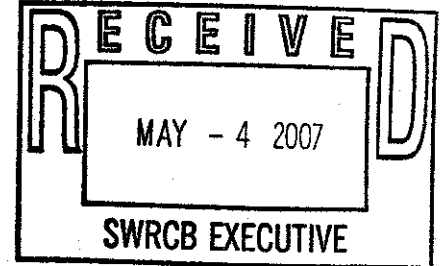




May 4, 2007

Tam Doduc, Chair and Members  
State Water Resources Control Board  
1001 I Street  
Sacramento, California 95814



VIA EMAIL: [commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov)

Re: Comments on the Preliminary Draft of NPDES General Permit for Discharges of Storm Water Associated with Construction Activities

Dear Chair Doduc and State Board Members:

California Coastkeeper Alliance and Santa Monica Baykeeper are pleased to submit these comments in response to the State Water Resources Control Board's ("State Board") request for documents, comments, and other information regarding the preliminary draft of NPDES General Permit for Discharges of Storm Water Associated with Construction Activities ("Draft Permit") circulated by the State Board on March 2, 2007. We include and incorporate by reference the comments submitted by Dr. Richard Horner on behalf of the California Coastkeeper Alliance ("Dr. Horner's Comments"), which address the permit provisions in detail. We thank the State Board for taking on the important and necessary task of reissuing an NPDES permit for construction activities in the State. We note at the outset that the Draft Permit is a marked improvement over the current General Permit for Discharges Associated with Construction Activities ("1999 Permit") and support many of the changes to that permit. We look forward to working with the State Board to develop a final permit that will ensure that the State Board will meet its mandate to protect water quality in the State of California.

### Introduction

California's need for housing, work spaces, and other infrastructure continues to grow. These development pressures create demand to build homes, office parks, and shopping centers not only in farmland, but also in ecologically sensitive and important areas not previously subject to landscape alteration, such as rolling grasslands, forested hillsides, wetlands, and ephemeral streams and creeks at the headwaters of many watersheds. We have all had the experience of driving through an undeveloped valley with a stream flowing from nearby ridgelines out to agricultural lands one year, and the very next year driving through this same valley to find the hillsides covered with houses, the valley floor covered with office

buildings and grocery stores, and the stream either gone or a shadow of its former self. The developers' financial incentive, when building whole towns in a matter of months, is to work as quickly as possible with little regard for the downstream water quality impacts of their operations, since every day spent building is a decrease in the profit margin. In the process, entire hillsides can be graded at once, with scores of dump trucks, cement mixers, and other heavy machinery criss-crossing the land, and the local ecosystem is immediately transformed. The incentive is the same with smaller scale projects: work quickly with an eye towards expeditious completion, regardless of the environmental cost of getting the job done. The questions the Water Board must ask are: what are the consequence for water quality of this pressure to work as quickly as possible, and how should a permit be constructed in light of this situation to best protect water quality?

One obvious consequence of these activities is the potential for massive amounts of sediment and other waste to discharge into nearby waterways. It is generally acknowledged that erosion rates from construction sites are much greater than from almost any other land use activity.<sup>1</sup> Once soil is disturbed by grading and the operation of trucks and other heavy construction equipment, the disturbed land becomes vulnerable to erosion, and any significant rainfall event has the potential to cause large amounts of sediments, oil and grease, trash, sewage, phosphorus and other chemicals used in construction activities to wash down hillsides and into creeks, rivers, and their downstream water bodies. The result is the deterioration of water quality and harm to aquatic species and their habitats. Another significant consequence of construction projects is long-term impacts on the local hydrology ("hydromodification"). In particular, construction projects can result in the complete and long-term transformation of the local hydrology by directly or indirectly rerouting streams and paving the land, to prevent preventing storm water infiltration.

A major issue that the State Board faces in developing a permit that will protect water quality from impacts of construction activity, and an issue that is unique to construction sites, is their high-pressure and transitory nature, and the resulting short timeframe that the Board has to make sure that proper measures are implemented to prevent both short- and long-term degradation. In light of the pressures of construction and its short-term nature, the State Board will only be effective and protect water quality if the permit sets forth clear requirements dischargers must meet that will protect water quality, simple and transparent methods to determine compliance with these requirements, effective means of enforcement to protect water quality during construction, and appropriate measures to prevent long-term physical and other impacts to the local hydrology and water quality.

The Draft Permit presents a major step towards achieving these goals. Our comments, which support many aspects of the Draft Permit and offer suggestions to improve others, are presented as follows: (1) we provide our support for many of the improvements the Draft Permit makes over the 1999 Permit such as the hydromodification standards and risk assessment procedures to guide BMP development and implementation; (2) we explain the

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<sup>1</sup> Novotny, V. and H. Olem, 1994, *Water Quality: Prevention, Identification, and Management of Diffuse Pollution*, New York: Van Nostrand Reinhold.

concerns we have with the Draft Permit despite these improvements. In summary, our concerns are:

- (a) compliance determinations in NPDES permits must be simple and transparent but as currently written the Draft Permit will not achieve this requirement;
- (b) beyond failing to allow for simple, transparent compliance determinations, the Draft Permit does not provide enforcement mechanisms necessary to address the transitory nature of construction discharges;
- (c) the Clean Water Act requires the Construction Permit ensure compliance with water quality standards but the Draft Permit fails in this regard;
- (d) numeric effluent limitations (“NELs”) are both feasible and appropriate but the Permit does not incorporate them for the most significant pollutants;
- (e) the Draft Permit’s monitoring provisions must be designed to demonstrate compliance with the permit and should not be treated as a penalty; and
- (f) though the agency review and public participation provisions of the Draft Permit are superior to those in the 1999 Permit, these provisions require further modification to meet the requirements of the Clean Water Act and controlling legal precedent.

#### **I. Support for Key Elements of the Draft Permit**

The Blue Ribbon Panel of Experts convened by the State Board to assess stormwater controls in California issued a report in June 2006, “Report on the Feasibility of Numeric Effluent Limitations Applicable to Discharges of Storm Water Associated with Municipal, Industrial and Construction Activities” (“Blue Ribbon Panel Report”). The Blue Ribbon Panel Report concludes that the existing system for managing storm water pollution is not working, “specifically recognizing in the construction context that “...traditional erosion and sediment controls are highly variable in performance, resulting in highly variable turbidity levels in the site discharge.” In the Draft Permit, the Fact Sheet incorporates the findings of the Blue Ribbon Panel Report, stating:

It is critical to recognize that the BMP solution to storm water problems has been inadequate, based on 15+ years of experience with construction, industrial, and Phase 1 MS4 storm water permits.<sup>2</sup>

The Draft Permit begins to address some of the issues raised by the Blue Ribbon Panel and State and Regional Water Board staff as systemic problems with the current permit. The changes to the current permit that we endorse include the following:

- Standards to eliminate or minimize damage caused by hydromodification;<sup>3</sup>
- Requirements to characterize the risks posed by each site;<sup>4</sup>

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<sup>2</sup> Draft Permit, Fact Sheet at 19 of 40 (emphasis added).

<sup>3</sup> Draft Permit, Section XI(A).

<sup>4</sup> *Id.*, Section VIII(A).

- Requirements to monitor the effluent and track potential damage to the environment so it can be quickly reversed;<sup>5</sup> and
- Guidelines for using the active treatment system (“ATS”)/source control options.<sup>6</sup>

We reference the comments by Dr. Richard Horner submitted on behalf of the California Coastkeeper Alliance (“Dr. Horner’s Comments”) for details on our support for these changes, and include additional analysis below.

**A. Hydromodification Standards Will Help Protect Long-term Water Quality and Aquatic Habitat from Negative Impacts of Construction and Development**

The hydromodification standards in the Draft Permit will generate important improvements in water quality in the face of increasing landscape alteration in California. The Draft Permit would benefit from additional explanation of the importance of maintaining the pre-construction hydrograph to in order to prevent aquatic habitat degradation; there is significant available technical information on this issue that could be easily integrated into the Draft Permit. Emphasis should be given to the benefits that a stable, functioning stream channel has on water quality – thus providing support incorporated into the Draft Permit for the proposed hydromodification standards.

A general NPDES permit for discharges associated with construction activities is the appropriate place to implement such hydromodification standards. The concern raised by CASQA and BIA at the April 20 Workshop – that the hydromodification standards in the Draft Permit will create a confusing and potentially conflicting regulatory regime for builders who must also meet similar standards pursuant to MS4 permits – appears to be merely an attempt to delay the implementation of a meaningful program. CASQA and BIA are asking the State Board to maintain the status quo and defer to a program that has been only marginally effective in protecting stream-bed degradation and associated water quality problems. Further, as Dr. Gary Wolff and staff noted during the April 20 Workshop, in many of the less-developed areas of the state not covered by MS4 permits, the construction permit may be only avenue the State Board has to require measures to meet its mandate of protecting water quality. Indeed, some of these areas likely have particularly pristine habitat that demands protection offered by hydromodification requirements. Reliance on the CEQA process or other planning processes will also be ineffective protection since, as Dr. Wolff also correctly noted, the State Board does not have the power to require changes to projects during these planning processes. In order to avoid any concern about duplicative regulation, a simple clarification stating that the dischargers must meet the stricter of either the hydromodification standards of the applicable MS4 permit or of the construction permit is all that would be necessary.

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<sup>5</sup> *Id.*, Attachment E, Section E.

<sup>6</sup> *Id.*, Section E(1).

The State Board should have no reservations about requiring hydromodification standards in the construction permit even though the construction permit may not have to be obtained until after the project is designed. As is the case with any permit that will be required at some point during development, the project must be designed to meet the requirements of that permit. Since preventing long-term water quality degradation that often accompanies landscape alteration is most cost-efficient and easiest to implement during the initial development phase, we support the inclusion of hydromodification standards in the Draft Permit.

**B. The Site Risk Analysis and Characterization Requirements Are Necessary for Determining Appropriate Pollution Control Measures**

The site risk analysis and characterization requirement is a well-conceived component of the Draft Permit. In particular, it will provide both the regulated parties and the regulators with important information to effectively develop and implement BMPs to control pollutant discharges. However, we caution that using the results of the risk analysis and characterization to exempt facilities from regulatory requirements must be avoided. Using risk analysis as a basis for regulation is inconsistent with the Clean Water Act's technology-forcing regulatory structure.<sup>7</sup> Further, as a practical matter, exempting certain facilities from fundamental aspects of the Draft Permit, such as the requirement to prepare a SWPPP and the requirements to monitor effluent discharges, will have the unintended consequence of encouraging these facilities to forego implementing needed pollution control practices. The relative risk of erosion or other pollution generating conditions at a site does not mean that there is no risk, and as such the Draft Permit should be modified to remove the exemptions to permit requirements currently allowed to low-risk sites.

**C. The Requirement to Monitor Effluent Regardless of Identified BMP Failure Is Essential**

We also support the new requirement to monitor the effluent regardless of whether there has been an identified BMP failure.<sup>8</sup> This monitoring will help dischargers better evaluate the effectiveness of, and modify if necessary, their BMPs to prevent pollution problems. It will also provide useful data that the Draft Permit Fact Sheet acknowledges must be collected to understand the water quality impacts of construction activities.<sup>9</sup> As noted in a memo from Cal EPA to the State Board, "appropriate data [should be] gathered and analyzed to determine our progress in protecting water quality."<sup>10</sup>

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<sup>7</sup> See 33 U.S.C. §§ 1311 and 1342 (establishing a permitting scheme that does not include risk in the calculation of when a permit is required or how limits on pollutant discharges should be decided).

<sup>8</sup> The Draft Permit has eliminated the requirement in the 1999 Permit to monitor for pollutants that are known or likely to be present in discharges. No explanation for removing this requirement from the permit was provided and we see none that would justify doing so. Pollutants known or likely to be present must be addressed with pollution control measures to ensure that water quality standards are met and monitoring for these pollutants must be required to evaluate compliance with this requirement.

<sup>9</sup> Draft Permit, Fact Sheet at 21.

<sup>10</sup> Memorandum from Dr. Alan Lloyd, Secretary, Cal EPA to Art Baggett, Chair, SWRCB (March 23, 2005).

**D. The Requirements Imposed When Highly Erosive Soils Will Be Exposed Are Valuable Additions to the Draft Permit**

We support the alternative ATS or source control options to control sediment when preconstruction soil surveys indicate that soils to be exposed are particularly prone to erosion.<sup>11</sup> We acknowledge the fears some commenters may raise about the potential toxicity of the polymers used in an ATS but do not believe that these fears are justified. Several other states, including Washington, have established a protocol and procedure for testing and approving these treatments and we encourage the State Board to consider establishing a similar system to approve these systems in California.<sup>12</sup> Further, the effluent limitations established to address toxicity<sup>13</sup> should provide an effective backstop to ensure that these systems are properly developed and implemented.

**II. Concerns That Still Need to Be Addressed**

**A. Compliance Determinations Should Be Simple and Transparent**

Any NPDES permit must lend itself to a simple and transparent compliance determination in order to be effective. The first Secretary of Governor Schwarzenegger's California Environmental Protection Agency ("Cal EPA") articulated this principle in an enforcement initiative that directs agencies on the development of permits to protect environmental quality.<sup>14</sup> The Enforcement Initiative Memo also states that "[c]urrently, one of the greatest difficulties faced by enforcement staff is complicated, ambiguous and/or poorly written permits or multiple, conflicting and confusing regulatory requirements that are unenforceable." The Secretary then provided specific recommendations in his Memo to address the problems associated with assessing compliance, stating that "[p]ermit requirements must be unambiguous. They should be written in such a way that they are clear, easy to understand, and determining compliance is simple." The Secretary added with respect to actual enforcement that "[s]imilarly, the enforcement consequences for violation should be clear."

These points were reiterated by the Governor's subsequent Secretary in a memo to the State Board,<sup>15</sup> which requested the Board to work with Cal EPA to:

- "[m]easure compliance rates among all potential violators of water laws . . . and post information about violations and compliance rates on the Internet";
- "regularize and systematically assure that violations are promptly and consistently enforced and prosecuted"; and

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<sup>11</sup> See Dr. Horner's Comments at 3-4.

<sup>12</sup> *Id.*

<sup>13</sup> Draft Permit, Section IV(4)(a)-(b).

<sup>14</sup> Enforcement Initiative Memorandum from Secretary Terry Tamminen, Cal EPA to Board Chairs, Department Directors, and Executive Officers (November 30, 2004) ("Enforcement Initiative Memo").

<sup>15</sup> Memorandum from Secretary Alan Lloyd, Cal EPA to Art Baggett, Chair, SWRCB, (March 23, 2005) ("Lloyd Memo").

- “[s]tandardize permitting requirements and permit monitoring, and reporting.”

Both the Enforcement Initiative Memo and the Lloyd Memo were issued during the development of the Draft Permit and reiterate the critical importance of making permits simple and transparent so that compliance can be effectively measured, reported, and when necessary, efficiently enforced to protect water quality.

The 1999 Permit did not achieve these goals. By relying exclusively on an inherently subjective BMP-based system of compliance and not requiring monitoring to evaluate BMP effectiveness, the 1999 Permit failed to provide an objective means to determine if the pollution control measures implemented were achieving the requirements of the permit to protect water quality. We heard perennial complaints from Regional Board staff that they lacked the funding to engage in the largely subjective and resource intensive process of site visits and technical oversight necessary to evaluate developers’ attempts to comply with the 1999 Permit.

It is disheartening to see that this Draft Permit largely reinstates the same regime for determining compliance as the 1999 Permit. Rather than correct many of the problems with the 1999 Permit, the Action Level (AL) feedback loop proposed in the Draft Permit is not designed to effectively evaluate compliance with the Permit. Instead, as the Draft Permit states, “the ALs in this General Permit are not directly enforceable.”<sup>16</sup> Rather, they are simply intended to provide feedback to see if the BMPs chosen by the discharger are in working as predicted. If they are not, there is no potential for a penalty, and all that the discharger must do is try some additional BMPs. The dischargers will never be assured that they have done what is required to meet the permit requirements and water quality standards, and the Regional Boards will have to spend just as much time making the subjective determination of whether a certain project is in compliance. This system failed under the 1999 Permit and it should not be repeated here.

To avoid perpetuating these problems as they exist in the 1999 Permit, the State Board should revise the Draft Permit. In particular, the permit should incorporate numeric effluent limits (NELs) rather than ALs for pollutants likely to be discharged. With NELs, determining compliance will be simple and dischargers will have quantitative information to help determine what additional steps are necessary to achieve compliance.

In addition, the Draft Permit’s monitoring program should be revised such that it can be used to evaluate compliance. As it is currently written, the monitoring requirements will generate useful data regarding BMP effectiveness relative to promised performance, but they will not indicate whether compliance with the required technology-based pollutant reductions or water quality standards has been achieved. Until compliance determinations are simple and transparent, neither the regulators nor the dischargers will know if the measures being taken are resulting in the protection of water quality that the Permit must ensure.

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<sup>16</sup> Draft Permit, Section 1, ¶ 14

**B. The Construction Permit Must Provide Appropriate Enforcement Mechanisms to Address the Transitory Nature of Construction Project Discharges**

The Governor's message in his Action Plan on the Environment could not have been any clearer regarding the importance of simplicity in permitting and the relationship this simplicity has to enforcement. Specifically, the Action Plan provides:

Strict law enforcement is vital to assure environmental protection, prevent polluters from achieving unfair competitive advantage against complying competitors, send a message of public values, and establish conditions conducive to creativity and participation in voluntary initiatives. My Administration will focus on keeping underlying statutes and regulations simple; simple rules are easiest to follow and comply with; unnecessarily complex rules are hard to comply with, hard to enforce, and encourage evasion.<sup>17</sup>

The Draft Permit does not provide this simplicity, nor does it provide adequate enforcement mechanisms needed to be certain the environment is protected. The substantial discharges of sediment and other pollutants from construction sites occur in a very short period of time, often over just one or maybe two rainy seasons. As such, in order to effectively enforce the terms of the permit and ensure that an entire project does not get built without needed controls to protect water quality and aquatic habitat, the Permit must provide the agency responsible for enforcement with effective tools to guarantee environmental protection. In the context of a permit governing construction activity, the agency responsible for enforcement must have the ability to stop the cause of the pollution problem immediately. Much as an enforcer of the fire code would have the ability to immediately stop a construction project and require the problem be corrected if an inspection revealed violations of the code, this permit must ensure that the Regional Boards have the authority to stop work if sample results or inspections reveal the pollution control measures are not working to protect water quality. This enforcement tool is critical if the state is to be effective in an environment like construction, as discussed in the Introduction to these comments.

The Draft Permit does not provide this essential authority. Instead, the Draft Permit provides that Regional Boards "may require revisions of SWPPPs and [other pollution prevention plans]." The statement that noncompliance with this order is grounds for enforcement under the Clean Water Act<sup>18</sup> is not effective in the construction context. For one thing, as explained, determining compliance under the Draft Permit would be a long, resource intensive process and thus is not responsive enough to provide for quick enforcement. Further, enforcement actions under the Clean Water Act can take months to even reach a stage where a work stoppage can be obtained. In the case of a construction project, these months could mean many more rain storms and associated pollutant discharges, or even the completion of the project such that by the time a stoppage is ordered, controls are no longer a viable option. The window of opportunity to correct the problem before more harm is caused

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<sup>17</sup> Governor Arnold Schwarzenegger, "Action Plan for California's Environment" (Oct. 2003).

<sup>18</sup> Draft Permit, Attachment C, Section I(1).



will have passed, making the threat of halting the project an empty one. The Draft Permit should be revised to provide both a simple method for determining performance and a streamlined mechanism that gives the Regional Boards the ability to step in and require immediate compliance before any other actions with the potential to degrade water quality are taken.

**C. The Construction Permit Must Ensure Compliance with Water Quality Standards**

A significant shortcoming of the Draft Permit is its authorization of polluted discharges without any method to ensure that water quality standards will be not be violated. We recognize that the Draft Permit contains prohibitions on discharges of pollutants that cause or contribute to an exceedance of any applicable water quality standards.<sup>19</sup> However, as explained below, the assertion of this requirement must be accompanied by numeric effluent limitations on discharges, and appropriate monitoring requirements to guarantee that the discharges authorized by the Draft Permit are not causing or contributing to violations of applicable water quality standards. Unless changes are made, neither the dischargers nor the Regional Boards will be able to make efficient compliance determinations or take appropriate subsequent action to mitigate the environmental harm caused by noncompliance.

A quick background on the requirements of the Clean Water Act is necessary to inform this discussion. The Clean Water Act requires that all NPDES permits, including permits for construction storm water discharges, comply with sections 301 and 402, 33 U.S.C. §§ 1311 and 1342. Specifically, section 402 requires the State Board issue permits that “apply, insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343.”<sup>20</sup> Section 301(b)(1)(C) requires that discharges be controlled with effluent limitations necessary to meet water quality standards.<sup>21</sup> In addition, section 13377 of the Porter-Cologne Act requires that NPDES permits “apply and ensure compliance with all applicable provisions of the [CWA] ... together with any more stringent effluent standards or limitations necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance.”<sup>22</sup> Together these provisions mandate that when discharges of pollutants are authorized by an NPDES permit, the NPDES permit must contain provisions that will ensure that applicable water quality standards are met.

Rather than comply with this Clean Water Act mandate, the Draft Permit focuses almost exclusively on the requirement that all NPDES permits require technology-based pollutant reductions in discharges, ignoring the additional requirement to ensure that water quality standards are met. The Draft Permit must be revised to include provisions that the discharges authorized by the Permit shall not result in a violation of water quality standards.

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<sup>19</sup> Draft Permit, Section VI(2).

<sup>20</sup> 33 U.S.C. § 1342(b)(1)(A).

<sup>21</sup> 33 U.S.C. § 1311(b)(1)(C).

<sup>22</sup> Cal. Water Code § 13377.

The technology-based requirements in the Draft Permit represent an improvement over previous permit iterations but do not go as far as feasible or necessary to reduce pollutant loads in discharges.<sup>23</sup> The Draft Permit itself acknowledges the shortcomings of the technology-based ALs and other pollution control requirements when stating:

The Action Levels chosen should indicate whether systems are working as intended. Since these are technology based numbers, though, they are not necessarily good indicators of compliance with downstream water quality standards.<sup>24</sup>

To meet its obligation and ensure that water quality standards are met, the State Board must replace the action level system currently proposed with a set of numeric effluent limitations and a monitoring program that allows dischargers to evaluate whether their discharges are causing or contributing to water quality standard exceedances.

**1. Numeric Effluent Limitations Are Necessary Component of Ensuring Water Quality Standards Are Met**

Numeric effluent limitations should be established for all pollutants present or likely to be present in the authorized discharges. These NELs will be based, at least in part, on numeric criteria set forth in a Statewide Water Quality Control Plan, the California Toxics Rule, the National Toxics Rule, or an applicable Regional Basin Plan. Since discharges to different water bodies may require different limitations, the State Board should develop a table for dischargers to use to identify which set of effluent limitations applies to their discharges.

Notwithstanding the fact that NELs will help substantially in ensuring compliance with water quality standards, the only generally applicable NEL established by the Permit is for pH.<sup>25</sup> The Draft Permit provides that pH is a good indicator of a failure of pollution control measures to prevent the discharge of pollutants associated with concrete and masonry activities. Including a NEL for pH is a good idea, but we see no reason why an NEL for sediment, the pollutant almost all commenters recognize as the most problematic at construction projects, as well as other pollutants likely to be present, were not developed. The mandate the State Board must meet is to ensure that discharges do not violate water quality standards. At the very least the State Board should implement NELs to address those pollutants most likely to lead to such violations.

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<sup>23</sup> See also Dr. Horner's Comments at 2.

<sup>24</sup> Draft Permit, Fact Sheet at 34.

<sup>25</sup> We are entirely unclear why the Draft Permit includes a compliance schedule for the pH NEL. The Draft Permit Fact Sheet states that "while we believe these limits are feasible to comply with immediately, we have set them to a compliance schedule to become effective 18 months after adoption of this General Permit." Draft Permit, Fact Sheet at 37 (emphasis added). We are unaware of a legal basis for including a compliance schedule when the State Board finds that immediate compliance is feasible. The Draft Permit should be revised to remove the compliance schedule for pH.

2. **Receiving Water Monitoring Must Be Mandatory to Ensure Water Quality Standards Are Met**

In addition to establishing appropriate NELs, the State Board should require monitoring of receiving waters to verify that the pollutant discharges authorized are not resulting in, or contributing to, exceedances of water quality standards. In *Defenders of Wildlife v. Browner*, the Ninth Circuit explained that the Clean Water Act requires strict compliance with water quality standards by dischargers of storm water associated with industrial activity (which includes construction activities). 191 F.3d 1159, 1165 (9th Cir. 1999). Without effective monitoring requirements it will be difficult for a discharger to know whether he or she is meeting this requirement. It will be additionally difficult for a regulator charged with enforcing the permit to know whether a particular discharger is in compliance. Finally, it will be impossible for the regulator to know whether their permit scheme is effective in ensuring that authorized discharges do not cause or contribute to exceedances of water quality standards. In fact, the Draft Permit acknowledges this problem, stating:

We do not know and cannot know without better monitoring if compliance with technology based standards will be adequate to prevent exceedances of receiving water objectives.<sup>26</sup>

The only way to correct this problem, comply with the law, and give the regulated community assurances that it is in compliance with the law is to establish a monitoring program that provides useful data for determining if water quality standards are being met.

A monitoring program to ensure that water quality standards are complied with would necessarily include mandatory monitoring of the surface water conveyances into which discharges from construction activities flow. The 1999 Permit established such a program, at least for water bodies impaired for sediment, by requiring dischargers to monitor the waters receiving their discharges both upstream and downstream of the discharge locations.<sup>27</sup> For reasons not articulated in the Fact Sheet or the Draft Permit, this requirement has been done away with, despite the fact that it would provide an effective mechanism for determining compliance with water quality standards.<sup>28</sup> We suggest that the sediment monitoring requirements of the 1999 Permit be carried over to the Draft Permit and expanded to address all pollutants that may be discharged from construction sites, including pollutants known or likely to be present.

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<sup>26</sup> Draft Permit, Fact Sheet at 21.

<sup>27</sup> 1999 Permit, Section B(7). If the monitoring indicated an increase in sediment loading downstream of the discharge, a rebuttable presumption was established that the discharge was causing or contributing to an exceedance of water quality standards. *Id.* It was then up to the discharger to monitor its effluent to prove that it neither caused nor contributed to the exceedance. *Id.*

<sup>28</sup> We are surprised that this process was done away with without explanation, especially since this requirement was in the 1999 Permit in the first place as a result of a court order.

**D. Numeric Limitations Are Feasible and Appropriate**

The Lloyd Memo from Cal/EPA to the State Board directs the State Board that “[w]here appropriate to achieve water quality protection, numeric limits based on sound science should be incorporated into permits that define the allowable discharge of pollutants that the Boards determine are a high priority.” When asked by the State Board whether numeric limits were feasible in the construction context, the Blue Ribbon Panel Report concluded that “[n]umeric limits . . . are technically feasible” and provided a series of guidelines that the State Board should follow when developing numeric effluent limitations for construction storm water discharges.<sup>29</sup> The BRP recommended that the State Board consider numeric limits for pH “in particular,” and added that “[t]he Board should consider Numeric Limits . . . for other pollutants of relevance to construction sites” in addition to pH.

The State Board should revise the Draft Permit to include numeric effluent limitations for high priority pollutants, which from construction sites must at a minimum include sediment and turbidity. Numeric effluent limitations are the most effective method available to the State Board to ensure that the permits will meet the dual requirements of the Clean Water Act to force technology-based solutions to reduce pollutants and to ensure that water quality standards are met. As with any other industry, the NELs can, and should, be established based on an evaluation of technology that is available, with the concentration limits set at the levels achieved by the appropriate technologies.<sup>30</sup> Further, NELs necessary to ensure that water quality standards are met can be established by referring to the numeric criteria for pollutants established in the Statewide Water Quality Control Plan, the California Toxics Rule, the National Toxics Rule, or an applicable Regional Basin Plan.

The benefits of using NELs are threefold. First, rather than having to spend countless hours reviewing SWPPPs and conducting site visits to assess whether the BMPs chosen will in fact achieve the pollutant reductions required, NELs set a pollutant concentration level that dischargers must comply with and leave it up to the discharger to determine how it will meet these limits. Second, utilizing NELs rather than ALs eliminates the need for a back-and-forth between the permittee and the Regional Board to determine the best method to reduce problematic discharges. Third, NELs provide a clear and simple method for evaluating compliance with the permit. This is a benefit to both the regulatory agency and the discharger since questions, about what constitutes compliance will be eliminated and, when enforcement is necessary, demonstration of non-compliance will involve a quick comparison of sample results to NELs.

**E. Monitoring Programs Should Be Designed to Demonstrate Compliance with the Permit and Not Treated as a Penalty**

We applaud inclusion in the Draft Permit of the requirement for dischargers to monitor and sample their discharges on a regular basis. However, even with this addition, the monitoring requirements in the Draft Permit will be insufficient to encourage and effectively

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<sup>29</sup> Blue Ribbon Panel Report at 16-17.

<sup>30</sup> 33 U.S.C. § 1311(b)(1)(A) and 1311(b)(2)(A). See Dr. Horner’s Comments at 4-5.

evaluate compliance with the permit. Our recommended improvements to the monitoring requirements in order to achieve the goals of the Lloyd Memo are set forth in the sections above addressing the requirement to ensure compliance with water quality standards and necessity of making compliance determinations simple and transparent.

Our remaining concern with the monitoring requirements as currently structured is that the incentives established are backward. As the Lloyd Memo states, any monitoring program in an NPDES permit must “[a]ssure that . . . appropriate data are gathered and analyzed to determine our progress in protecting water quality.”<sup>31</sup> Notwithstanding the directive from Cal/EPA, which still stands, the Draft Permit appears to treat monitoring as a penalty rather than what it is – an essential component in an effective regulatory system. For example, receiving water monitoring is only required when ALs are exceeded and low-risk sites are not required to monitor their discharges.<sup>32</sup> Monitoring is the only way for dischargers, the regulators, and the public to judge the effectiveness of the pollution control measures implemented; it is the simplest and most-effective way to judge compliance with the terms of the permit; it is the best way to test the accuracy of assumptions built in to the permit (for example whether the low-risk sites in fact have fewer pollution problems); and it is the only way to evaluate impacts to water quality.<sup>33</sup> As such, it should not be treated as a penalty but understood and utilized as the only effective means to ensure pollution in storm water discharges are controlled.

As a practical matter, when monitoring is not required, permits fail to achieve their goals. For example, the 1999 Permit does not require monitoring until after a problem has been visually detected. One result of the 1999 program is that there is no way to determine if BMPs that appear to be working are in fact doing their job. The perils of not requiring monitoring can also be found in the group monitoring programs authorized by the General Industrial Storm Water Permit, such as the Metals Recyclers Group (“MRG”) operating in Region 4. Members of the MRG are only required to monitor two times every five years. Results from this limited monitoring reveals repeated and regular exceedances of benchmarks and water quality standards for almost all pollutants they discharge. Without regular feedback on the effectiveness of their pollution controls, the MRG dischargers have no idea of whether they are complying with their permit or not. Both of these examples demonstrate the importance of establishing a regular monitoring program that is not treated as a penalty but instead is understood as an integral part in protecting water quality.

#### **F. Agency Review and Public Participation Processes Require Revision**

The agency review and public participation provisions in the Draft Permit are a good start towards incorporating the review and participation requirements of the Clean Water Act into the permitting process. We support the inclusion of provisions allowing the Regional Boards to review the NOI, SWPPP, and SWPPP Checklist and to require revisions to the

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<sup>31</sup> Lloyd Memo at 2.

<sup>32</sup> Draft Permit, Attachment E, Section E(3).

<sup>33</sup> See Lloyd Memo at 2.

SWPPP or rescind permit coverage if these documents are found to be inadequate.<sup>34</sup> We also support the provisions that require the SWPPP to be submitted to a publicly accessible database, allow the public to comment on the SWPPP and other aspects of the permit application, and give the Regional Board the flexibility to require revision of the SWPPP or rescind permit coverage based on public comments. However, the agency review and public participation provisions do not completely satisfy the requirements of the Clean Water Act and controlling legal precedent. As explained more thoroughly below, the agency review of a discharger's SWPPP should occur early in the permitting process, prior to receipt of permit coverage.<sup>35</sup> In addition, the avenues for public participation must occur prior to the discharger's receipt of permit coverage and must include opportunities for a public hearing.<sup>36</sup>

The Clean Water Act requires agency review of permit applications and the substantive terms of the permit designed to control pollutant discharges, prior to granting permit coverage.<sup>37</sup> In cases where the substantive terms of the permit include the development and implementation of BMPs to prevent pollutant discharges, it is incumbent that the agency issuing permit coverage have the opportunity to review the BMPs selected prior to permit coverage to ensure that they will have the required effect of achieving the applicable pollutant reduction standards.<sup>38</sup> Agency review is appropriate even where the terms of the general permit identify detailed management practices, since absent review "nothing requires that the combination of [BMPs] that the operator [of the construction project] selects from this 'menu' will have the combined effect of reducing discharges to [the applicable pollution reduction standards]."<sup>39</sup> In sum, the Ninth Circuit requires that:

Stormwater management plans that are designed by the regulated parties must, in every instance, be subject to meaningful review by an appropriate regulating entity to ensure that each such program [meets applicable pollutant reduction standards].<sup>40</sup>

As a final note, *EDC* provides that "technical issues relating to issuance of NPDES permit issuance should be decided ... at a stage where the [permitting agency] has the greatest flexibility to make appropriate changes."<sup>41</sup>

The Draft Permit fails to meet these requirements. In pertinent part, the Draft Permit provides that "Regional Boards *may* review permit registration documents [NOI, SWPPP, SWPPP Checklist] and reject or accept permit coverage."<sup>42</sup> On its face the Draft Permit does not require review of the SWPPP and other documents that establish the substantive pollution

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<sup>34</sup> Draft Permit, Section XIII(1)-(2).

<sup>35</sup> See *Environmental Defense Center v. EPA*, 344 F.3d 832, 854-858 (9th Cir. 2003) ("EDC").

<sup>36</sup> *Id.*

<sup>37</sup> See 33 U.S.C. §§ 1342(a) and 1342(b); *EDC*, 344 F.3d at 841, 854-856, and 855 n.32.

<sup>38</sup> *Id.* at 854-856.

<sup>39</sup> *Id.* at 855 n.32.

<sup>40</sup> *Id.* at 856.

<sup>41</sup> *Id.* at 857 (citing EPA interpretation of permitting process requirements found in 44 Fed. Reg. 32,854, 32,885 (June 7, 1979)).

<sup>42</sup> Draft Permit, Section XIII(2).

control measures chosen by the permit applicant to meet the applicable pollutant reduction standards. Further, the Draft Permit fails to indicate when this discretionary review will take place. The Draft Permit seems to indicate that permit coverage is effective on the date the permit registration documents are “administratively accepted.”<sup>43</sup> The Draft Permit does not suggest that agency review will take place, if it takes place at all, prior to the grant of permit coverage. This scheme is inconsistent with the requirements of the Clean Water Act and controlling Ninth Circuit precedent, and the State Board should correct it to comply with the law.

The solution we propose to satisfy the agency review requirements is to mandate agency review of the SWPPP, and other documents that establish the substantive pollution control measures, prior to the grant of permit coverage. An alternative would be to develop NELs that all dischargers must comply with and leave the method for complying with them up to the discharger. Under the latter alternative, the substantive terms of the permit would be the numeric effluent limitations, and there would be no issue of dischargers writing the terms of their permits.

The public participation provisions of the Draft Permit also need modification to meet the requirements of the Clean Water Act and controlling legal precedent. Section 402 of the Clean Water Act provides that the permitting process must provide for “opportunity for public hearing” and make a copy of each permit application available to the public.<sup>44</sup> Further, the timing for the public review process is the same as for agency review – that is public participation in the permitting process must occur prior to the issuance of permit coverage and in “the most open, accessible forum possible.”<sup>45</sup>

As currently written, the Draft Permit does not achieve these requirements. The Draft Permit states “the Regional Water Boards shall review comments provided from the public ... within the 90-day public review period” and “the Regional Water Boards *may* take actions ... requiring public hearings.”<sup>46</sup> The Draft Permit does not indicate when this public review period will occur relative to permit coverage, but, as noted above, permit coverage is effective the date the SWPPP and other documents are “administratively accepted,” which appears to coincide with the date they become available to the public.<sup>47</sup> That is, if our understanding is correct, the Draft Permit does not allow for public participation prior to permit coverage as required. Further, if a public hearing is requested (for which the decision to grant is discretionary, not mandatory as required by law), the hearing will not take place until after the permit has been issued, the project has begun, and the project momentum is already well underway. Asking the Regional Boards to mandate BMP reconfigurations at that point in the

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<sup>43</sup> *Id.*, Section VII(4).

<sup>44</sup> 33 U.S.C. §§ 1342(a)(1) and 1342(j); *EDC*, 344 F.3d at 856-857 (regulatory agency must make permit application materials publicly available and allow for a public hearing on NPDES permits).

<sup>45</sup> *EDC*, 344 F.3d at 856-857 (citing EPA interpretation of permitting process requirements found in 44 Fed. Reg. 32,854, 32,885 (June 7, 1979)).

<sup>46</sup> Draft Permit, Section XIII(2) (emphasis added).

<sup>47</sup> Draft Permit, Section VII(4)

process does not meet the requirement that agency review and public participation occur at the stage when the agency has “the greatest flexibility to make appropriate changes.”<sup>48</sup>

The Draft Permit should be reworked to ensure that public participation requirements of the Clean Water Act are met. To do so, we suggest a mandatory public review period prior to the grant of permit coverage. Likewise, we suggest that Draft Permit, Section XIII(2) be rewritten to include the following language: “upon request, a public hearing on any permit application shall be provided by the Regional Board.” These simple revisions to the Draft Permit will resolve the bulk of the public participation shortcomings and help ensure that the State Board acts as required by the Clean Water Act.

### **Conclusion**

We would again like to thank the State Board and staff for preparing a Draft Permit that takes many of the needed steps to control the water quality impacts of construction activity in California. However, there is still room for improvement. The State Board should take the necessary steps to complete its task and issue a General NPDES Permit for discharges associated with construction activities that ensures compliance with water quality standards and guarantees that California meets its mandate to protect water quality and aquatic habitat. Growth pressures in California will continue to demand larger and more elaborate construction projects and projects that increasingly reach into undeveloped areas. The State Board must take all steps necessary to protect the health of California’s waters and habitat impacted by these pressures, for the benefit of us all.

Thank you.

Sincerely yours,



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<sup>48</sup> *EDC*, 344 F.3d at 856-857 (citing EPA interpretation of permitting process requirements found in 44 Fed. Reg. 32,854, 32,885 (June 7, 1979)).