its way to avoid considering the above factors, arguing that the DCGP represents a NPDES only permit. Such efforts are misplaced, and incorrect.

2. *The CGP is a joint federal/state permit subject to federal and state laws despite references in the DCGP purporting to avoid application of state law.*

In a significant departure from the currently applicable CGP and the PCGP, and to avoid consideration of the State Factors, the SWRCB has revised the DCGP to state that it “regulates pollutants in discharges of storm water associated with construction activity (storm water discharges) to *US jurisdictional* surface waters from construction projects that disturb one or more acres of land surface or are part of a common plan of development or sale that disturbs more than one acre of land surface.” DCGP, § I.23 (emphasis added). In addition, the SWRCB states that the DCGP does not apply to “non-jurisdictional waters (as determined by the US Army Corps of Engineers.)” *Id.* at § I.32; *compare*, PCGP §§ I.24, I.33, DCGP §§ I.23, I.32.²⁰ By these edits, it would appear that the SWRCB intends to remove itself from the reaches of the State Factors.

The DCGP reference to U.S. jurisdictional surface waters seeks to limit application of the permit to “waters of the US,” which are defined at 33 C.F.R. § 328.3(a) to include:

- (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (2) All interstate waters including interstate wetlands;
- (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce [];
- (4) All impoundments of water otherwise defined as waters of the U.S.;
- (5) Tributaries of water identified in paragraphs (1) through (4);
- (6) The territorial seas;

²⁰ In contrast, the current CGP states that it applies to “regulate[] pollutants in discharges of storm water associated with construction activity (storm water discharges) to surface waters,” (Finding 2) and explains that “[s]torm water discharges and authorized nonstorm water discharges to any surface or ground water shall not adversely impact human health or the environment.” (Section B.1.)

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (1) through (6) of those section. *Id.* at (1) to (7).

In contrast, “waters of the state” are defined in California Water Code section 13050, subsection (e), as “any surface waters *or groundwater*, including saline waters, within the boundaries of the state.” (*Emphasis added.*) *Id.* By comparing these definitions, it is clear that groundwater, which constitutes a water of the state, does not qualify as a water of the US. Although the DCGP “US jurisdictional surface waters” edit limits the ability of the DCGP to regulate groundwater, the SWRCB nevertheless seeks to address groundwater in the permit. *See*, DCGP, § V.1. Specifically, the DCGP states that “[s]torm water discharges and authorized non-storm water discharges shall not contain pollutants in quantities that cause a public nuisance in groundwater or surface water.” *Id.* The clear discrepancy between the finding, which claims the DCGP applies only to U.S. jurisdictional surface waters, and the Receiving Water Limitations section, which seeks to regulate groundwater, underscores the critical problem that arises with the approach adopted by SWRCB and shows that the CGP is intended to apply to waters of the state as WDRs, which historically has always been the case with the CGP. *Compare*, DCGP, §§ I.23, V.1.

Furthermore, to the extent that the SWRCB intends to interpret the CGP to apply to indirect discharges, or discharges to tributaries of U.S. jurisdictional waters (as was implied by staff at the May 21, 2008 workshop and pursuant to 33 C.F.R. § 328.3(5)), then such discharges likely would encompass discharges to waters of the state. In that case, the indirect discharges will trigger the application of WDRs and the State Factors.

3. *The DCGP Exceeds the Federal Minimum Requirements and the SWRCB Understands and Acknowledges that the Balancing Factors Must Be Considered in This Instance.*

Despite the best efforts of the State Board to create a NPDES-only permit, the provisions of the DCGP far exceed the otherwise applicable federal minimum requirements. As a result, the DCGP is subject to the State Factors, pursuant to *City of Burbank, supra*, 35 Cal. 4th at 624-628.

EPA has not required, in the history of construction storm water permitting, that post-construction controls be required, has specifically decided not to adopt NELs or NALs for construction sites and has not required public review of the sort proposed in the DCGP. *See*, EPA Construction Permit, updated January 21, 2005.

For example, there are no federal effluent limitation guidelines for the construction industry, and any attempt by the State Board to establish industry-wide TBELs via the DCGP may be allowed under State law, but would represent a regulation exceeding federal minimum requirements. In addition, the specific DCGP provisions that require hydromodification, NELs and NALs and an undefined public review process also exceed current federal minimum requirements. In light of these additional provisions, the SWRCB cannot claim that the DCGP simply is a NPDES permit.

In pleadings filed in ongoing litigation related to the application of water quality objectives to storm water, the SWRCB in the case of *Cities of Arcadia v. SWRCB* (Superior Court of California, Orange County Case No. 06CC02974) (“the Basin Plan case”) already has recognized that the California Water Code section 13241 balancing factors are *essential* to development of the DCGP. *See, Cities of Arcadia v. SWRCB*, Respondents’ Trial Brief in Opposition to Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief, November 26, 2007, at 28. Specifically, counsel for the State Board argued in briefing that:

the [State and Regional Water] Boards acknowledge that they must consider the section 13241 factors in circumstances beyond the initial adoption of water quality objectives. Such circumstances include . . . when creating permit limits that are more stringent than existing water quality objectives. [Citations.] Additionally, *City of Burbank* itself held that the Water Boards must consider the 13241 factors when translating water quality standards into permit limits that *are more stringent than required under federal law. Id. (emphasis added.)*²¹

Additionally, recognizing the discrepancy between the DCGP and the Federal CGP, and hoping to avoid an in-depth comparison between the two, the SWRCB submitted a letter to EPA on April 23, 2008, addressing the development of federal Effluent Limitations Guidelines (“ELG”) and Standards for the Construction and Development Category. In that letter, the State Board asked the EPA to slow down this process and delay the issuance of a final rule. *See, April 23, 2008 Letter from Darrin Polhemus to Administrator Stephen L. Johnson*, at 1. As noted therein, the SWRCB

is in the process of finalizing a statewide construction general permit that is intended to feature several *far-reaching*, effective mechanisms to substantially reduce or eliminate discharges of pollutants from both active construction sites as well as permanent flows from the impervious surfaces created through the development process. Any ELG that sets national standards that are *less effective* than those established in the California Water Board’s general permit creates the risk of *economic and regulatory disparities* between California and other states in our region. *Less protective standards* may also result in inadequate protections of interstate waters that flow into California, posing elevated risk and

²¹ Notably, if the SWRCB were to suggest that the Porter-Cologne balancing factors may be ignored because the proposed WDRs are themselves mandated by federal law, the SWRCB would bear the burden of proving both existence and extent of the federal preemption. *See, e.g., Love v. Foster*, 100 F.3d 413, 414 (1st Cir. 1996) (“the consideration of whether a state law is contrary to . . . a federal law and must, therefore, yield . . . starts with the basic assumption that Congress did not intend to displace state law. [Citations omitted.] Accordingly, the party claiming preemption has the burden of proof (*see* ROTUNDA & NOWACK, TREATISE ON CONSTITUTIONAL LAW § 12.4, at 90 (2d ed. 1992)) and must persuade the court that preemption is proper....”).

impairment issues for our communities and watersheds. *Id.* at 1–2 (emphases added).

As can be seen, the SWRCB acknowledges in this letter that the DCGP likely will exceed even the proposed federal minimum requirements, and as such, the DCGP cannot be characterized as simply a NPDES permit. The DCGP requirements—in particular the NELs—are much more stringent than required under federal law, and therefore, the California Water Code Balancing Factors must be considered by the SWRCB prior to adoption of a Final CGP.

4. *The SWRCB Revisions Will Cause Potentially Disastrous Results*

Practically, the effects of the SWRCB’s end run around the California Water Code Balancing Factors will cause a host of unintended consequences that will negatively impact the RWQCBs, the regulated community and the courts.

First, by drafting what is intended to be a NPDES-only permit, the SWRCB has created a situation that will quickly overwhelm the RWQCBs. Because there are potentially thousands of construction sites across the State that do not discharge to U.S. jurisdictional surface waters, each of the dischargers from those sites will be required to seek an individual construction permit from the applicable RWQCB. The number of individual permit applications will swamp the RWQCBs and may result in an immediate and indefinite halt to a vast share of the construction in California. The financial implications to the agencies and to the landowners will be staggering. *See also* the discussion in section III.G, below.

More importantly, when and if the RWQCBs can manage to find the time to review each individual permit application, the responsibility for reviewing and considering the State Factors will fall disproportionately and inappropriately on the shoulders of RWQCB staff. Proper consideration of the State Factors involves significant subjective review, and as such, RWQCB staff is not the proper group to be engaging in this exercise, rather the SWRCB in drafting a general permit should shoulder this responsibility.

Second, to the extent that any RWQCB ultimately relied upon the Final CGP, if it codifies the current DCGP, to form the basis for an individual or general permit or an individual or general waiver, such reliance would be unacceptable in light of the SWRCB’s failure to consider the State Factors. This oversight could subject any so-called tiered WDRs or waiver of WDRs to uncertainty, and potentially, to litigation.

Third, from an extremely practical standpoint, the limitation on discharges to U.S. jurisdictional surface waters likely will require that dischargers hire outside consultants to assist in determining whether property runoff is covered by the Final CGP, or whether an individual permit is required. The escalating costs associated with consultant analysis is yet another unintended consequence of the State Board’s efforts to avoid following the applicable State law.

Lastly, the DCGP fails to explain how direct and indirect discharges will be addressed by the RWQCBs. To the extent that the State Board intends for the DCGP to apply to indirect

discharges, many of these discharges will likely reach waters of the state, *i.e.*, groundwater or non-federal jurisdictional surface waters, which therefore, implicates the State Factors. Thus, at some point, the State Factors must be addressed—either by the RWQCBs per the DCGP as written, or by the SWRCB in the consideration of a Final CGP. Because forcing the state law compliance down to the RWQCBs is inappropriate by the SWRCB in drafting a general permit of the CGP’s magnitude, the Commenting Parties urge the SWRCB to engage in a thorough review of the State Factors now, before adopting the Final CGP.

D. Monitoring Requirements

1. *The monitoring program proposed in the DCGP is not required by law, is not cost-effective, and is unlikely to result in usable data.*

The SWRCB has stated that dramatically expanding storm water sampling and analysis over requirements in the Current CGP is not required by law, and that no useful information would be generated. In the *Baykeeper* case, the SWRCB defended the sampling and analysis provisions of the Current CGP, stating that “[t]he Permit’s sampling and analysis requirements... are the most rigorous in the nation, and go far beyond the requirements of the Clean Water Act and implementing regulations.” *Baykeeper, supra*, Opposition Motion For Order Enforcing Writ of Mandate, December 17, 2004, at 1. The SWRCB has provided no basis for reversing its position now through its dramatic proposed expansion of the monitoring program in the DCGP.

The monitoring program proposed in the DCGP will result in significant expenditures and compliance costs without providing usable data. The data gathered through this expansive program will have little practical value, because data will be collected using a variety of methods and without a uniform study design, potentially yielding data that are unusable for the purposes of evaluating numeric measures or advancing the goals of the program. The DCGP fails to identify any other purposes of, or questions to be answered by, the monitoring program other than to use in enforcement actions. Statement by G. Gearheart, SWRCB Staff at SWRCB Workshops on DCGP May 7 & 21, 2008. Any monitoring requirements with a purpose of determining compliance with the improperly established NALs and NELs proposed in the DCGP, would also be improperly established. *See* §§ III.A and III.B, above. Furthermore, a oppressive monitoring program such as proposed by the DCGP would violate the terms of California Water Code section 13267, which requires that the burdens of a monitoring program bear a reasonable relationship to the benefits to be obtained from the monitoring.

2. *The SWRCB is contradicting its own positions on effluent monitoring, which were previously validated by the Baykeeper court, and is disregarding the recommendations of Blue Ribbon Panel.*

The DCGP proposes to replace the “most rigorous” monitoring requirements contained in the Current CGP with a much more aggressive effluent monitoring regime that requires collection of “storm water grab samples from one sampling location in each drainage area beginning in the first hour of any new discharge and during the first and last hour of every day of normal operations for the duration of the discharge event.” Draft CGP, Attach. B, at 5 (related to

Risk Category 2 and 3 sites). Where effluent sampling required by the Current CGP was triggered by specific situations and/or criteria (e.g., direct discharges to sediment-impaired waters, exposure of non-visible pollutant sources to storm water, or failure of a BMP), the DCGP increases the sampling requirements to include all storm events and all drainage areas associated with construction activity, even in those areas that utilize BMPs that fully prevent exposure of pollutants to storm water, areas that are stabilized, or areas that are inactive. For large projects in particular, this could result in the onerous and expensive task of repeatedly collecting effluent samples from multiple, potentially remote discharge locations during each and every storm event. For all projects, this proposed monitoring program would seem duplicative, burdensome, and of questionable merit, and could lead to gross inequities in enforcement. This dramatic increase in sampling places an unreasonable burden on the discharger in terms of logistics and costs required to conduct the sampling and analysis. *See further*, Technical Memo.

In its pleadings in the *Baykeeper* case, the SWRCB explained various reasons why storm water effluent sampling at construction sites is either not required or of little use, pointing to the “delay involved in waiting for laboratory results when immediate corrective action during the storm event is needed,” and the fact that extensive monitoring is “too costly making housing unaffordable with little or no environmental benefit.” *Baykeeper, supra*, Respondents Memorandum of Points and Authorities in Support of Motion for Discharge of Writ, at 4–5, n.6. The SWRCB explained:

Common sense, of course, suggests that it would be difficult to grab water samples from all of the small dribblets of runoff that might be leaving the construction site[.]... Common sense also suggest[s] that Board reliance on visual inspection of water turbidity at the site, as well as sediment track left from flow, is more practicable and accurate.

Baykeeper, supra, Respondent’s Opposition to Petitioners’ Request for Judicial Notice, at 6.

The SWRCB’s position above is consistent with the Blue Ribbon Panel’s findings that improvements can be made in designing and implementing BMPs. *See*, Blue Ribbon Panel Report, at 7, 16. Discharge from the majority of construction sites can be well-controlled with good SWPPP design, and more diligent and proper application and maintenance of BMPs; this approach has a proven record of controlling water quality in storm water discharges from construction sites, and is currently considered cost-effective for construction sites by EPA²² and pursuant to the Current CGP. Contrast this with the DCGP’s seeming abandonment of the current approach in favor of a numeric-based approach with corresponding extensive effluent monitoring.

²² 40 C.F.R. § 122.44(k)(2) provides that BMPs may be used in NPDES permits “to control or abate the discharge of pollutants... under § 402(p) of the CWA for the control of storm water discharges”; *see also*, *Citizens Coal Council v. United States EPA*, 447 F.3d 879, 896 (6th Cir. 2006).

The *Baykeeper* court acknowledged that sampling and analysis of storm water effluent is not *per se* required by the CWA and, in many cases, is not technically feasible. The Court repeatedly referenced the difficulties associated with storm water discharge monitoring, finding that “[t]he scientific and technical difficulties of obtaining and analyzing storm water discharge samples that accurately reflect the impact of the discharges on water quality of receiving waters would... preclude use of the sampling results as numeric water quality-based effluent limitations.” *Baykeeper, supra*, Ruling on Submitted Matter, May 18, 2005, at 11; *see also* Technical Memo (for additional information related to the difficulties imposed by the DCGP’s proposed monitoring requirements). In light of the *Baykeeper* court’s statements, those made by the Blue Ribbon Panel, and SWRCB’s own prior position on monitoring, and a lack of evidence presented in the DCGP or its Fact Sheet as to why the SWRCB would be now reversing its course and proposing an extensive monitoring approach, the proposed monitoring does not appear justified.

The more prudent approach appears to be to apply resources toward ensuring the efficacy of BMPs, rather than the costly effort to monitor for exceedances of numeric limits where resulting water quality benefit is uncertain. Visual observations should continue to be relied upon primarily as the tool to assess whether BMPs are effective with limited instances of storm water monitoring, as is already required by the Current CGP.

3. *The proposed receiving water monitoring program presents onerous technical challenges and is unlikely to provide information that is useful for addressing water quality impacts.*

Implementation of components of the receiving water monitoring program may be particularly burdensome to dischargers. The Commenting Parties’ recommendation is to remove receiving water monitoring elements of the DCGP. However, if monitoring of receiving waters is to continue to be an element of the Final CGP, there are several issues that the SWRCB must resolve prior to imposing such a program.

Access and safety issues are significant factors in receiving water sampling, because receiving waters are usually located off the site controlled by the discharger. Where receiving waters are on private property, access could be denied or revoked at the discretion of the owners, while permits may be required to access sampling points on controlled public lands. Safe access for sampling may not be available. Also, a construction site’s connection to a receiving water body is often remote and tenuous, making it difficult to identify the appropriate receiving water body to sample. In many cases the discharge does not occur directly to the water body, but rather to a seasonal channel, through percolation to groundwater, or to a lake where sampling upstream and downstream is not an option. *See further*, Technical Memo. Clarification of how a receiving water is defined and the discharger’s ability to effectively monitor the receiving water needs to be addressed before any type of receiving water monitoring requirement should be imposed.

As is the case with effluent sampling, receiving water monitoring is not likely to yield useful data for adjusting construction site BMPs. In addition to the difficulty in complying with

the logistical requirements of the monitoring program, the value of the data garnered from such sampling is questionable. For example, discharges from a particular construction site often flow into public or private storm sewer systems and are commingled with discharges from many other sources so that there is no technically valid way to associate the receiving water quality with the discharges from a particular construction site. Also, receiving water pH and turbidity can vary widely based on different natural soils and precipitation characteristics, within a single storm event, and even between storms events, making the meaningful interpretation of analytical results from individual grab samples exceedingly difficult. These issues are compounded for sites located in large watersheds or for linear projects (e.g. roadway construction) where multiple sources contribute to a single receiving water. *See further*, Technical Memo. Thus, the Commenting Parties are concerned that receiving water data would be used improperly as an indicator of whether a certain construction discharge has caused or contributed to a receiving water quality exceedance, when, given the forensic challenges inherent in connecting receiving water quality monitoring data with discharge from a particular site, it would be exceedingly difficult to truly ascertain if a particular construction site were a cause or a contributing factor to exceedances of a water quality objective in the receiving water.

Based on the above discussions and on the additional considerations presented in the Technical Memo, the water monitoring required by the DCGP is unlikely to provide useful information for addressing water quality impacts caused by construction sites discharges and, thus, this requirement is not appropriate for inclusion in the Final CGP. The SWRCB must consider, evaluate, and resolve these concerns before proceeding with a monitoring program remotely close to that presented in the DCGP. For these reasons, the Commenting Parties recommend that the SWRCB revisit the design of the receiving water monitoring and reporting program after addressing the outstanding issues identified in these comments, such that the monitoring program provides meaningful data that more clearly supports the long-term goals and objectives of the program. As discussed in Section III.A.5, above, the Commenting Parties would support a scientifically designed, third-party, regional monitoring approach in lieu of an uncontrolled data set collected by individual dischargers.

E. Post-Construction Controls

We applaud the SWRCB for limiting the application of the post-construction requirements in the DCGP to those areas outside of areas covered by municipal separate storm sewer (“MS4”) permits as was requested in our comments on the PCGP. However, the Commenting Parties continue to believe that the CGP program is an inappropriate forum to mandate post-construction flow controls, and that there are more appropriate permitting programs available to the SWRCB to accomplish its goals. To this end, the Commenting Parties suggest removal of the post-construction control provisions from the DCGP. If however, the any post-construction provisions are to remain the Final CGP, there are several technical deficiencies presented by the DCGP that must be remedied (*see further* Technical Memo) and there must be a grandfathering provision included in the Final CGP to address projects already under construction and those that have already been designed and received entitlements to develop (*see further* §III.L.1, below).

1. *Despite statements to the contrary in the DCGP, the post-construction requirements of the DCGP do apply to areas governed by MS4 permits.*

Although the DCGP claims to limit the application of its post-construction requirements to those areas covered by MS4 permits (see e.g., DCGP § VIII.H; DCGP Fact Sheet, at 18) the DCGP contains post-construction requirements that would apply to areas already governed by MS4 permits. Namely, section V.4 of the DCGP states: “Storm water discharges and authorized non-storm water discharges shall not disrupt the pre-project equilibrium flow and sediment supply regime. In cases where the pre-project flow and sediment supply regime is not in equilibrium, project related activities shall not impede the natural channel evolution process.” Because of its use of “pre-project” terminology, this section would imply that its requirements relate to the post-construction condition, and are not conditioned by the other DCGP permit language limiting post-construction controls to non-MS4 areas. Thus, this requirement would apply statewide despite the DCGP’s claim to limit post-construction requirements to non-MS4 covered areas of the state. (Notwithstanding the lack of an MS4 limitation, there are technical problems with this proposed provision discussed in greater detail in the Technical Memo.) The Commenting Parties would recommend removal of section V.4 of the DCGP along with other post-construction requirements for reasons discussed further, below.

2. *The CGP is neither the legally appropriate nor the most effective manner in which to regulate post-construction impacts.*

The DCGP contains restrictions related to post-construction activities in sections V.4 (discussed above and limiting flow and sediment supply regimes to pre-project conditions) VIII.H.3 (replicating the pre-project water balance) and VIII.H.4 (preserving pre-construction drainage density and time of concentration of flows) (collectively the “Post-construction Controls”). These Post-construction Controls quite obviously regulate conditions after the construction activities have ceased. This form of regulation is inappropriate for regulation in the DCGP, which by definition deals with discharges associated with construction activities—not post-construction discharges. See 40 C.F.R. § 122.26. The relevant industrial storm water permit regulations properly focus NPDES permit requirements on discharges associated with the industrial activity serving as the basis for the regulation—here construction activities—and exclude those activities and/or conditions that do not constitute the regulated activity. 33 U.S.C. §1342(p); 40 C.F.R. § 122.26(b)(14).²³ Regulating post-construction impacts through the CGP program, which is specifically focused on construction activities, goes beyond the intent and purpose of this permit—much as regulating discharges associated with the operation of non-

²³ The CWA sets forth two programs for regulating stormwater through NPDES permits: municipal and industrial. 33 U.S.C. §1342(p)(2). If a storm water flow is not industrial in nature, it is likely capable of being regulated through a municipal system. The DCGP recognizes this with its attempt to limit the Post-construction Control requirements to those areas already governed by MS4 permits. Recognizing that the regulation of post-construction flows more appropriately falls to the municipal permits, it is unreasonable for the DCGP to then seek to regulate post-construction flows in an industrial storm water permit.

industrial areas of a site would go beyond the permit regulating discharges from industrial activities.²⁴

In the EPA Construction Permit, EPA specifically made this determination with respect to the regulation of post-construction impacts by choosing not to regulate post-construction flows. *See* 69 Fed. Reg. 22480 (proposed April 26, 2004) (to be codified at 40 C.F.R. pt. 450); 67 Fed. Reg. 42644 (June 24, 2002) (to be codified at 40 C.F.R. pt. 122 and 450). In the EPA Construction Permit, EPA noted the responsibility and authority of local government over land use planning “to protect infrastructure and achieve local resource goals” as one of the reasons that it was not appropriate to regulate post-construction flows as part of its construction program. 69 Fed. Reg. 22480 (proposed April 26, 2004). EPA also noted the high costs associated with such controls and the “lack of data that indicates that such provisions would result in notable improvements” in the existing construction storm water program. *Id.*

- (a) The MS4 permit program is an appropriate place to regulate post-construction controls.

Post-construction storm water flows should continue to be, regulated through those processes through which land use planning and design are regulated, namely the Phase 1 and 2 MS4 Permits, and through local general and specific planning, watershed management planning, 401 certification processes, and CEQA. As SCCWRP recognized in its 2005 report on hydromodification²⁵ management,

A variety of regulatory programs and tools exist to help in the regulation of hydromodification effects, including: CWA Section 401 certifications, total maximum daily loads, MS4 permits and associated SUSMP requirements, Watershed Urban Runoff Management Plans and the Watershed Management Initiative which encourage municipalities to work cooperatively to manage issues such as hydromodification. In addition, [CEQA/NEPA] processes can be used to better address hydromodification issues, especially with regard to cumulative effects. SCCWRP 2005b.

The EPA has stated, “[t]he Phase II MS4 regulations contain explicit requirements for local program to control storm water discharges from construction activities and to manage ‘post-construction’ (long-term) runoff” 69 Fed. Reg. 22474 (Apr. 26, 2004). The SWRCB appears to agree with EPA and has already recognized the appropriateness of regulating post-construction flows through MS4 permits by its purported limitation of the Post-construction

²⁴ To illustrate, in the statewide industrial general permit, the SWRCB expressly excludes from the definition of “stormwater associated with industrial activities” non-industrial discharges from the site. SWRCB Order No. 97-03-DWQ, Attach. 4, at 2 (excluding non-industrial areas such as “office buildings and accompanying parking lots.”).

²⁵ The PCGP utilized the term hydromodification to describe its limitations on post-construction flows. The Fact Sheet for the DCGP uses the term “runoff reduction” rather than hydromodification to address post-construction flows. DCGP Fact Sheet, at 14. Regardless of the terminology used, the DCGP’s requirements relate to flows in a post-construction condition and are not appropriate for regulation in a construction permit.

Control requirements in the DCGP. DCGP §VIII.H. The SWRCB simply does not go far enough in excluding from the CGP program any requirements related to post-construction conditions, leaving all such regulation to the MS4 programs and to local land use controls.²⁶

The SWRCB staff have stated in the May Workshops that their rationale for having the Post-construction Controls in the DCGP were to target areas of the state not currently governed by MS4 permits as many of these areas are perceived to have a high number of active construction sites and that many of these areas may have “sensitive waters” in need of protection. However, this thinking would ignore the ability of the Phase II or Small MS4 permit program to most-appropriately address post-construction flows in a more appropriate fashion than the CGP program. The state’s general permit for small MS4 systems (SWRCB Order 2003-0005-DWQ) (“Small MS4 Permit”) is designed to govern areas with “high growth or growth potential” and small public systems that “discharge to sensitive waters” including waters that have been deemed impaired under section 303(d) of the CWA. Small MS4 Permit, at 2–3. Thus, the SWRCB has the ability to mandate coverage under the Small MS4 Permit for the precise areas of the state that it seeks to target through the DCGP’s Post-construction Controls. When asked why such regulation had not been attempted as of yet, SWRCB staff (at the May 21st Workshop) responded that regulation through the Small MS4 Permit would take longer than regulation through the CGP as cities and counties are brought into the Small MS4 Permit program and required to prepare their post-construction flow plans. Regulating a discharge through an inappropriate permitting regime simply because it is administratively convenient is not proper justification for the Post-construction Controls. The Small MS4 Permit is already capable of regulating the type of flow being inappropriately targeted by the DCGP and should be used in lieu of the CGP program for regulation of post-construction flows.

- (b) CEQA is an appropriate alternative for addressing post-construction flows for any areas not covered by the large or small MS4 permit programs.

Should there still be areas of the state not covered by the Small MS4 Program that the SWRCB or the RWQCBs are concerned may have adverse impacts on water resources due to post-construction flows, there are other, better avenues of regulation already in existence—namely the California Environmental Quality Act (CEQA). The Post-construction Controls in the DCGP would effectively reach back in time to the local land use planning, project design, and environmental permit and approval stages of development, which typically are completed years in advance of applications for grading permits and are processed through CEQA. At the CEQA stage of project development, appropriate post-construction controls can be designed and

²⁶ Several of the Building Industry Associations have complained about the uncritical, dictatorial, inflexible and “one size fits all” nature of some MS4 provisions concerning post-construction controls, and that under such post-construction controls, existing land use approvals are not appropriately protected in all cases. Notwithstanding these legitimate complaints, the Commenting Parties have no disagreement with the proposition that the RWQCBs, through their MS4s and consistent with statutorily-sanctioned processes such as CEQA, may reasonably address post-construction concerns with appropriately derived post-construction controls that consider all geomorphically relevant factors causing concern.

specified as a component of larger projects, consistent with CEQA and properly derived MS4 permits or other local regulatory conditions. By regulating post-construction flow impacts at the point of the commencement of construction,²⁷ the PCGP creates the inevitable result that project design, land use planning and project land use and environmental approvals would have to be re-analyzed and re-assessed, and potentially substantially changed, requiring redesign and retrofit. Project delays and associated carry costs, re-design and retrofit expenses, lost output, and the project development uncertainty associated with re-visiting project design and approvals at the construction stage would be substantial and would adversely affect the development industry as a whole.

Under existing CEQA regulations, the type of impacts targeted by the Post-Construction Controls must be analyzed and addressed as a part of project planning and design, as well as local land use and environmental review and approvals. For example, CEQA regulations require that potential impacts related to: alteration of drainage patterns of a site or an area, alteration of the course of a stream or river, and conditions resulting in erosion either on-site or off-site, all be examined in the CEQA documentation with appropriate mitigation as needed. 14 Cal. Code Regs. § 15000 *et seq.*, Appx. G (listing potential significant impacts for hydrology and water quality to be addressed in CEQA documents). Thus, if an area were outside of a large or small MS4 permit coverage area, there is still ample opportunity for the SWRCB and RWQCB to ensure that such projects appropriately consider potential adverse impacts resulting from post-construction flows at a stage of the project development where it is most efficient to design and condition a project to address such flows (rather than at the point of commencement or termination of construction as regulated by the CGP program).

In response to the suggestion that CEQA is an appropriate venue for the SWRCB and RWQCBs to address post-construction flow concerns, SWRCB staff previously has stated at the May Workshops that asking RWQCB staff to review CEQA documents for purposes of imposing post-construction flow mitigation would be burdensome for the RWQCBs. However, under the proposals contained in these comments, there would be very few CEQA documents for RWQCBs to review as the vast majority of projects would fall under MS4 permit coverage areas (assuming that more areas would be covered under the Small MS4 program than are presently). We also note that several other state agencies, including but not limited to, the Air Quality Resource Boards, the Department of Fish and Game, the State Historical Resources Commission, and the Department of Transportation routinely review and comment on CEQA documents, diminishing any arguments that such review by the RWQCBs or the SWRCB would be an unreasonable expectation.²⁸

²⁷ In fact, the DCGP regulates post-construction flows at the *termination* of construction activities by requiring that the demonstration of compliance with the Post-Construction Controls come at the time of filing of the NOT. DCGP §VIII.H.2. This timing would even further exacerbate the problems of properly designing and building a project to address the DCGP's Post-construction Control requirements as any changes at this stage to BMPs likely would require demolition, re-permitting, and re-construction.

²⁸ As a trustee agency under CEQA, the RWQCBs and SWRCB regulate natural resources affective by projects (Cal. Pub. Res. Code §21070) and as such receive notices of CEQA processes and have opportunities to comment and coordinate with lead agencies on the contents of CEQA documents, including appropriate mitigation for significant environmental impacts. *See e.g.*, Cal. Pub. Res. Code §§ 21080.4(a); 14 Cal. Code Regs. §15086(a)(2).

- (c) Development of a statewide runoff reduction policy is a necessary precursor to a statewide runoff reduction standard.

If the SWRCB wishes to further streamline its assessment of CEQA documents for those projects lying outside of small MS4 permit coverage areas, it could and should adopt a statewide policy related to post-construction water quality and flow control. It would appear that this is already a goal of the SWRCB. The Fact Sheet to the PCGP contained a statements which were removed in the DCGP Fact Sheet. These statements—related to statewide policymaking—were as follows:

We intend to phase in such measures [hydromodification controls] over time, with a yet to be determined triage process to determine which projects require them. Measures that control hydromodification at existing urban facilities can be more expensive to address; we do not have a uniform statewide approach to this issue yet. The stormwater program roundtable is working on this issue in order to develop a coherent and defensible statewide approach, even if that approach is to implement via separate Phase I MS4 permits at the regional level.

PCGP Fact Sheet, at 20. Despite the fact that these statements were removed from the DCGP Fact Sheet, the SWRCB has not yet developed the statewide policy referenced in the PCGP. By regulating post-construction runoff through the DCGP before developing a statewide policy, the SWRCB is putting the cart before the horse as it undertakes to mandate Post-construction Controls without having completed the necessary studies to develop a “coherent and defensible approach.” *Id.* It also precludes development of a coherent, defensible and consistent statewide approach because the Post-construction Control requirements of the DCGP are substantially different than, and undermine rather than support, implementation of appropriately derived post-construction control standards that might be adopted by RWQCBs as part of MS4 permits.

A comprehensive and effective statewide policy with respect to post-construction controls would be helpful to such control, provided that it is characterized both by (i) the flexibility to address post-construction flow-related impacts as appropriate based on geomorphically relevant local conditions, and (ii) provides clear, scientifically valid standards and guidance as to the manner in which the RWQCBs should address impacts during appropriate land use planning processes. Such a well-designed policy could be implemented in any number of ways to effectively interface with the land use planning and environmental processes, including most notably CEQA processes, CWA § 401 water quality certification processes, and MS4 permitting requirements. By moving consideration of post-construction flow related concerns “upstream” in the planning process, appropriate controls could be adequately considered and designed at the most appropriate and effective time in the project development process.

- (d) The suggested approach to addressing post-construction water quality concerns.

We urge the SWRCB to remove the Post-Construction Control provisions of the DCGP entirely. Regulation of post-construction flows can be accomplished by the SWRCB and the RWQCBs through the large and small MS4 permit programs. The small MS4 permit program already is capable of expansion into areas of the state of concern to the SWRCB in terms of post-construction flow controls. Regulations governing CEQA documents already require an examination and mitigation for significant impacts potentially caused by post-construction flows and the SWRCB and RWQCBs have the right and duty to coordinate with lead agencies through CEQA on any projects that may fall out of the large and small MS4 permit program. If the state wishes to further streamline its processing of CEQA documents, it can establish a statewide policy related to post-construction hydromodification and flow control as would appear to already be a goal of the SWRCB.

3. *NPDES permits such as the CGP are ill-suited and inappropriate vehicles for regulating post-construction flows.*

The DCGP's Post-construction Controls seek to regulate runoff or flow in and of itself, regardless of what pollutants may be contained in the flow. As acknowledged by the DCGP Fact Sheet, the Post-construction Controls target downstream effects of flow, e.g., erosion, but do not target the pollutants contained in the flows. DCGP Fact Sheet, at 14 (stating that the Post-Construction Controls are "aimed at lessening the problems caused by changing the landscape and related hydrology associated with new and redevelopment projects.") As such, the regulation of post-construction flows would appear to fall outside the scope of the NPDES program itself.

When Congress adopted the CWA it made specific distinctions between point sources, which are regulated by NPDES, and nonpoint sources, which are regulated by State and local governments through the CWA's section 208 nonpoint source regulation program. *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 176 (D.C. Cir. 1982).²⁹ Conditions in downstream areas, such as erosion "due to decreased sediment load or variable water releases" were identified as nonpoint source issues not subject to the NPDES program. *Id.* at 177. Furthermore, upstream actions that result in downstream scour have also been deemed to fall outside of the scope of NPDES permit regulation. *Id.* Thus, even when changes to a stream flow regime result from upstream development, the effect is a nonpoint source issue, not one for regulation through a NPDES permit.³⁰ Additionally, when Congress created the CWA section 319 program to address nonpoint source plans, it did so understanding it was addressing issues outside of the scope of the NPDES program and specifically understood that eroding streambanks were part of section 319 not the NPDES program. 132 Cong. Rec. 31962 (Oct. 15, 1986) (statement by Congressman Hammerschmidt regarding incentivizing the States to begin management of streambank erosion and sheet flow).

²⁹ The 208 process involved adopting area wide waste management plans, which are the precursors to the CWA section 3419 nonpoint source plans utilized today.

³⁰ See further, *Missouri ex rel. Ashcroft v. Department of the Army*, 672 F.2d 1297 (8th Cir. 1982) (finding soil erosion below a dam did not constitute the addition of a pollutants from a point source subject to NPDES regulation)

The SWRCB has acknowledged that flow control is best regulated outside of a permit program. In its Nonpoint Source Program Strategy and Implementation Plan 1998-2013 (“PROSIP”) the SWRCB classifies hydromodification impacts, and streambank and shoreline erosion as nonpoint sources. PROSIP, at iv (classifying “hydromodification” as one of the 6 nonpoint source categories addressed by the PROSIP). One of the Regional Boards—the San Diego RWQCB—has also specifically addressed erosion and classified it as a nonpoint source “by definition ... exempt from the federal NPDES permitting program.”³¹

Thus, based upon all the factors discussed above, it is clear that the downstream effects sought to be regulated by the Post-Construction Controls of the DCGP are ill-suited for, and were not intended to be regulated by, a NPDES permit such as the CGP. As discussed above, if such effects are to be regulated in a permit program, the MS4 permit program is better suited and is intended by both state and federal authorities to address these effects. In the absence of a permit program to regulate the post-construction effects, the Commenting Parties again suggestion that CEQA be used as a process for the SWRCB and RWQCBs to impose upon projects the type of controls that address runoff reduction from new development and redevelopment projects.

4. *The DCGP’s approach to controlling post-construction flows undermines wetland restoration and creation and the use of regional BMPs to address water quality concerns.*

The Post-construction Controls, including the preservation of water balance and drainage areas, undermine and preclude wetlands creation and restoration projects. In addition, dischargers receive points for in-stream work in the risk calculation sections of the DCGP, which may discourages such environmentally beneficial projects as streamchannel restoration and wetland restoration. The Final CGP should be worded to remove the disincentives with respect to wetlands creation and restoration efforts.

The DCGP also discourages the use of regional and sub-regional hydrologic control and combination hydrologic control and treatment control BMPs, but available scientific evidence indicates that such BMPs can be highly effective and provide significant water quality benefits. Many such regional controls are, or can be, part of integrated water resource management programs which have been promoted by RWQCBs.³² The provisions of the PCGP that discourage the use of regional BMPs should be deleted and/or revised (this would include not only the Post-construction Controls but other permit terms that over-emphasize Low Impact Development measures to the detriment of regional BMP implementation).

F. Permit Application Processing and Review

³¹ San Diego RWQCB, Water Quality Control Plan for the San Diego Basin, at 4-66.

³² As an example, both the Los Angeles and Santa Ana RWQCBs promote the use of integrated programs that often rely on regional controls.

The Commenting Parties have a number of serious concerns about Section XII.2 of the DCGP. Chief among these is the Board's revision to the section in response to comments made in 2007. The revision results in a process that is even more vague and unreasonable than the one presented in the PCGP. Importantly, neither the public review procedures first suggested in the PCGP nor those now provided in the DCGP are mandated or required by law.

The DCGP provisions would vest an unprecedented amount of discretion in the RWQCB staff. The proposals included within the DCGP would have unintended and unavoidable consequences that would turn the land use process in California on its head. To avoid these results, the Commenting Parties offer a number of alternative proposals at that end of this section.

1. Public Review of Permit Application Documents

Previously, the PCGP provided for a 90-day public review period for new permit applications submitted to the RWQCBs. *See*, March 2, 2007 PCGP § XII.2. In what may be an attempt to sidestep the concerns raised about an undue "holding period" represented in the PCGP, the DCGP deletes the reference to 90-days, but retains the remainder the section. Rather than clarifying the issue and responding to the concerns raised, the Board has succeeded in muddying the waters even further, by creating what amounts to a never-ending review period, intensifying the ambiguity surrounding the proposed public review process.

After the Board's edit, it is even more difficult to ascertain how this provision will be applied and what effect the proposed public review will have on projects that already have been through extensive public review and comment in the land use approval, CEQA and environmental permitting processes. By adding a subsequent and undefined round of public review at the last stage of the building process, the SWRCB injects an inordinate amount of additional confusion and delay into development. The effects of this provision, as written, will be disastrous. For instance, by establishing a new and ambiguous comment period when a project proponent applies for coverage under the Final CGP at the grading stage, all prior project approvals and all adopted mitigation measures may be re-opened and challenged well after the applicable statutes of limitation on local land use, CEQA, and environmental approvals have expired. Such a result will cripple development in California.

- (a) The public review process is vague and undefined, and provides RWQCB staff with unprecedented discretion.

The single mention of a public review period occurs in Section XII.2 of the DCGP. There is only a brief mention of the original 90-day proposal in the Fact Sheet, and no real explanation for the subsequent edit, beyond a general discussion of public participation cases. *See*, Fact Sheet, at 18, 46–47. Notably, the DCGP does not define the process that is to be followed, the potential enforcement penalties that may be imposed or the procedural and due process protections that are to be afforded to permittees in the event comments on Permit Registration Documents ("PRDs") are received. This oversight is most egregious because it is possible that comments concerning initial SWPPP provisions may be received long after

construction commences in reliance upon administratively approved PRDs. Thus, the DCGP creates a new, but totally undefined, process for redress of public comments on SWPPPs, and the degree to which enforcement action and civil and criminal penalties may apply is uncertain.

The DCGP mentions a host of actions a RWQCB may take based on comments received and/or based on its own independent review, but these provisions raise more questions than they answer. *See*, DCGP § XII.2. For example, the DCGP notes that if comments are received the RWQCB can rescind permit coverage; however, it is unclear when such an action would take place and what the impact will be on the activities previously conducted in reliance upon permit coverage. *Id.* Other potential responses of the RWQCB include requiring public hearings or formal RWQCB permit approvals and requesting revisions to a SWPPP and/or Monitoring Program within a specified time period. *Id.* In addition, the DCGP allows RWQCB to require revisions to SWPPPs, Rain Event Action Plans (“REAPs”) and Monitoring Programs and to terminate coverage under the Final CGP when a discharger fails to comply with the permit requirements or whether the RWQCB determines that an individual NPDES permit is appropriate. *See*, DCGP, § XII.6, XII.8. However, none of these potential actions are defined in the DCGP. Without a definite process for public review and RWQCB action, the procedures included in Section XII create a substantial administrative burden on both the regulated community and the RWQCBs.

In fact, the current DCGP vests unprecedented discretion in the RWQCB staff, without any guidance on how such discretion is to be exercised. Such a delegation of responsibility without establishing the necessary safeguards is improper. *See, Wilkinson v. Madera Community Hospital* (1983) 144 Cal.App.3d 436, 442. In effect, the SWRCB has granted the RWQCB unrestricted authority to make fundamental policy decisions. *See, People v. Wright* (1982) 30 Cal. 3d 705, 712. RWQCB staff is tasked with accepting and distilling comments from the public, for an undetermined time period, and then reacting to those comments without any reasonable boundaries. The amount of sophistication that will be required of RWQCB staff as they comb through comments and determine what actions may be required, in the absence of any direction from the SWRCB, is unacceptable and will result in an inevitable delay in development as all parties involved attempt to understand and participate in the process. Moreover, the potential for marked variability across the State as different RWQCBs review PRDs is phenomenal, and would result in uneven and unfair protocols.

- (b) The public review process will wreak havoc on land use, CEQA and environmental permitting procedures

The new proposed public review process is especially troubling given that DCGP requirements are aimed, for the first time, at post-development project design features established during the land use, CEQA and environmental permitting processes, *i.e.*, hydromodification and LID requirements. It appears that the SWRCB has overlooked or purposefully ignored the current, ample opportunities available for public review and comment, and granted project opponents a new, thirteenth-hour chance to derail development. In effect, project opponents who miss one or more statutes of limitation in the existing land use, CEQA

and environmental permitting processes have been handed a chance to correct those earlier errors through the DCGP.

The combination of post-construction hydromodification control requirements coupled with public review and comment creates a new opportunity for members of the public and RWQCBs to challenge existing land use and environmental approvals. What this means to developers is that after clearing CEQA, after obtaining project approvals and permits from local jurisdictions and environmental approvals from other resource agencies and possibly even after construction has commenced, new challenges to project approvals and insistence upon fundamental changes in project design could extend for months, if not longer, after PRDs have been filed. It is undisputed that the land use, CEQA and environmental permitting procedures offer the public and the respective RWQCB opportunities to participate and comment on proposed projects; if a member of the public or the RWQCB elects not to participate, the SWRCB should be providing an additional bite at the apple at the construction stage.

Notwithstanding the misplaced legal authority for the SWRCB's proposed public review process, which is discussed below, the practical, real-world implications of this proposal are draconian. Such a system would create a new and belated form of project development challenge that could result in potential redesign of projects and renewal of the entitlement processes; potential reductions in project size; potential increased infrastructure costs after financial commitments and budgets are set; and increased carrying costs during project delays. Moreover, the risks and uncertainty associated with potential late-in-the-game legal challenges allowed by this additional public review process could affect negatively a project's necessary financing and/or could result in a decision by a financial underwriter to withdraw its monetary support for the project.

Accordingly, if the SWRCB determines that a public review process must be provided in the Final CGP, though such a review is legally not mandated, the public review process needs to be substantially revised. Any public review process incorporated into the Final CGP must establish a defined process whereby project proponents can satisfy public participation requirements without allowing new legal challenges to the previously issued land use, CEQA and other environmental approvals (*e.g.*, hydromodification control and LID requirements), which were resolved and approved long before grading and building permits are issued and construction commences. The Commenting Parties urge the State Board to adopt a Final CGP that exempts from any public review process the project elements previously approved in conjunction with the land use, CEQA, and environmental permitting processes where public participation was available.

2. *The CWA Does Not Require Public Review and Hearing Provisions for NOIs or SWPPPs Prepared Under the CGP*

We understand that the public review process included within Section XII.2 of the DCGP is intended to satisfy the SWRCB's perception that public review of approvals issued under the Final CGP is legally mandated based on two federal Courts of Appeals decisions referenced in the Fact Sheet: (1) *Environmental Defense Center, Inc ("EDC"). v. United States EPA*, 344 F.3d

832 (9th Cir. 2003) (holding that Notices of Intent (“NOIs”) submitted under EPA’s Phase II general permitting regulations for small MS4s are subject to public review and public hearing provisions of the CWA); and (2) *WaterKeeper Alliance, Inc. (“WaterKeeper”) v. United States EPA*, 399 F.3d 486 (2d Cir. 2005) (holding that nutrient management plans submitted under EPA’s regulation of confined animal feeding operations are subject to public review and public hearing provisions of the CWA).

As stated in the Fact Sheet, “[t]hese decisions remanded portions of regulations adopted by US EPA and are not directly applicable to the State Water Board.” *See*, Fact Sheet, at 46. Despite this clear recognition that the federal decisions do not apply to the CGP, the Fact Sheet goes on to state, “[n]onetheless, this General Permit includes provisions to comply with the *spirit* of these decisions by making discharger General Permit documents readily available to the public for review and comment. This General Permit allows for NOI and SWPPP review process and public participation process to the extent practicable.” *Id.* (*emphasis added*).

Although the State Board may intend for the RWQCBs to “focus their resources on those priority construction sites that pose significant harm to the environment or that have inadequately complied with the permit registration requirements,” the vague and ambiguous public review process now contained in the DCGP contains no such parameters, and instead opens up each and every one of the “tens of thousands of construction sites throughout the state” to an uncertain and potentially project-killing review procedure at the last stage of the building process. *Id.*

- (a) *EDC* does not require that the Board adopt any additional public participation requirements

In the Ninth Circuit’s 2003 *EDC* opinion, the court ruled that “EPA’s failure to make NOIs available to the public or subject to public hearings contravene[s] the express requirements of the Clean Water Act.” *EDC, supra*, 344 F.3d at 858. As noted above, this is one of the cases referenced in the Fact Sheet, and we understand that—in light of this decision and after reviewing Section XII.2—it appears that the State Board intends to (i) make NOIs available to the public prior to the effectiveness of a NOI, and (ii) to conduct a public hearing of some type at the RWQCB’s discretion before a NOI becomes operative. Of note is that the effectiveness of an NOI prior to any RWQCB hearing was discussed in part at SWRCB staff workshops conducted in May 2008; however, staff did not sufficiently clarify the DCGP language and we urge that clarification as to timing be provided in the Final CGP.

As an initial matter, the above-described State Board position is much broader than the position taken by the State Board’s counsel immediately after issuance of the *EDC* decision. On April 22, 2004, Ms. Elizabeth Jennings issued a memorandum stating, “[i]t should be noted that the court’s decision is limited to the small MS4 regulations, and does not necessarily apply to other permits such as general construction and general industrial.” *See*, April 22, 2004 memorandum from Elizabeth Jennings to Stan Martinson.

We agree with the interpretation taken by Ms. Jennings in the 2004 memo, limiting the impact of the *EDC* decision to small MS4s and finding the opinion inapplicable to general

construction permits. The Ninth Circuit itself limited its holding to small MS4 general permits, distinguishing it from other types of general permits, holding that the “Phase II [MS4] general permitting scheme differs from the traditional general permitting model.” *EDC, supra*, 344 F.3d at 853. The Ninth Circuit further explained its rationale for the different treatment given to the small MS4 category:

The Clean Water Act requires EPA to ensure that operators of small MS4s ‘reduce the discharge of pollutants to the maximum extent practicable.’ [Citation.] Because a Phase II NOI establishes what the discharger will do to reduce discharges to the ‘maximum extent practicable,’ the Phase II NOI crosses the threshold from being an item of procedural correspondence to being a substantive component of a regulatory regime. *Id; see also*, 33 U.S.C. § 1342(p)(3)(B).

In light of SWRCB counsel’s prior interpretation of the *EDC* decision, which is in line with the actual holding of the case, the Commenting Parties urge the Board to refrain from moving forward with the public review process included within Section XII.2. Additionally, there are several other factors concerning *EDC* that militate strongly against burdening permittees with onerous and time-consuming public disclosure and participation processes and, thus, merit discussion here.

Setting aside momentarily general distinctions between the DCGP and an MS4 permit, the opinion in *EDC* further indicates that the ongoing ability of the public to review SWPPP documents during construction may obviate the need for any further, additional public participation or hearing. Specifically, the Ninth Circuit in *EDC* was unwilling to accept EPA’s argument that the MS4 NOIs would themselves be available to citizens for ongoing review only because the issue was raised for the first time on appeal. *EDC, supra*, 344 F.3d at 857, n. 35. Nevertheless, recognizing that the referenced section “does seem to provide for the public availability of a small MS4’s records,” the Ninth Circuit expressly invited EPA to make such an argument upon remand. *Id.* at 858, n. 35.³³ The *EDC* decision strongly suggests that EPA would have prevailed on the question of public availability had EPA raised the point at any time prior to a petition for rehearing. *Id.*

In short, the *EDC* holding concerning public participation turned on (i) whether EPA’s permit at issue was sufficiently clear in mandating that NOIs would be among the records that permittees were required to make available to the public during reasonable business hours pursuant to 40 C.F.R. § 122.34(g)(2), and (ii) EPA’s apparent failure to explain the point to the

³³ “If EPA intends this section to provide for the public availability of NOIs – for example because it intends NOIs to be among the records subject to [40 C.F.R. § 122.34(g)(2)’s public availability requirements] – it may clarify on remand.” *Id.* Specifically, 40 C.F.R. § 122.34(g)(2) reads, in relevant part, “You must make your records, including a description of your storm water management program, available to the public at reasonable times during regular business hours.... You may require a member of the public to provide advance notice.”

courts early on. It is particularly telling that the court in *EDC* instructed EPA, in footnote 35, to cure these shortcomings upon remand.³⁴

On a practical basis, given the dynamic nature of construction activities and the need for ongoing adaptive management of construction, it seems likely that the courts would approve of a general construction permit as long as the permit provides citizens with ongoing access to NOIs, SWPPPs, and enforcing regulators. Specifically, the Ninth Circuit in *EDC* indicates that the public participation and public hearing statutory requirements of the federal CWA may be satisfied by permit conditions that provide:

- Immediate, ongoing and reasonable availability of a NOI to all members of the interested public through provisions akin to those found in 40 C.F.R. § 122.34(g)(2) (“You must make your records, including a description of your storm water management program, available to the public at reasonable times during regular business hours . . . You may require a member of the public to provide advance notice.”); and
- An opportunity for the general public to contact the relevant, enforcing RWQCB concerning any NOI and SWPPP.

Under the rational interpretation of *EDC* presented herein, there is no indication that coverage under a general permit must be delayed for any notice or hearing period, since a failure to comment upon filing of the NOI does not preclude the subsequent involvement of the public and adaptive revisions to the SWPPP. Accordingly, all of the legal and policy concerns that underpinned the Ninth Circuit’s opinion in *EDC* can be addressed through a permit condition akin to the following:

The NOI and its accompanying SWPPP must be maintained by the permittee at the relevant construction site, and must be kept available for inspection by the general public during reasonable hours of work. The permittee may require a member of the public to provide 24-hour advance notice prior to visiting the relevant construction site. The permittee must also provide conspicuous notice to the public that they may direct any concerns about the NOI, the SWPPP or the permittee’s storm water management practices to the relevant RWQCB, and provide the name, address and phone number of applicable regional board.

³⁴ EPA eventually went further, however, and issued a revised small MS4 permit for its Region 6 which includes a thirty-day period for public review and hearing concerning an NOI and the BMPs identified therein. *See*, Final NPDES General Permits for Small MS4s in New Mexico, Indian Country Lands in New Mexico and Indian Country Lands in Oklahoma; Minor Revisions and Corrections; 72 Fed. Reg. 32654-01 (June 13, 2007). Importantly, however, EPA has *not* changed its public participation procedures concerning construction general permits anywhere within the Ninth Circuit Court of Appeals’ jurisdiction in light of *EDC*.

Such a permit condition, which is roughly similar (in sum and substance) to the existing CGP conditions, would satisfy the public participation concerns set forth in the *EDC* opinion.³⁵

- (b) WaterKeeper also does not require that the Board adopt any additional public participation requirements

In *WaterKeeper*, the Second Circuit indicated that the federal statutory requirements concerning citizen participation and hearings would be satisfied by permit conditions that afforded ongoing access to NOIs and SWPPPs. *WaterKeeper, supra*, 399 F.3d 486. Specifically, the court considered EPA’s rule concerning confined animal feeding operations (“CAFOs”), and the public’s right to participate in the development of nutrient management plans, which are analogous to SWPPPs in CAFO regulation. *Id.* at 503-04. In finding that EPA’s CAFO rule violated 33 U.S.C. § 1251(e), which is the federal public participation statute, the Second Circuit noted that “[t]he [challenged] Rule does not . . . require that copies of the nutrient management plans be made available to the *public* by CAFOs.” *Id.* at 503 (emphasis in original). The court further held that under the CAFO rule, “citizens would be limited to enforcing the mere requirement to develop a nutrient management plan, but would be *without means to enforce the terms of the nutrient management plans* because they lack access to those terms. This is unacceptable.” *Id.* at 503–04 (emphasis added).

Given this holding, the Second Circuit was obviously concerned with the fact that citizens were denied ongoing access to the terms of the nutrient management plans, which as noted, are analogous to SWPPPs. In California and in the context of construction activities, any such concerns are addressed already by permit conditions that provide all interested citizens with ongoing access to SWPPPs and their specific terms through provisions akin to 40 C.F.R. § 122.34(g)(2).³⁶ We believe, therefore, that the SWRCB does not need to adopt the public review provisions of Section XII.2, but should instead include language in the Final CGP which would guarantee citizens ongoing and reasonable access to NOIs and SWPPPs, such as the proposed language, above.

³⁵ In 2006, the California Court of Appeal considered the State Board’s use of a permit that set forth storm water management practice requirements in an attachment to the permit. *See, Divers’ Env’tl. Conservation Org. v. State Water Res. Control Bd.*, 145 Cal.App.4th 246 (2006). On appeal, the Court upheld the permit against a claim that this practice constituted an inappropriate delegation of discretion to the permittee. *Id.* at 262–63. The Court in *Divers’* appropriately conditioned the permit on development of a SWPPP that was required to include specific information on sources of pollution, monitoring, recordkeeping and reporting. *Id.* In particular, the Court approved of the permit’s adaptive management approach that required the permittee to revise the SWPPP and implement additional BMPs in the event the plan failed to meet the minimum permit requirements. *Id.* Because *the Divers’* case stands in contrast to the “failure to regulate” portion of the *EDC* decision and because the *Divers’* court did *not* adopt a specific public participation requirement, the former opinion casts only a little additional light on the question of public participation under the DCGP. However, because the *Divers’* court generally endorsed the iterative BMP approach, if the Final CGP provides for ongoing, reasonable access to PRDs throughout the period of permit coverage, then the permit would satisfy both the legal requirement to regulate dischargers and the State Board’s apparent desire to afford a certain degree of public participation in the process. The suggestions outlined herein allow the SWRCB to meet both of these goals.

³⁶ The CGP states that the “SWPPP shall be provided, upon request, to the RWQCB. The SWPPP is considered a report that shall be available to the public by the RWQCB under section 308(b) of the [CWA].” *See*, CGP, § A.15.

- (c) The Seventh Circuit has determined that the current public hearing provisions are sufficient

Unlike the Ninth Circuit, the Seventh Circuit Court of Appeals has reviewed the issue of public participation specifically in the context of a general construction permit. *See, Texas Independent Producers and Royalty Owners Association v. U.S. EPA*, 410 F.3d 964 (7th Cir. 2005) (“Texas Independent”). In the *Texas Independent* decision, the court found that public participation during the formulation and promulgation of the general construction permit was sufficient to satisfy the federal statutory requirements of public participation and public hearing. *Id.* at 977–78.

Specifically, the Seventh Circuit upheld EPA’s interpretation that NOIs and SWPPPs are not “permits” or “permit applications” and, therefore, not subject to the public participation requirements of CWA sections 1342(a)(1) and (j). *Id.* at 978. In a footnote, the court referenced the Ninth Circuit’s holding in *EDC*, and stated that, “the statutory language at issue addresses only ‘permit applications’ and fails to include any mention of NOIs, SWPPPs, or other so-called ‘functional equivalents.’” *Id.* at 978, n.13.

In light of the Seventh Circuit’s decision, available public participation in the current process to develop a Final CGP is sufficient, no additional public review is required when individual NOIs and SWPPPs are prepared. *Id.* at 978. Thus, the proposed alternative language that we set forth above would seem to go above and beyond what the law requires in the context of a general construction permit. Nevertheless, in the event that the State Board moves forward with its intent to insert an additional level of review into the NOI and SWPPP process, we urge that the procedures identified in Section XII.2 be jettisoned in favor of the language suggested herein.

3. *The CGP Process Already Includes A Sufficient Public Review Process and RWQCBs Already Possess Adequate Authority to Review and Require Revisions to CGP documents.*

Pursuant to CWA section 1342 and Cal. Water Code section 13260, the SWRCB’s issuance of the Final CGP is itself subject to public review. As indicated by the court in *Texas Independent*, the proper venue for public participation is at this current level when the general permit is being issued, not after submittal of individual PRDs. *Id.* Indeed, the SWRCB’s efforts to provide a robust, collaborative approach to promulgating the Final CGP comports perfectly with the holding of the Seventh Circuit.

Moreover, pursuant to the current permit, the RWQCBs already have the authority to review SWPPPs and other CGP documents (e.g., monitoring programs), require revisions to SWPPPs and other CGP documents, conduct compliance inspections and take enforcement actions that are well defined in applicable statutes, and which provide sufficient procedural and due process protections for dischargers. And, the RWQCBs have received guidance from the SWRCB to respond promptly to any request by a member of the public to review a SWPPP. *See*, June 7, 2005 Memorandum from Celeste Cantu, Executive Director, to Regional Water Board

Executive Officers and Assistant Executive Officers, re: Public Availability of Storm Water Management Plans. Therefore, the provisions of Section XII.2 of the DCGP are unnecessary in light of already-existing RWQCB authorities and will subject the process to continued uncertainty.

If it is the State Board's goal to enhance public participation in the implementation of the CGP, the provision in the DCGP requiring electronic filing of PRDs, coupled with public access of such documents, is sufficient. *See*, DCGP §§ I.29, II.A.2, and VI.2. Specifically, the DCGP requires that "[a]ll dischargers seeking coverage under this General Permit shall electronically file their PRDs," including the NOI, site map, SWPPP and a SWPPP compliance checklist. *See* DCGP § VI.2, Fact Sheet, at 46–47. The new requirement to submit site maps and SWPPPs places a substantial burden on developers, as SWPPPs often contain multiple complex graphics. Developers, particularly small developers, will incur costs associated with converting these graphics into a format that can be uploaded to the California Integrated Water Quality System website. Despite these burdens, the building industry recognizes the trend toward electronic filings is inevitable, and therefore, has determined that the DCGP's PRD electronic submittal requirement, once thoughtfully developed, is a means to further facilitate public access to SWPPPs.

Practically, it is also important to note that SWPPPs undergo many revisions pursuant to the requirements of the current permit, and are generally viewed as "evolving documents." Thus, the Commenting Parties urge the SWRCB to revise the language of the DCGP to limit the electronic submittal requirement to the *initial* SWPPP that is a part of the PRD package, and not to require electronic submittal of further updates to the SWPPP. *See, e.g.*, DCGP § I.29. Such a limitation may allow for the initial SWPPP to be considered as part of a CEQA approval involving public participation, and would obviate any need for a separate and later period of review that could result in potential delay and/or mischief.³⁷

Lastly, it is important to remember that the provisions included within Section XII.2 of the DCGP are unnecessary given the current enforcement procedures of the RWQCB, the SWRCB, EPA and citizen groups (via section 505 of the CWA) that are available to correct an perceived inadequacies within PRDs. Through these enforcement powers, changes to a SWPPP can be effected to remedy any inadequacies with the SWPPP (and other PRDs) and sufficient penalties for failure to follow CGP requirements are provided.

4. *Alternative Approaches To Increase Public Participation*

If the SWRCB determines that it is necessary to include a public review period for PRDs, it must carefully define the requirements and procedures for such a process. Although we do not

³⁷ The SWRCB's consideration of the use of REAPs recognizes that construction is a dynamic process involving constant adjustments and readjustments. This practical reality obviates any possibility of continuous public participation of a type that would halt or delay construction whenever a SWPPP or REAP is altered. Permittees must have the flexibility to apply best management practices on the ground immediately when circumstances dictate.

agree that any public review process is legally or otherwise necessary to achieve public participation in the CGP program, if the Final CGP is to include such a process, we submit that the better approach is to provide for electronic filings and/or on-site availability, as noted above. If any additional review rights are created, the review process must include, at a minimum, the following limitations to avoid creating a process that will have serious legal and economic consequences for the development industry as a whole:

- There should be a very short maximum time period, *i.e.*, 15-30 days, in which a RWQCB must respond after receiving a comment, and there should be a provision that if the RWQCB fails to respond to comments within the prescribed timeframe, the comments are deemed to be invalid.
- RWQCB action in response to qualified comments should be limited to a prompt determination that comments are not valid or, in the alternative, specific direction to the developer to revise the SWPPP as necessary to comply with construction phase (and not post-construction) water quality requirements.
- There should be an express provision that the PRD public review and associated RWQCB determination periods developed in the Final CGP can run concurrently with the applicable CEQA public comment period, so as to avoid a “late hit” for projects after CEQA review has been completed.
- Comments on which a RWQCB shall act must raise a substantial issue regarding, and are limited to addressing, compliance of PRDs with construction-phase water quality control requirements. RWQCBs must be prevented from considering comments addressing or challenging post-construction hydromodification controls already reviewed under CEQA or a similar process, which provided the opportunity for public review. Such a prohibition will limit the potential to countermand final land use and environmental approvals, permits and entitlements. If it is critical that a public review process be included, the Final CGP must clearly explain that the proposed public review process is *not* an opportunity to re-open earlier land use decisions, and in particular, prior CEQA approvals.

CEQA includes a set of very specific, and relatively short, statutes of limitation that allow project opponents to challenge environmental decisions, including determinations that an activity is exempt from CEQA. *See*, Cal. Pub. Res. Code §§ 21167. The Legislature has made it clear that these short statutes of limitations, which range from 30 to 180 days, are meant to “avoid delay and achieve prompt resolution of CEQA claims.” *San Franciscans for Reasonable Growth v. City and County of San Francisco* (1987) 189 Cal.App.3d 498, 504. Because of the central role CEQA plays in nearly every land use decision in California, it is essential that the Final CGP expressly state:

The ongoing rights of citizens under the NPDES program is limited to participation and hearing concerning the permittee’s

adaptive management of construction period best management practices. This public review process is not intended to and does not grant citizens the right to challenge, belatedly and outside of the processes established pursuant to the California Environmental Quality Act (“CEQA”), land use approvals respecting project design, project siting or sizing, and/or project mitigation which were subject to forgone or unsuccessful challenges pursuant to CEQA.

Such language is necessary to assure that a permittees’ obligation to install, maintain and adjust BMPs during the construction period are not confused with the land use approvals that logically precede construction, and which cannot be re-opened without significant damage to both property owners’ interests and the interests of the public agencies involved.

In light of the above, the Commenting Parties encourage the SWRCB to consider the actions taken by EPA when it adopted the Final NPDES General Permits for Small Municipal Separate Storm Systems (“SMS4s”) in New Mexico, Indian Country lands in New Mexico and Indian Country lands in Oklahoma (“New Mexico SMS4 permit”).³⁸ After the *EDC* decision was issued, EPA revised New Mexico SMS4 permit to allow public comment, but tied the hearing process to the amount of significant public interest exhibited over a discharge. This process involves the public, but provides some amount of certainty and closure to permittees. Specifically, the New Mexico SMS4 permit, includes “Appendix E: Providing Comments or Requesting a Public Hearing on an MS4 Operator’s NOI.” As stated therein, “[a]ny interested person may provide comments or request a public hearing on a [NOI] submitted under this general permit. [U.S.] EPA would like to point out that the permit itself has already done [sic] through the NPDES notice and comment public participation process required by 40 C.F.R. 124.10 and is not being reopened.” *See*, New Mexico SMS4 permit, Appx. E. Thereafter, the New Mexico SMS4 permit outlines the public participation procedures, which include local public notice of a NOI and posting on EPA’s website, and requires that comments be received within 30 days of posting. Comments should be as specific as possible and included suggested remedies where possible, and should include any data supporting the position taken by the commentor. *Id.* Upon receipt:

EPA will evaluate all hearing requests received on an NOI to determine *if a significant degree of public interest exists* and whether issues raised may warrant clarification of the MS4 Operator’s NOI submittal. EPA will hold a public hearing *if a significant amount of public interest is evident*. EPA may also, at the Agency’s discretion, hold either a public hearing or an informal public meeting to clarify issues related to the NOI submittal.

³⁸ *See, supra*, note 34.

Id. The Commenting Parties believe that a public participation process modeled on the procedures outlined above would more than satisfy the apparent intent of the State Board, but would provide for a degree of finality, which is absolutely necessary to the construction industry in California.

G. The DCGP Inappropriately Exempts Certain Projects, Thus Failing to Serve as a Proper General Permit.

As was discussed in detail above, in section III.C.2, the DCGP has been limited in jurisdiction to discharges to waters of the U.S. If the limitation were to remain, all construction sites discharging to waters of the state would not fall within the CGP program and would be forced to obtain state WDRs (either individual or general within a region) or waivers of WDRs from local RWQCBs. This jurisdictional limitation on the CGP is likely to create a regulatory morass as thousands of sites are forced out of the general permit program and a significant amount of construction throughout the state is brought to a halt while the RWQCBs scramble to issue individual permits or waivers or adopt general permit or waivers within their regions to address these orphaned projects. This type of jurisdictional limitation is not in keeping with the purpose of general permitting under the federal CWA. Under EPA regulations, general permits are appropriate for discharges that:

- A) Involve the same or substantially similar types of operations;
- B) Discharge the same types of wastes ...;
- C) Require the same effluent limitations, operating conditions, or standards for sewage sludge use or disposal;
- D) require the same or similar monitoring; and
- E) ...are more appropriately controlled under a general than under individual permits.³⁹

The SWRCB has already determined that regardless of whether or not construction sites in the state discharges to a U.S. jurisdictional water, in general, construction sites would meet the EPA qualifications for issuance of a general permit; hence the existence of the Current CGP and its inclusion of all essentially all construction projects throughout the state regardless of the jurisdictional status of the receiving water. *See* text accompanying note 20, above. For the SWRCB to now turn its back on the existing program and force many, if not the majority, of sites that would have otherwise been covered by the CGP into the hands of the RWQCBs is not in keeping with the CWA regulations. Furthermore, greatly expanding the number of permits that must be issued by the RWQCBs runs counter to statements in the Fact Sheet to the DCGP itself, which states that the purpose of the DCGP is to “greatly reduce the administrative burden associated with permitting individual storm water discharges.” Fact Sheet, at 4. As a policy matter, the SWRCB should draft the Final CGP in such a way as to be inclusive, not exclusive, and should continue to cover construction sites discharging to waters of the state under the general permit program.

³⁹ 33 C.F.R. § 122.28(a)(2)(ii).

For similar reasons, the Final CGP should not orphan sites determined to be risk category four. Under the DCGP, such sites are excluded from the CGP and would be forced to obtain individual permits from the local RWQCBs. DCGP §I.32. It is unknown how many sites will be classified as risk category four under the terms of the DCGP, and these sites will then be forced to obtain individual permits. Obtaining individual permits can be an extremely time consuming process and has been known to take months, if not years, to obtain in certain instances. Thus, the DCGP is establishing what would likely be a large regulatory backlog of sites that would be awaiting individual permits.

Categorically excluding risk category four sites from the CGP is both unnecessary and problematic. The RWQCBs already have discretion through the CGP to write individual permits for sites where they deem it necessary. DCGP §XII.4. If a RWQCB in reviewing the PRDs from a particular risk category 4 site were to determine the site merited an individual permit, the RWQCB would be able to impose such a requirement. However, if the RWQCB were to determine that the broad language and multitude of requirements already included in the CGP were sufficient for the particular site, then the site should be allowed to be covered by the CGP. The Final CGP should be drafted to include risk category 4 sites within the jurisdiction of the CGP and allow the RWQCBs, at their discretion, to determine which sites in their area merit special permitting, if any.

H. Final Stabilization Requirements for Revising Permit Coverage for Change of Acreage Would Be Infeasible or Unenforceable When Applied

The DCGP requires that a permittee continue coverage of a parcel until “Final Stabilization” as defined by the DCGP in footnote 12 on page 25 is achieved or until the parcel has been sold and the new owner files PRD. DCGP § II.B.3. Such a requirement would: (1) prevent the close out of permit applications to areas no longer owned or controlled by a permittee or (2) impose upon a permittee obligations that a permittee will be without legal authority to implement.

The condition that a permittee must achieve “Final Stabilization” is unlikely to be achieved in a time period that reasonably reflects the construction process in California. For example, concerning residential building in particular, parcels are sold to new home buyers oftentimes without backyard landscaping. The build-up of 2 inches of plant litter can take several growing seasons. Once a parcel has been sold there is no legal way for a permittee to actively control the site to establish or maintain the “Final Stabilization” required by the DCGP for the filing of a Notice of Termination. DCGP § II.B.3

Furthermore, there is no practical method to assure a purchaser of a parcel would submit a PRD and then subsequently comply with the DCGP’s terms as required by the DCGP. These provisions are unenforceable on the original permittee in both instances as parties can not be held liable for land that they neither own nor control. It would also be legally impractical and commercially unworkable to require builders to arrange contractually for ongoing permission to secure Final Stabilization on parcels that have been sold as proposed.

The Final CGP should reflect the practical and legal realities engendered by these obstacles to compliance. The Final CGP should allow a Change of Acreage to be filed and accepted by a permittee without any waiting period for PRDs to be filed (if necessary) by a new permittee; any enforcement obligations for failure to file PRDs by a new permittee will continue to rest with the State and Regional Boards. The definition of “Final Stabilization” for the purposes of filing a Change of Acreage should be expanded to all three definitions given in § XI 3 of the DCGP at page 25-26.

I. The DCGP's Qualified SWPPP Developer and Practitioner Requirements Are Impractical and Lack Appropriate Justification in the Record.

While the Commenting Parties support the SWRCB’s efforts to create baseline program curricula for SWPPP preparers and practitioners (inspectors, samplers, etc.) there is no justification in the record for limiting the preparation of SWPPPs and inspection of construction sites in the manner proposed by the DCGP. Section IX.A of the DCGP limits the pool of Qualified SWPPP Developers to those holding one of 7 credentials (most of which also require a college degree) and limits the pool of Qualified SWPPP Practitioners to those holding one of 9 credentials (most of which require a college degree).⁴⁰ In fact, the impact of these requirements would be a significant increase in the cost of preparation and implementation of SWPPP, and would potentially leave projects stranded awaiting preparation of documents by a certified Developer or potentially in non-compliance while site personnel await receipt of certification credentials. This is especially true considering that many of the approximately 20,000 active permittees would need to be re-approved for coverage within one hundred days of the adoption of the DCGP.

A conservative estimate of the current number of “Qualified SWPPP Practitioners” that would need to be certified is approximately 60,000 (20,000 sites x (1 Developer and 2 Practitioners per site (a principal and a back-up))). It is unlikely that the two certifying companies offering the credentials per the DCGP—Certified Professional in Erosion and Sediment Control, Inc. (“CPESC”) and Certified Inspector of Sediment and Erosion Control, Inc. (“CISEC”)—could supply the necessary training to allow the construction industry to comply with this provision in two years as required for the “Qualified SWPPP Practitioner” let alone the very limited one hundred day compliance deadline that will have to be met for the “Qualified SWPPP Developer,” where the DCGP does not allow a two-year grace period of obtaining this qualification.

EPA’s current Construction General Permit requires that qualified personnel conduct inspections but declines to specify “any inspector license or certification requirements at this time.” U.S. EPA, NPDES General Permit for Storm Water Discharges from Construction Activities, Fact Sheet at 29. The EPA has not proposed to change this position in its current Proposed General Permit. U.S. EPA, 2008 Proposed NPDES Permit for Storm Water Discharges from Construction Activities, Fact Sheet, at 22. Additionally, of the states cited in

⁴⁰ The proposed qualification requirements are particularly ironic when the RWQCB staff enforcing this permit are not required to have the same certifications as those of the regulated community.

the DCGP Fact Sheet (page 62) as support for the certification requirements, only the state of Georgia requires the preparer of a SWPPP be a design professional, all other states cited only require that “qualified personnel” conduct site inspections. Thus, it is clear that the DCGP is proposing qualification requirements far in excess of what federal or other state authorities have deemed necessary or reasonable. Nothing presented in the Fact Sheet beyond a desire to have persons knowledgeable in erosion and sediment control with the skills to assess site conditions appears to justify the DCGP’s limitation on appropriate qualifications to a limited set of individuals in the state. Certainly, the burden on the regulated community to have all relevant personnel possess one of the listed qualifications in an extremely limited time period would appear to be untenable.

We recommend that the Certification requirements for the “Qualified SWPPP Developer” in DCGP Section IX.A.1 be deleted from the Final CGP to reflect the general consensus among EPA and the various states cited in the Fact Sheet that there should be no specific criteria for SWPPP preparation. Instead, we recommend substituting more general language requiring that SWPPP preparers will be knowledgeable in the permit requirements with the skills necessary to prepare SWPPPs and related documents meeting the permit’s requirements. At a very minimum, we recommend that the Final CGP clarify that SWPPPs may be prepared by persons working under the direction of a Qualified SWPPP Developer. Additionally, DCGP Section IX.A.4 should be amended to reflect the original language from the DCGP that a Qualified SWPPP Practitioner have either a CPESC/CISEC certification (or be a Qualified SWPPP Developer) *or* have attended a State Water Board-sponsored or approved Qualified SWPPP Practitioner training course. Replacing the DCGP’s requirement that Certified Practitioners have the listed credentials *and* attend a SWRCB-sponsored course with the more inclusive option of possessing the credentials *or* attending the course will allow the SWRCB to ensure Practitioners are properly trained while providing the regulated community with additional options (potentially at a lower cost) to obtain the required training.

With particular regard to the post-construction requirements of the DCGP (§ VIII.H), projects that have advanced beyond initial planning and have already received project entitlements are among the most likely to find the provisions of the new permit will create significant feasibility problems, as these projects will have already been through project design and environmental review. Indeed, many affected development projects will have already commenced construction. To then expect these projects to comply with the post-construction flow control requirements as proposed in the DCGP, would likely entail redesigning the project re-processing and updating environmental review documents, which would, in turn, be extremely burdensome to the point of resulting in projects’ belatedly-discovered infeasibility.

With regard to other elements of the DCGP, particularly where projects are being constructed in regions that may have significant sedimentation problems, permittees will have already designed and implemented BMPs to address water quality concerns arising from those conditions. If the proposed new risk factor provisions were to be imposed upon these ongoing projects, such projects may not be able to avail themselves of either of the two ameliorating activities contemplated in the risk factor worksheet (DCGP Appx. A) to reduce their risk factor

below a level four, which would trigger the need to obtain an individual permit. An active project that has to suspend activities to obtain ongoing coverage under an individual permit (which can take years to accomplish) will in all likelihood be unable to continue construction due to financing issues likely to arise during the suspension. A further concern is the unnecessarily increased regulatory uncertainty that will result when over 20,000 currently active permit holders attempt to comply with the DCGP during the first 100 days that it is operative regardless of the stage of construction they are in and whether or not termination of CGP coverage is imminent. These “continuing permittees” could face extreme budgetary shortfalls as they work to implement new and costly permit requirements, such as NELs, receiving water monitoring, inspector certification, etc. Such projects also could be faced with potential enforcement if, for example, inspectors are unable to obtain the required credentials prior to imposition of new permit terms.

We suggest adding language to the Final CGP establishing a firm date for grandfathering that will significantly reduce the risk of project infeasibility and the level of regulatory uncertainty engendered by wholesale and compliance with the Final CGP.

To this end, the Commenting Parties offer the following suggested language:

The terms “new development” and “re-development” are defined such that new development is defined as projects for which tentative tract or parcel map approval was not received by the date of adoption by the SWRCB of this permit and re-development means projects for which all permits necessary to commence construction (save this storm water general permit) were not issued by the date of adoption by the SWRCB of this permit. New development does not include projects receiving map approvals after the date of adoption by the SWRCB of this permit that are proceeding under a common scheme of development that was the subject of a tentative tract or parcel map approval that occurred prior to the date of adoption by the SWRCB of this permit. All permittees covered under the previous permit (SWRCB Order 99-08-DWQ) which will continue construction operations after 100 days after this new permit is adopted but which will be able to file a Notice of Termination no more than 180 days after this permit is adopted may continue to comply with the terms of Order 99-08-DWQ. All other ongoing projects must comply with the new permit terms once PRDs are deemed complete and permit coverage is administratively approved by the SWRCB.

J. The DCGP Gives Undue Preference to Advanced Treatment Systems (ATS) and Fails to Remedy Concerns about Implementation of Such Systems.

The DCGP’s Risk Calculator (Appendix A) unduly preferences the use of ATS by allowing credit for its use while failing to grant credit for other BMPs proven to be effective in reducing the risk of excessive sedimentation. The DCGP’s Fact Sheet correctly identifies other effective erosion and sediment control BMPs, and further identifies ATS as a possible BMP for sediment control where other erosion and sediment controls may not be effective. However, the DCGP’s Risk Calculator short circuits this determination by using ATS as the single largest

factor for reducing sediment risk with out allowing other possible BMP choices to reduce risk where other BMPs may also be effective.

1. *The DCGP Effectively Mandates a Specific Technology BMP by Unduly Preferencing ATS Systems Against California Law and Sound Public Policy.*

The DCGP Risk Calculator effectively forces projects into the ATS alternative by allowing only ATS as a BMP that could reduce a project’s risk level from four (triggering the need to obtain an individual permit) to three (allowing CGP coverage). The terms of California Water Code section 13360 explicitly provide that the SWRCB “shall not specify the design, location, type of construction, or particular manner in which compliance may be had with” a requirement or order issued by the SWRCB. The ATS bias in the DCGP violates this provision because it effectively mandates the method, mechanism, and specifications for compliance, and as such violates California Water Code section 13360.

Further, sound public policy requires that the SWRCB refrain from mandating ATS in light of the significant technical issues associated with ATS. The technical data required to justify widespread use of ATS simply is not available. Additionally, placing toxicity testing requirements on the large number of construction sites to enable implementation of ATS (*see* DCGP Appx. C), which may not have water quality benefit, makes little sense from a practical or policy perspective. The State of Washington, which has a formal program in place to test and monitor the chemicals used in ATS systems, has certified only three chemicals for use in such systems and requires training for ATS operators. However, the SWRCB’s ATS bias reveals a complete disregard for these as-yet unaddressed concerns by pushing an uncertain technology on the regulated community—and requiring that regulated community to conduct the monitoring and studies that should inform, not follow, implementation of this technology—all before any clear water quality benefit has been demonstrated. The Commenting Parties advise the SWRCB that until it is able to marshal the necessary resources to undertake adequate testing and analysis of ATS, including the chemicals associated with such systems and the certification of ATS operators, the SWRCB should refrain from creating a de facto mandate in its Risk Calculator for the implementation of ATS.

2. *Additional Policy Concerns Raise Serious Concerns with the Immediate Implementation of ATS.*

If ATS is identified in the CGP even as one among a number of available feasible and practical erosion control BMPs, then an adequate phase-in period should be included to allow sufficient time for the regulated community and support industry to develop the capability to provide the new technology to the industry on a broad basis. The DCGP seems to assume that ATS can be implemented immediately. As noted by the Blue Ribbon Panel Report, it simply is not feasible, nor advisable from a water quality perspective, for the permit applicants that are covered under the CGP to implement ATS technology immediately. Blue Ribbon Panel Report, at 17.

Because ATS is a sediment control, rather than an erosion control, that requires collection of construction site runoff, chemical injections, coagulation and settling, filtration and polishing of runoff prior to discharge, and all without regard to background receiving water sediment loads and conditions, a number of technical considerations indicate that it is unlikely that ATS is an appropriate industry-wide pollutant control measure for several reasons, discussed in detail in the Technical Memo and Appendix B to the Technical Memo.

There is no technical or other data that industry experts have access to supporting the DCGP's suggestion that ATS chemical treatment for sediments will result in better water quality for receiving waters than that achieved by proper implementation of comprehensive and complementary BMPs.⁴¹ In this regard, it is critical in setting industry-wide pollutant control measures to distinguish between a technology that achieves the best effluent reductions, and the technology that is most appropriate to improve receiving water conditions based upon consideration of all appropriate factors, including indirect water quality impacts, non-water quality environmental impacts, cost-effectiveness, and a comparison of engineering aspects and water quality benefits provided by various treatment processes.⁴² The federal Clean Water Act's requirement that EPA (or in this case the State Administrator) must choose the "best" water quality control technology does not mean that the chosen technology must be the best at pollutant removal; instead the chosen technology must be acceptable on the basis of numerous factors, only one of which is pollution control.⁴³ So while the DCGP's Fact Sheet, (page 58) states that ATS technologies can consistently produce discharges with turbidity less than 10 NTU, the key question is whether that level of pollutant reduction makes ATS the best treatment control technology for construction sites taking into account all appropriate factors.

A number of additional technical issues and concerns integral to establishing industry-wide pollutant control measures designed to implement BAT/BCT indicate that ATS is neither the best treatment technology nor an appropriate pollutant control measure. As concluded in the Blue Ribbon Panel Report, and acknowledged in the DCGP Fact Sheet (page 58), there are serious technical concerns regarding the ATS treatment process.⁴⁴ The concerns include the potential acute and chronic toxicity effects that may be associated with long-term, widespread use of polymers and chemical additives as a part of the ATS; inevitable accidental or improper

⁴¹ It is clear from the DCPG's preference for ATS over other BMPs in the risk calculation that the SWRCB believes ATS will be better for water quality than other BMPs.

⁴² *Citizens Coal Council and Kentucky Resources Council v. U.S. EPA*, 447 F. 3d 879 (6th Cir. 2006) (addressing application of BAT standard, which is a stricter standard for water quality control than the BCT standard applicable to sediment); *see also* 33 U.S.C. § 1314(b)(4)(B) (consider treatment processes employed and consider environmental impacts); Cal. Water Code §§ 13241(b & c) and 13263 (consider water quality conditions that can be reasonably achieved through coordinated controls and consider the hydrographic unit under consideration, including the quality of water available thereto).

⁴³ *Citizens Coal*, *supra* note 42, at 903.

⁴⁴ As noted by Nautilus Environmental in the letter report dated April 16, 2007 (set forth in an attachment to the CBIA comments on the PCGP included herein), toxicity testing of ATS discharges conducted concurrently with implementation of ATS methods as proposed in the CGP cannot effectively preclude the potential for adverse and significant toxic effects associated with use of the technology. The potential for significant adverse toxicity impacts make the water quality benefits of the ATS technology highly questionable, particularly because traditional erosion and sediment controls do not carry toxicity risks. *See further*, Technical Memo.

releases of ATS chemicals and copolymers. and the concern raised by the Blue Ribbon Panel Report that sediment would be *too* greatly reduced in discharges from ATS facilities, creating “hungry water” that would have adverse environmental effects. *See further*, Technical Memo.

In addition to the technical concerns related to the potential adverse environmental effects that may be caused by ATS treatment, particularly in alluvial systems in California, the currently inconsistent DCGP provisions regarding ATS and post-construction flow control should also be reconciled. Although the post-construction control requirements of the DCGP compare pre-construction attributes to post-construction attributes, and therefore seemingly ignore the “during construction” effects of ATS treatment, nowhere does the DCGP plainly indicate that prohibitions against disrupting pre-project equilibrium flow and sediment supply require (DCGP § V.4) are temporarily excused to any degree during the construction period. Further, the DCGP omits reference to any defined point in time during construction at which ATS may be discontinued. The inconsistency in DCGP approach to post-construction control—the de facto mandate of ATS despite discharges capable of causing problems during construction, while at the same time requiring compliance with post-construction controls—sets a compliance trap for dischargers subjecting them to penalties for violation. It will be important to eliminate this compliance trap from the Final CGP.

To assure technical feasibility of implementation,⁴⁵ the Blue Ribbon Panel Report recommends phased implementation of ATS, commensurate with the capacity of the dischargers and support industry to respond to and implement the approach. However, the DCGP provides no phasing for proper development and implementation of ATS. Currently, there are not enough trained personnel or equipment suppliers to implement the ATS on the grand scale that the DCGP contemplates by the undue preference given to ATS, making compliance technically infeasible. *See further*, Technical Memo. ATS is infeasible for other reasons as well. In addition to the burdensome costs, limited benefit in comparison with the efficacy of BMPs, and potential non-water quality impacts (additional energy usage associated with pumping requirements) ATS is not a “feasible” control measure).⁴⁶

Because ATS treatment requires operation of pump systems and similar active implementation, as a practical matter, the PCGP needs to take into account local ordinances that prohibit or restrict the operation of construction equipment at night and on weekends. Local operating restrictions may preclude operation of ATS as envisioned by the Permit, making the technology infeasible to attain water quality benefits.

⁴⁵ 33 U.S.C. §1314(b)(4)(A)(consider effluent reduction attainable through the application of, and engineering aspects of the control technology); Cal. Water Code §§ 13263 and 13241(c)(consider water quality conditions that can be reasonably achieved through coordinated controls).

⁴⁶ *BP Exploration & Oil v. United States EPA*, 66 F.3d 784, 796 (6th Cir. 1995)(EPA’s determination of an “infeasible” control measure was appropriately based on “high economic and non-water quality environmental impacts”); *Hooker Chemicals & Plastics Corp. v Train*, 537 F.2d 620 (2d Cir. 1976) (a technology may be “unavailable” if there is no data in the administrative record that it may reasonably be expected to yield effluent reduction mandated when applied to particular industry).

In light of these concerns, we request thorough consideration of information pertinent to ATS pollutant control requirements. As set forth in the Technical Memo, we request that the SWRCB consider modifying the risk approach, which currently allows credit only for these proposed control measures with control measures, so that credit is also allowed for control measures designed to establish pro-active approach to implementation of comprehensive and complementary BMPs emphasizing erosion and source control

K. Applicable Case Law Indicates that the SWRCB is Acting Arbitrarily in Imposing on Permittees through the DCGP Improperly-Established Water Quality Standards.

The SWRCB is facing current litigation over the adoption of the Los Angeles Basin Plan. *See, Cities of Arcadia v. SWRCB* (Superior Court of California, Orange County Case No. 06CC02974) (“the Basin Plan case”).⁴⁷ The Basin Plan case alleges that the SWRCB never considered its water quality objectives (also called water quality standards and referred to by the Court and herein as the “Standards”) in relation to how those standards apply to storm water. *See, Basin Plan case*, March 13, 2008 Minute Order, Notice of Ruling/Decision, at 1 (“Notice”) Specifically, the trial court determined that:

There is no substantial evidence showing that the Board considered the 13241/13000 factors before applying the Standards to storm water In *City of Burbank, supra*, the California Supreme Court held that if NPDES permit conditions were not compelled by federal law, the Boards were required to consider economic impacts including the ‘discharger’s cost of compliance. [Citation.] The Court interpreted the need to consider economics as requiring a consideration of the cost of compliance on the cities. [Citation.] So, under *Burbank*, the 13241 factors cannot be evaluated in a vacuum. They must be considered in light of the impact on the ‘dischargers’ themselves. The evidence before the court shows that the Board did not intend that the Basin Plan of 1975 was to be applied to storm waters when it was originally adopted. . . . There is no substantial evidence in the record to show that the Boards have ever analyzed the 13241/13000 factors as they relate to storm water. *Id.* at 6.

Although the Superior Court has not issued a final judgment in the Basin Plan case, the holding quoted above is critical to the current DCGP process, as the Standards discussed in the decision cannot be applied via the DCGP until the SWRCB takes the necessary steps to properly establish those Standards. Unless or until the State Board engages in a review of the California

⁴⁷ The Orange County Superior Court issued its Minute Order in favor of the petitioners on March 13, 2008. However, the decision has not been codified in a final judgment as of this writing due to a number of late intervention requests granted by the Court. It is anticipated that a final judgment will be handed down within the next month, approximately.

Water Code section 13241/13000 balancing factors as they apply to storm water-related Standards, the DCGP requirement that flows not cause or contribute to exceedances of water quality standards cannot be adopted or subsequently enforced. *See*, DCGP, § V.2.

L. Miscellaneous Issues

1. *A Grandfather Clause is Needed to Avoid Creating Conditions of Project Infeasibility.*

The DCGP would require all projects not completed within one hundred days of the adoption of the CGP to comply with the terms of the CGP as finalized. DCGP § VI. Significant changes in the requirements for coverage proposed in the DCGP would render currently active projects infeasible or, in some instance, without coverage if a project falls into risk category four and is thus obligated by the DCGP to obtain an individual permit.

2. *The DCGP Fails to Define What Constitutes A “Direct Discharge”*

Attachment A to the DCGP is the Receiving Water Risk Factor Worksheet. The first question posed on this worksheet is “Does the disturbed area discharge (either directly or indirectly) to a 303(d)-listed waterbody impaired by sediment?” *See*, Attachment A, A.1. If the answer to that question is yes, “the project is automatically a high receiving water risk project,” with all the attendant issues that flow from such a designation. *Id.*

Despite the potentially harsh consequences of the answer to such a question, the terms “direct discharge” and “indirect discharge” are not defined anywhere in Attachment A. In fact, the terms are not defined either in the DCGP or in the Fact Sheet. This omission must be addressed prior to adoption of the Final CGP, because as currently written Attachment A is vague and ambiguous.⁴⁸

To correct this error, the Commenting Parties offer the following definition:

A “direct” discharge to an impaired water body is one wherein flow exits a point source at the construction site and enters directly to the impaired receiving water with no intervening flows commingling with site flows. An “indirect” discharge to an impaired waterbody is one wherein flow exits a point source at the construction site, enters another point source (e.g., municipal separate storm sewer system pipe, flood control channel, conduit) or natural tributary which then enters the impaired receiving water without receiving any additional flows that could be commingled with the construction site discharge. Construction site

⁴⁸ It should be noted that since ¶ 23 of the DCGP limits CGP coverage to discharges to waters of the U.S., if a construction site discharges directly or indirectly to a non-U.S. jurisdictional waterbody (e.g., water of the State) prior to any flow reaching an impaired U.S. jurisdictional waterbody, the construction site would not be covered by the CGP. Without any additional clarification in Attachment A to the DCGP, the vague and ambiguous terms “direct” and “indirect” discharge conflict with the jurisdictional limitation of the DCGP to discharges to waters of the U.S.

flows which commingle with other surface flows (point or non-point sources) before entering the impaired receiving water are not considered direct or indirect discharges.

3. *Requiring compliance with “all local regulations” unnecessarily expands potential enforcement and unreasonably exposes projects to increased risk.*

Section VI.7 of the DCGP requires compliance with “all local regulations.” This provision creates an opportunity for enforcement of elements not in the CGP through a CGP-related enforcement action and potentially exposes projects to State and Federal enforcement of local rules in an improper forum. Municipalities, counties, drainage districts and other local districts each have their own enforcement powers for their local water quality regulations, ordinances, rules, etc. The DCGP’s requirement to comply with “all local regulations” is not only unnecessary, but also subjects CGP permittees to a potential CGP violation (and ensuing enforcement) for violating a local rule as the compliance with the local rule is made a requirement of the CGP. To add CGP enforcement venue extends the reach of the CGP well beyond its purview and unnecessarily exposes permittees to enforcement of local rules by SWRCB and RWQCB staff or citizens under § 505 of the CWA. The Commenting Parties urge the SWRCB to remove Section VI.7 entirely from the Final CGP.

4. *Elements of the DCGP improperly imply that excursions over NALs are permit violations, when they are not.*

The DCGP’s Fact Sheet makes clear that the NALs are not effluent limitations and excursions above the NALs are not to be considered permit violations. DCGP §I.14 (stating that the NALs are “not directly enforceable and do not constitute NELs). Despite this statement, there are DCGP provisions that imply that an excursion over an NAL is effectively a violation of the permit. For example, the DCGP states:

- Additional BMPs must be immediately implemented upon an NAL exceedance. (DCGP §I.15);
- SWPPPs must be revised to “prevent” pollutants in storm water or non-storm water discharges or “substantially reduce” pollutants below the NALs (DCGP §I.15); and
- Requiring a report related to the excursion be filed within 10 days of the monitoring effort such that the RWQCB, stakeholder agencies, and the general public have access to the information (Fact Sheet, at 39).

With regard to the first issue, requiring that additional BMPs be implemented immediately upon an NAL excursion implies that the current suite of BMPs was insufficient and potentially a violation of the technical standards to which BMPs are held. This runs counter to other elements of the DCGP that do not make such an assumption, but rather, acknowledge that modification of BMPs may not be necessary or that the excursion of the NAL may have been due to other forces, such as site run-on. *See* DCGP § VIII.A.4. The language of the DCGP

should be conformed such that it is made clear that an excursion over an NAL does not in all cases, mandate immediate implementation of additional BMPs.

Regarding the requirement to revise a SWPPP to prevent pollutants from contacting storm water—this is not generally possible when the pollutant is sediment (for which there is an NAL). Any implication that storm water would be required to be prevented from even contacting soil is absurd and a physical impossibility. The other statement that would have pollutants “substantially reduced” below NALs would imply that even pollutant levels approaching the NAL limits are frowned upon. If the DCGP is to include NALs, and if such values are to be set at true upset values (see discussion above in section III.A.4), then the SWRCB should not be making statements in the permit that would belie the establishment of the NALs themselves. Additionally, the requirement to revise the SWPPP to prevent or substantially reduce pollutants implies that a pollutant level at or even approaching the NAL is somehow unacceptable and a permit violation, despite the other DCGP statements to the contrary. The language of the DCGP should be conformed such that it is clarified that an excursion over an NAL triggers a need to examine the excursion and implement BMP or SWPPP changes as necessary to reduce pollutant loads, but that pollutant loads need not be totally eliminated nor are such loads required to be at levels substantially below the NALs.

The requirement that a report of the NAL excursion be submitted to the RWQCB within 10 days of the monitoring effort would unduly elevate the excursion of the NAL in the public eye. Given that exceedance of an NAL is not a permit violation, to have such reports required to be filed in the manner suggested by the DCGP would imply that the excursion of the NAL is more of a permit violation than not. As an alternative, we recommend that details regarding excursions over NALs be included in the annual report where the excursion, any necessary corrective actions, and subsequent water quality monitoring can be assessed thoroughly.

5. *Potential assessment of mandatory minimum penalties (MMPs) being considered by staff does not provide a safe harbor to enforcement.*

At both of the May Workshops and again at the SWRCB Hearing on the DCGP held on June 4th, 2008, staff discussed possible imposition of MMPs specifically in the context of exceedances of NELs. Staff statements were unclear, but at times implied that the deferred imposition of MMPs may provide a safe harbor for enforcement and/or may be the maximum penalty issued for exceedance of NELs. Neither implication is true under current law. If the SWRCB intends to establish safe harbors to enforcement or otherwise curtail regulatory discretion with regard to enforcement, it must be very clear on these issues in the text of the Final CGP.

Sections 13385(h) and (i) of the California Water Code establish MMPs for certain types of NPDES permit violations. For example, a MMP of \$3,000 would apply to the fourth non-serious violation of a permit in a six-month period. However, the mandatory imposition of a deferred MMP (i.e., mandatory only following four non-serious violations) does not remove the discretion of a RWQCB to assess penalties before the fourth violation or to assess penalties greater than the MMP amount. As pointed out in the SWRCB’s Enforcement Policy, when an

event triggering imposition of an MMP occurs, the RWQCB must “either assess an ACL [administrative civil liability] for the mandatory minimum penalty *or assess an ACL for a greater amount.*” SWRCB, *Water Quality Enforcement Policy*, at 36 (2002)(emphasis added). Assessing penalties of up to \$10,000 per day per violation (Cal. Water Code §13385(c)) at the administrative level or seeking civil penalties of up to \$25,000 per day per violation (Cal. Water Code §13385(b)) is within the discretion of the RWQCBs and the SWRCB regardless of the triggering or not of MMPs.⁴⁹

There is no safe harbor provided by the MMP provisions of the Water Code that would except a permittee under the CGP from incurring penalties far in excess of the MMP amounts (\$1,000–\$3,000) for any violation, including the first non-serious violation. If the SWRCB intends on creating such a safe harbor for exceedances of NELs or any other provision of the CGP, it must state so explicitly in the Final CGP. Similarly, if the SWRCB intends to limit the amount of monetary liability for exceedances of NELs as was implied by SWRCB staff, this also must be stated explicitly in the Final CGP. Without such specific provisions being placed in the Final CGP, members of the regulated community must presume they bear potential liability of tens of thousands of dollars for each violation of the CGP and that there is no “four strikes and you are out” rule as implied by SWRCB staff.

6. *Other miscellaneous concerns*

In addition to the discussions above, the Commenting Parties have the following concerns regarding certain provisions in the DCGP:

- The DCGP requires BMPs that would divert all run-on around or through the construction site. DCGP, Attach. H, ¶ 4.a. This provision could create flooding concerns if implemented. Most notably, a design storm component is lacking from the current DCGP language. The diversion of off-site run-on is typically feasible for certain size storms; however, larger flood events (e.g., 100 year storms) would not be capable of accommodation through implementation of diversion structures meeting the technical standards of the CGP. The Final CGP should clarify the provision and include requirements that better guard against creating flood risks.
- Requirements in the DCGP that would require “immediate” sweeping of streets (DCGP §VIII.D.7) when sediment is deposited upon them goes beyond BCT requirements, would be unduly burdensome, and is unnecessary. If entrainment of sediment in runoff from on paved areas is not a threat (e.g., dry weather with no presence of dry weather flows), then “immediate” sweeping of streets would not be necessary. The Commenting Parties recommend this provision be revised to be more

⁴⁹ It should also be noted that the MMP statute does not apply to citizens bringing enforcement actions under section 505 of the federal CWA. In these citizen-initiated lawsuits, the plaintiffs can seek penalties of up to \$32,500 per day per violation for any violation (even the first one) of any term of a NPDES permit, including excursions over NELs if such provisions are included in the Final CGP.

reasonable and reflect that sweeping must occur as needed to minimize entrainment of sediment in runoff but need not be “immediate.”

- The DCGP requirement that air deposition issues be addressed with BMPs throughout all stages of construction (DCGP §VIII.F.6) is vague and appears seeks to require permittees to address issues beyond their control. If the DCGP seeks to have permittees control air deposition from on-site sources (e.g., fugitive dust from grading operations) then such a requirement would be reasonable, and the Final CGP should clarify this position. If, however, the SWRCB intends permittees to control air deposition from off-site sources, such sources may not be controllable by permittees and would not be related to the construction process; the Final CGP should clarify that control of such off-site sources is not required.
- The DCGP’s SWPPP requirement to show flow patterns from the site to receiving waters (DCGP, Attach H, ¶2) is not feasible at all times. These flow patterns will not always be known, especially for sites discharging to MS4s. The Final CGP should be revised to require showing of flow patterns to receiving waters only when a site discharges directly to receiving waters.
- Sections of the DCGP related to Rain Event Action Plans are improved over the PCGP proposals, but still are still lacking in certain technical areas as discussed further in the Technical Memo.

IV. CONCLUSION

The Commenting Parties have been committed to working with the SWRCB on the CGP, through commenting on the PCGP, working with the SWRCB staff during the time between PCGP issuance and DCGP issuance, the current DCGP comment effort, and, in the future, any additional rounds of comments on future drafts of the CGP. We welcome every opportunity to assist the SWRCB shape the Final CGP into a progressive permit that raises the bar for construction site pollutant control throughout the state while providing a reasonable and workable approach to improving water quality using the limited resources available to achieve that goal. Should you have any questions on the comments provided here or which to discuss any of these issues further, please contact us.